[Cite as *Bermann v. Ohio Dept. of Job & Family Servs.*, 2015-Ohio-3963.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

PATRICIA BERMANN PLAINTIFF-APPELLEE VS. OHIO DEPARTMENT OF JOB AND FAMILY SERVICES DEFENDANT-APPELLANT	))))))))))	CASE NO. 14 MA 151 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 13 CV 3097

JUDGMENT: Reversed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 23, 2015

[Cite as *Bermann v. Ohio Dept. of Job & Family Servs.*, 2015-Ohio-3963.]
WAITE, J.

{¶1} Appellant Ohio Department of Job and Family Services ("ODJFS") appeals the reversal by the Mahoning County Court of Common Pleas of an ODJFS decision denying Appellee Patricia Bermann's Medicaid application. The underlying dispute was whether John Bermann, Appellee's husband, had made improper transfers of resources under Medicaid law by purchasing over $572,000 in annuities within five years of Appellee's application to Medicaid seeking payment of her nursing home costs. After a lengthy series of administrative review hearings, ODJFS ultimately denied nursing home coverage and the matter was appealed to the court of common pleas. Pursuant to an agreement by the parties, the case was initially remanded for a completely new review as to coverage.

{¶2} This second set of administrative proceedings resulted in a decision that Appellee was to receive no nursing home coverage for a period of 79 months. The revised decision led to a second appeal to the court of common pleas. It is this second appeal to the common pleas court that is now before us. The court reversed the ODJFS decision and ruled that Appellee should receive full Medicaid coverage for her nursing home expenses. The issue now on appeal is whether the common pleas court should have dismissed the Bermanns' administrative appeal because the preceding administrative appeal (to the ODJFS) was not timely filed, thus negating the jurisdiction of the court of common pleas to rule on the matter.

{¶3} ODJFS argues on appeal that a party must exhaust all administrative remedies prior to seeking relief in the court of common pleas, and that the failure to file timely administrative appeals constitutes a failure to exhaust administrative

remedies. Appellee argues that there is no necessity to exhaust administrative remedies when so doing would be wholly futile or when it would be onerous or unusually expensive. The record reflects that it was possible for the Bermanns to obtain the relief they sought through a timely appeal to ODJFS, and that their appeal was simply filed late. There is no evidence that the appeal process to ODJFS would have been onerous or unusually expensive. Although the Bermanns urge that another appeal to ODJFS would have been futile because ODJFS had previously ruled against them, the mere belief (or even the likelihood) that an administrative agency or board will not rule favorably does not render an administrative appeal wholly futile. An administrative appeal is wholly futile only when no appropriate relief can be possibly granted through appeal. Appellee simply failed to file a timely appeal to ODJFS. Hence, the common pleas court should have dismissed this case. We agree with Appellant that the common pleas court had no jurisdiction to hear this case, and reverse the judgment of the court and reinstate the administrative decision.

Case History

{¶4} Appellee Patricia Bermann was admitted to a nursing home in 2011 and applied for Medicaid in 2012. The application was made to the Mahoning County Department of Job and Family Services (MCDJFS). During the five-year period before she applied for Medicaid, her husband, John Bermann, purchased annuities totaling $572,681.66. The MCDJFS partially granted the Medicaid application, but denied nursing home coverage because it determined that the annuities purchase constituted an improper transfer of resources under Medicaid law. Appellee timely

appealed the MCDJFS decision, requesting a state hearing before the ODJFS. The decision was upheld, and Appellee further appealed to an administrative review panel of the ODJFS. The administrative appeal panel upheld the state hearing decision. Appellee filed her administrative appeal to the Mahoning County Court of Common Pleas. Pursuant to an agreement by the parties, the case was remanded to the MCDJFS for a new review of the Medicaid application.

