

In the
Supreme Court of Ohio

PATRICIA CRAWFORD-COLE, : Case No. 2008-0462
: :
Appellant-Appellee, : On Appeal from the
: Lucas County
v. : Court of Appeals,
: Sixth Appellate District
LUCAS COUNTY DEPARTMENT OF JOB :
AND FAMILY SERVICES, : Court of Appeals Case
: No. L-07-1188
Appellee-Appellant. :
:

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF *AMICUS CURIAE* STATE OF OHIO**

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Amicus Curiae State of Ohio's Proposition of Law No. 1:

Ohio's administrative procedure law for state agencies, R.C. Chapter 119, applies only to state agencies and not to county agencies, so it does not apply when a county department of job and family services revokes a Type B day care license..... 11

Amicus Curiae State of Ohio's Proposition of Law No. 2:

*A court of common pleas does not have subject matter jurisdiction to hear an appeal under R.C. 119.12 if the appellant has failed to exhaust her administrative remedies. A party fails to exhaust when she does not request an administrative hearing by the relevant deadline; such a hearing is needed to develop the case's factual and legal issues and to allow an agency to apply its expertise to a case.*13

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INTRODUCTION

This case raises two procedural questions of administrative law, each of which recurs frequently and calls for the Court's review. The first is whether Ohio's administrative procedure law for state agencies, R.C. Chapter 119, can be applied to a *county* agency, even though the county agency easily falls outside of the definition of "state agency" under R.C. 119.01. For over a decade, some courts have been requiring counties to follow the state-agency rules. Here, a court held that a procedural rule the county followed—a deadline required by a state regulation that expressly applies to county agencies—was invalid because it conflicted with Chapter 119, but that view is mistaken if counties do not even fall under Chapter 119. The second issue is whether an appellant's failure to exhaust administrative remedies, such as the failure to request an agency hearing, is a jurisdictional defect or an affirmative defense. This second issue is raised in the context of a party who claims that she failed to invoke her administrative remedies because she never received the agency's notice to her, and that context is a recurring one on which the courts below need guidance.

These issues arose here when Appellant, the Lucas County Department of Job and Family Services (LCDJFS), revoked a day care license held by Appellee Patricia Crawford-Cole. Under state law, county agencies such as LCDJFS oversee licensing and supervising day care centers with six or fewer children, such as the one Crawford-Cole ran. LCDJFS sent Crawford-Cole a notice by certified mail that her license would be revoked for certain violations, and that, pursuant to a state regulation, Ohio Admin Code 5101:2-14-40(C), she had ten days to request a hearing. She never requested a hearing, and alleges that she never received the notice. When her license was revoked, she appealed to the common pleas court, which held that she failed to exhaust her administrative remedies by not requesting a hearing before LCDJFS.

The appeals court reversed, and its decision implicates the two issues that the State urges the Court to address. First, the appeals court ruled that the ten-day limit for Crawford-Cole to request a hearing was invalid, because it conflicted with the thirty-day period that R.C. 119.07 provides for parties to ask *state* agencies for a hearing. *Crawford-Cole v. Lucas County Dept. of Job and Family Services* (6th Dist.), 2008-Ohio-359 (“App. Op.”) (attached to LCDJFS Mem. in Support of Jur.), ¶ 24. Second, the appeals court held that her failure to request a hearing did not bar her from filing her appeal. *Id.* ¶ 24 n.2. Both holdings warrant review.

First, the Court should address the question whether Chapter 119’s requirements, which govern state agencies, can even be applied to county agencies such as LCDJFS. The Sixth District’s decision did not directly analyze the issue, but in applying the particulars of R.C. 119.07 to LCDJFS, it necessarily assumed that Chapter 119 applies. The Sixth District had applied Chapter 119 in this context before, and several appeals courts have similarly done so. See below at 12 (citing cases). But the Sixth District’s (and other districts’) premise—that Chapter 119 applies to county agencies—is erroneous, as Chapter 119 itself shows. Virtually every aspect of Chapter 119, from R.C. 119.01’s definition of a covered “agency” as a state agency, to R.C. 119.10’s requirement that the Ohio Attorney General shall represent any “agency” in such a process, readily demonstrates that it is limited to *state* agencies. As such, this ongoing application of the state administrative law to *county* agencies warrants review by this Court, as such improper application of Chapter 119 will otherwise continue to create problems, such as the false “conflict” that the appeals court found here, between R.C. 119.07’s 30-day limit and Ohio Admin Code 5101:2-14-40(C)’s 10-day limit.