{¶5} On remand, MCDJFS once again determined that Appellee did not fully qualify for nursing home coverage, this time for a restricted period of 79 months. Appellee again appealed to the state hearing level, and the MCDJFS decision was upheld. The state hearing decision was issued on Monday, October 7, 2013. Appellee had a 15-day time limit to appeal the state hearing decision to the administrative panel of ODFJS. Former Ohio Adm.Code 5101:6-8-02(C)(4). Her 15-day period expired on Tuesday, October 22, 2013. Appellee did not send her appeal request until Friday, October 25, 2013.

{¶6} On November 4, 2013, ODJFS issued a decision dismissing the appeal due to its untimely filing. It was this dismissal order that was then appealed to the Mahoning County Court of Common Pleas. ODJFS sought to have the court dismiss the appeal because the prior appeal to ODJFS had been untimely filed. ODJFS explained that the Bermanns had failed to exhaust their administrative remedies by not properly following the administrative appeal deadlines, and therefore were not entitled to judicial relief in the court of common pleas. On October 9, 2014, the lower court determined, without explanation, that the administrative appeal to ODJFS was

timely filed and that the annuities purchase was proper under Medicaid law, allowing full coverage for Appellee's nursing home costs. ODJFS filed a timely appeal of this determination, again arguing that the prior administrative appeal was untimely and the matter should have been dismissed.

ASSIGNMENT OF ERROR

> THE LOWER COURT ERRED BY FAILING TO EITHER: 1) DISMISS MS. BERMANN'S APPEAL FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES; OR 2) AFFIRM THE ADMINISTRATIVE APPEAL DECISION DISMISSING MS. BERMANN'S UNTIMELY APPEAL OF A STATE HEARING DECISION.

{¶7} Appellant argues on appeal that the trial court was required to dismiss the administrative appeal (or in the alternative, affirm the ODJFS decision) because the prior administrative appeal was filed late. Former Ohio Adm.Code 5101:6-8-01(C)(4) required that the earlier administrative appeal be filed within 15 days. (We note that Ohio Adm.Code Chapter 5101 has recently been renumbered to Chapter 5160). Despite the trial court's unexplained ruling that the appeal was timely, there does not seem to be any dispute in this record that the administrative appeal was, in fact, filed too late. Appellee's argument on appeal is that no appeal to ODJFS is required if the appeal would be wholly futile or the appeal procedure would be onerous or unusually expensive. Appellee urges that an administrative appeal in her case would have been futile, because she had once before been denied nursing home coverage. At no time does she argue that the administrative appeal would

have been onerous or unduly expensive. In rebuttal, Appellant argues that an administrative appeal is defined as wholly futile only when the administrative agency lacks the power to grant the relief requested in the appeal. Appellant contends that ODJFS had the power to reverse or modify the state hearing decision, which is the relief Appellee sought. Appellant explains that the mere fear of losing an appeal is not a proper basis for filing the appeal late and then claiming appeal is futile. Appellant is correct in this argument and its assignment of error is sustained.

{¶8} The standard of review for an administrative appeal to the common pleas court is whether the court abused its discretion in ruling on the agency's decision. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). As such, an appellate court must review the facts on the record to determine whether any reliable, probative, and substantial evidence exists to support the lower court's judgment. *Metz v. Ohio Dept. of Human Serv.*, 145 Ohio App.3d 304, 310 (2001). With respect to issues of law, an appellate court conducts a *de novo* review. *Id.*

{¶9} The underlying dispute in this case is whether Appellee was entitled to full Medicaid benefits, including benefits for nursing home care, even though her husband transferred hundreds of thousands of dollars of his own assets to annuities just a few months prior to the date Appellee applied for Medicaid. On initial application to the MCDJFS, the agency denied nursing home coverage until October of 2018 due this alleged improper transfer of assets. Former Ohio Adm.Code 5101:1-39-07(B)(5) defines an “improper transfer” to mean “a transfer on or any time after the look-back date * * * of a legal or equitable interest in a resource for less than

fair market value for the purpose of qualifying for medicaid, a greater amount of medicaid, or for the purpose of avoiding the utilization of the resource to meet medical needs." Since Medicaid requires the institutionalized person to spend down their resources before being eligible to receive coverage, improper transfers of assets in the five-year look-back period can result in denial or delay of Medicaid coverage. *See, e.g., Vieth v. Ohio Dept. of Job & Family Services.,* 10th Dist. No. 08AP-635, 2009-Ohio-3748, ¶16-23.