Second, the Court should address whether a failure to exhaust administrative remedies is a matter of subject-matter jurisdiction or an affirmative defense. The appeals courts are split on

this precise question, as the Ninth District has held that exhaustion is a jurisdictional prerequisite to an appeal under Chapter 119, while the Second, Sixth and Tenth Districts treat exhaustion as an affirmative defense. See below at 8 (citing cases). Exhaustion is a critical issue in administrative appeals, as it is the exhaustion requirement that ensures that parties first go through an agency process, which allows all parties to develop a record there, as opposed to starting fresh in the courts. In addition, this case offers the Court a chance to address a particular, recurring fact-pattern: how courts should treat a litigant who claims that she failed to invoke administrative remedies because she allegedly never received the agency's notice.

Consequently, the Court should grant review and address these issues, because they recur frequently, and because they involve procedural issues that are fundamental to the orderly processing of such appeals.

STATEMENT OF AMICUS INTEREST

The State of Ohio has a strong interest in both issues. First, a state agency, the Ohio Department of Job and Family Services (ODJFS), promulgated Ohio Admin. Code 5101:2-14-40, the administrative rule that the court below struck down. The General Assembly gave power to ODJFS to promulgate rules regarding day care centers, including those day care centers that the counties oversee, so ODJFS has a strong interest in seeing its rules upheld. R.C. 5104.011. Second, the State as a whole has an interest in seeing that Chapter 119 is not extended to county agencies when those counties act on delegated power from state agencies. In particular, the Attorney General, who is required to represent state agencies in proceedings pursuant to Chapter 119, has an interest in ensuring that his mandate is not somehow broadened to cover non-state agencies. Finally, the State and its agencies have an independent interest in the exhaustion issue, apart from the issue of applying Chapter 119 to counties, because the exhaustion doctrine applies to all state agency appeals and therefore affects all state agencies.

STATEMENT OF THE CASE AND FACTS

A. Crawford-Cole failed to operate her day care center in a lawful manner.

Patricia Crawford-Cole had a license to operate a "Type B family day care home" (Type B day care). The Lucas County Department of Job and Family Services (LCDJFS) issued the license on July 1, 2006. App. Op. ¶ 2. This license permitted her to care for up to six children at a time, and to receive funding from the county. R.C. 5104.01(SS). Within a month, LCDJFS discovered that Crawford-Cole was apparently violating the terms of her day care license by caring for more than six children. LCDJFS confirmed that violation during a July 20, 2006, home visit, at which it discovered that Crawford-Cole was caring for fourteen children. App. Op. ¶ 3.

B. Crawford-Cole appealed her license revocation in the courts, but she had not asked for an administrative hearing.

On July 24, 2006, LCDJFS sent Crawford-Cole a letter, by certified mail, to notify her that it intended to revoke her Type B day care license and that she had ten days to request a hearing. See *id.* ¶ 4. Someone in her household signed for the certified mail. *Id.*

Crawford-Cole, however, did not request a hearing with the LCDJFS. She claims that she did not receive the certified letter. *Id.* ¶ 5.

After the period for seeking a hearing expired, LCDJFS terminated Crawford-Cole's license; it did so on August 3, 2006, before it heard her claim that she had not received the notice. See *id.* On September 27, 2006, Crawford-Cole filed a notice of administrative appeal with the Lucas County Court of Common Pleas.

C. The common pleas court dismissed her appeal, but the appeals court reversed.

The common pleas court dismissed her appeal, concluding that it did not have subject matter jurisdiction because Crawford-Cole, by not seeking an agency hearing, had not exhausted her administrative remedies. See *id.* ¶ 7.

The Sixth Appellate District reversed, concluding that the common pleas court did have jurisdiction. *Id.* ¶ 27. The Sixth District held that Crawford-Cole should have been given thirty days to request an administrative appeal under R.C. 119.07, instead of the ten days afforded under Ohio Admin.Code 5101:2-14-40(C). *Id.* ¶¶ 23-24. The Sixth District suggested that the administrative rule was unconstitutional because it surpassed legislative authority by contradicting a statute. *Id.* ¶ 23 (citing *Midwestern Coll. of Massotherapy v. Ohio Med. Bd.* (10th Dist. 1995), 102 Ohio App.3d 17, 23). The Sixth District also ruled that exhaustion of administrative remedies “is not a necessary prerequisite to an action, such as the one at hand, which challenges the constitutionality of an administrative rule.” *Id.* ¶ 23 n.2 (citing *Derakhshan v. State Med. Bd. of Ohio* (10th Dist.), 2007-Ohio-5802).

The State of Ohio now joins LCDJFS in asking the Court to review this case.

THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

A. The Court should review the continued and mistaken application of Chapter 119 to decisions by county agencies.

The Court should review this case to stop and reverse a growing trend in the appeals courts: the mistaken application of Chapter 119, which governs *state* agencies, to decisions by county departments of job and family services. The first application of Chapter 119 in this context, specifically involving the same type of day care license at issue here, was apparently the Second District’s decision in *Gamblin v. Montgomery Count. Dep’t of Human Servs.* (2nd Dist. 1993), 89 Ohio App.3d 808, 813. The Sixth District followed suit in *McTee v. Ottawa County Dep’t. of*

Human Servs. (6th Dist. 1996), 111 Ohio App. 3d 812, and of course did so again in the decision below. The Seventh, Eighth, and Tenth District have taken the same approach. See, e.g., *Cosby v. Franklin County Dep't of Job and Family Servs.* (10th Dist.), 2007-Ohio-6641; *Miller v. Crawford* (7th Dist.), 2006-Ohio-4689; *Child Care Provider Certification Dep't v. Harris* (8th Dist.), 2002-Ohio-3795. Thus, five different appellate districts have applied Chapter 119 to county decisions such as the one at issue here, but none has adequately explained how the *state* administrative procedure statute applies to county agencies.

Applying Chapter 119 to county agencies contradicts the plain statutory text. Most important, R.C. 119.01(A) defines the term “agency” for the purpose of Chapter 119 to include any *state* entity with licensing power:

“Agency” means, except as limited by this division, any official, board, or commission having ... the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the *state* having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.

R.C. 119.01(A)(1) (emphasis added). This provision expressly includes an “official or work unit having authority to promulgate rules or make adjudications in the department of job and family services[.]” R.C. 119.01(A)(2). The statute does not, however, mention counties or political subdivisions. Nor does it say that counties, when acting on authority delegated from the State, then “become” the State for the rest of the Chapter. Thus, when a State agency does adopt rules delegating that power, those rules themselves govern procedures (subject to any other expressly applicable statutes and to constitutional limits), but Chapter 119 is not imported as a whole. Thus, the courts that have imported Chapter 119 should be corrected, and this Court should give the courts and parties guidance regarding the proper remedy for an aggrieved party. That remedy might be, in a proper case, a right to appeal under Chapter 2506, or perhaps parties must seek an

extraordinary writ such as mandamus. See, e.g., *State ex rel. McArthur v. DeSouza* (1992), 65 Ohio St. 3d 25.

Further, applying Chapter 119 to county bodies, such as LCDJFS here, carries many implications. Those implications show why the Court's review is needed, and some implications also help to show why the decision below was wrong. For example, the Court has recently reaffirmed the need for strict compliance with Chapter 119's provisions, including the need to properly file and original notice of appeal with an agency and a copy with the court. *Hughes v. Dep't of Commerce* (2007), 114 Ohio St. 3d 47, 2007-Ohio-2877, ¶¶ 17, 19. Courts need to know whether such rules apply in contexts such as Crawford-Cole's, and parties need to know whether to file under those rules or under others that are county-specific. In some cases, the county-specific rule may be "harder" to meet, such as the shorter deadline at issue here, and in other cases, the Chapter 119 rule may be stricter. Either way, uncertainty is bad for everyone.

In addition, R.C. 119.10, which requires the Attorney General to represent agencies in proceedings held pursuant to Chapter 119, shows both that review is needed and that the decision below is wrong. It shows that review is needed because the appeals court's approach, taken to its logical extreme, could mean that the Attorney General is required to step in and defend county JFS agencies in contexts such as this. Such representation cannot be squared with common sense or with the other statutes defining the attorney general's representation of *state* agencies and the county prosecutors' representation of county entities. See R.C. 109.02; R.C. 309.09(A). This impracticable result confirms what inheres in the rest of Chapter 119's structure: that it applies to state bodies, not local ones.

Consequently, the Court should review this case to determine whether Chapter 119 applies to county agencies, and the Court should answer that question "no."

B. The Court should resolve the appellate districts' split over whether, in an administrative appeal, a failure to exhaust administrative remedies is a jurisdictional flaw or an affirmative defense.

The Court should also review this case to resolve a split in the appeals courts on the issue of exhaustion of administrative remedies. Further, this case involves the particular fact pattern of a party who claims that she did not receive notice from an agency, and the courts and parties need guidance on how to handle that particular, recurring scenario.