{¶10} Following her initial denial of nursing home coverage, Appellee appealed this decision to the ODJFS where her appeal was partially sustained. ODJFS issued an order for MCDJFS to recalculate the amount of improper transfers. Appellee appealed this recalculation order to an administrative appeal panel of ODJFS, only raising the question as to whether any of the annuity purchases were improper (rather than on the specific dollar amount), and the ODJFS affirmed that improper transfers had been made. This was further appealed to the court of common pleas, resulting in an agreed judgment entry remanding the case back to MCDJFS for a new review of coverage. On remand, it was once again determined that improper transfers were made, but this time, a 79-month period of restricted coverage was imposed. Appellee once again appealed to the ODJFS, and the MCDJFS decision was upheld on October 7, 2013.

{¶11} Former Ohio Adm.Code 5101:6-8-01(C)(4) set the time limit for filing an administrative appeal to a hearing panel of the ODJFS: "The request must be

received by the bureau of state hearings, within fifteen calendar days from the date the decision being appealed was issued."

{¶12} An appeal that is not filed within the 15-day time limit is ripe for dismissal by the agency pursuant to Ohio Adm.Code 5101:6-8-01(E)(1)(b):

(E) Dismissal

(1) An administrative appeal request may be dismissed because:

* * *

(b) It is not timely, as defined by paragraph (C)(4) of this rule.

{¶13} We find nothing in the record, other than the trial court's bold conclusion, indicating that Appellee filed her appeal to ODJFS panel on time. The state decision was issued on October 7, 2013. Thus, the final date to file a timely appeal was Tuesday, October 22, 2013. The appeal was not faxed to the ODJFS Bureau of State Hearings until Friday, October 25, 2013. Appellate instructions were all clearly printed on the state decision, and Appellee does not now argue that the appeal should somehow be construed as timely.

{¶14} We have held that: "Although failure to exhaust administrative remedies is not a jurisdictional defect per se, under Ohio law a complainant must exhaust any administrative remedies before invoking the common pleas court's jurisdiction." *Zidian v. Dept. of Commerce*, 7th Dist. No. 11 MA 39, 2012-Ohio-1499, ¶46, citing *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 462, 674 N.E.2d 1388 (1997). Administrative exhaustion is necessary because the administrative agency has

special expertise in hearing the issue and rendering a decision, and judicial deference is normally given to that decision. *Turner v. Goldberg*, 7th Dist. No. 96CA252, 1999 WL 61050. Failure to timely file an appeal during the administrative appeal process constitutes failure to exhaust administrative remedies. *Townsend v. Bd. of Bldg. Appeals*, 49 Ohio App.2d 402, 402, 361 N.E.2d 271, 271 (9th Dist.1976); *B.B. ex rel. Biery v. Ohio Dept. of Job & Family Serv.*, 9th Dist. No. 22218, 2005-Ohio-340; *Stoyer v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 08AP-1118, 2009-Ohio-2658, ¶12-13.

{¶15} There are two exceptions to the requirement that a party must first exhaust his or her administrative remedies: "First, if there is no administrative remedy available which can provide the relief sought, or if resort to administrative remedies would be wholly futile, exhaustion is not required. Second, exhaustion of remedies is unnecessary when the available remedy is onerous or unusually expensive." (Citations omitted.) *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 17, 526 N.E.2d 1350 (1988). Appellee argues that it does not matter that she missed her deadline for filing her appeal to the ODJFS hearing panel because the appeal would have been wholly futile. Thus, she argues that her further appeal to the court of common pleas was proper. Her theory is that ODJFS had once already denied her request for Medicaid assistance for her nursing home fees during the first round of appeals. It was this denial that lead to an agreed judgment entry in the common pleas court to remand the case to the MCDJFS.

{¶16} The fact that an administrative agency may deny an appeal is not the type of circumstance that qualifies under the definition of "wholly futile." In *Morris v. Morris*, 2d Dist. No. 2003-CA-94, 2004-Ohio-6059, the Second District Court of Appeals determined that an appeal (filed one day late under former Ohio Adm.Code 5101:6-8-01) would not have been wholly futile because "[t]he legal issue involved was not complex and a timely appeal by Mrs. Morris of the initial agency decision *might have been successful* before the Hearing Examiner who was an attorney. Also Mrs. Morris might have appealed to the common pleas court in the event the Hearing Examiner got the legal issue wrong." (Emphasis added.) *Id.* at ¶46. While Appellee contends that any second administrative appeal to ODJFS would likely have resulted in the same fashion as her earlier appeal, her very argument implies that it also may not have had the same result.

{¶17} It appears that Appellee is not arguing that further appeal to ODJFS was wholly futile, but rather, that it was likely to be futile. The fact that ODJFS had the power to entirely grant the relief Appellee requested, or to grant a shorter period of Medicaid restriction, completely undermines Appellee's argument that further appeal was wholly futile. In fact, this record reflects that in her first appeal to the agency, she was partially successful. In addition, further appeal to the court of common pleas would certainly have been available if the administrative appeal had been timely filed, and the court of common pleas would then have had the benefit of having the ODJFS' factfinding and reasoning as to why Medicaid restriction, if any, continued to apply.

{¶18} If we accepted Appellee's argument, we would fundamentally change the rules governing administrative appeals. Any party who fears losing at the administrative level could skip the process by simply labeling it as "futile." But we cannot accept Appellee's argument, here, for several other reasons.

{¶19} Although Appellee urges that her second appeal was futile because the Medicaid request had already been denied once, it is clear that the case was returned to the process for a second review only through agreement of all the parties, including Appellee. Appellee cannot use the fact that there was a second round of administrative review of her application as an argument to support her futility argument since Appellee agreed to the additional review process. "The doctrine of invited error estops an appellant, in either a civil or criminal case, from attacking a judgment for errors the appellant induced the court to commit. Under that principle, a party cannot complain of any action taken or ruling made by the court in accordance with the party's own suggestion or request." *Royse v. Dayton*, 195 Ohio App.3d 81, 2011-Ohio-3509, 958 N.E.2d 994, ¶11 (2d Dist.).

{¶20} It is also evident that the second "round" of administrative appeals cannot preemptively be labeled as "wholly futile" because her first appeal was partially sustained. In the initial stages of the case, the ODJFS found that MCDJFS had incorrectly determined the amount of the improper transfer of funds, and ordered MCDJFS to recalculate the amount. (12/28/12 ODJFS Decision, p. 4.) Appellee actually obtained partial relief in her first administrative appeal. It is disingenuous

now for Appellee to argue that any attempt at relief from an appeal to ODJFS would clearly be wholly futile.

{¶21} We would be remiss if we did not also note that Appellee did, in fact, seek to file an administrative appeal. Unfortunately, she missed her filing deadline. It appears that she only raises her "futility" argument in an attempt to salvage her tardy filing of this administrative appeal. While we empathize with Appellee that this deadline was apparently accidentally missed, an appeal cannot be determined to be futile simply because a party missed the deadline for filing.

{¶22} This record clearly reflects that Appellee missed the filing deadline for an administrative appeal to a hearing panel of the ODJFS. Because this record does not reflect that an administrative appeal would have been wholly futile, and lack of evidence that further appeal to ODJFS would have been onerous or unusually expensive, Appellee was required to exhaust her administrative appeal process in order to perfect a further appeal to the common pleas court. Appellant's assignment of error is sustained and the judgment of the Mahoning County Court of Common Pleas is reversed and the determination of the administrative body is reinstated.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.