1. The appeals courts are split over a critical issue of subject matter jurisdiction.

The appeals courts are split on the issue whether a party's failure to exhaust administrative remedies is, in an administrative appeal, a jurisdictional flaw or an affirmative defense. The Ninth District has held that such a failure is jurisdictional. *Grill v. ODJFS* (9th Dist.), 2003-Ohio-1139. The Second and Tenth District have both held that such a failure is merely an affirmative defense. *Derakhshan v. State Med. Bd.* (10th Dist.), 2007-Ohio-5802; *Cooper v. City of Dayton* (2nd Dist. 1997), 120 Ohio App. 3d 34. The Sixth District, in the decision below, joined the two latter districts, and it expressly cited the Tenth District's *Derakhshan* decision in doing so. See App. Op. ¶ 23 n.2. The Court should resolve this conflict.

Different consequences flow from the classification of this doctrine as jurisdictional or as an affirmative defense, so the debate is not an academic one. Jurisdictional flaws are, of course, not waivable, and thus can be raised at any time. *State v. Lomax*, 96 Ohio St.3d 318, 321, 2002-Ohio-4453. Further, a lack of subject matter jurisdiction is an always-fatal flaw, with no defense, while in contrast, a party can overcome a failure to exhaust in certain circumstances, such as when any attempt to exhaust would have been futile. See, e.g., *Consol. Land Co. v. Capstone Holding Co.* (7th Dist. 2002), 2002-Ohio-7378, ¶ 40 (party failed to prove affirmative defense of exhaustion because requiring parties to wait for decision regarding mining permit

from Ohio Department of Natural Resources would have been a “vain act”). Thus, the Court should resolve the split, so the proper consequences flow from the proper classification.

Further, the Court should review this case to distinguish cases such as this, in which failure to exhaust is raised in an administrative appeal, from cases involving declaratory judgment. See *Jones v. Village of Chagrin Falls* (1997), 77 Ohio St.3d 456. In *Jones*, the Court held that a party’s failure to exhaust was not jurisdictional when the party filed a declaratory judgment; instead, said the Court, the doctrine was an affirmative defense. But in the declaratory judgment context, the party at most seeks some collateral action touching on subject matter that could have been handled administratively. In an administrative appeal, the party seeks to review the actual agency action directly, so bypassing the agency’s internal proceedings should be an absolute bar to proceeding, not just a defense that can be overcome. In particular, that is so because administrative appeals exist only by statute, so unlike declaratory judgment, which is jurisdictionally premised on R.C. Chapter 2721, an administrative appeal must strictly comply with Chapter 119 to trigger a common pleas court’s jurisdiction. See *Hughes*, 2007-Ohio-2877, ¶ 17.

Indeed, the split on this issue has centered on how to read the Court’s *Jones* decision, and on whether the administrative appeal context differs from the declaratory judgment context. The Ninth District noted significant differences between a declaratory judgment action and an administrative appeal under R.C. 119.12. “An administrative appeal can be perfected only in the method prescribed by statute” *Grill*, 2003-Ohio-1139, ¶ 27 (citing *Zier v. Bureau of Unemp. Comp.* (1949), 151 Ohio St. 123, syllabus ¶ 1). The Ninth District reasoned that if a party failed to exhaust administrative remedies prior to appealing (in that case, failing to timely request administrative review at the agency level before appealing under R.C. 119.12), then jurisdiction

could not have vested for an appeal. *Id.* By contrast, the appeals courts that have found failure to exhaust to be merely an affirmative defense have relied upon *Jones* in reaching that conclusion, and have said the different context did not change the outcome. See *Derakhshan*, 2007-Ohio-5802, ¶ 27 (finding “this distinction to be without legal consequence in this case”); *Covell v. BMV* (2d Dist.), 1998 Ohio App. Lexis 2964.

Thus, the Court should review this case to resolve this split on a significant and recurring issue.

2. **Here, the party alleges that she failed to exhaust only because she never received the certified notice that the agency sent, and agencies and courts need guidance on how to handle this particular, recurring scenario.**

Further, by reviewing this case, the Court can provide guidance not only on exhaustion generally, but also on how to resolve the particular scenario that occurred here: a party undoubtedly failed to request a hearing, but she did so, she says, because she never received the notice that would have spurred her to action. A failure to receive notice, if it truly occurs, will usually lead to a missed deadline, since the party usually does not otherwise discover the problem until after the party misses the statutory 15-day deadline for appealing an agency order.

The lower courts have approached this situation in several different ways. A court might conclude that it lacks jurisdiction because of a lack of exhaustion, as the trial court did here. Or the court might find that a failure to exhaust is not jurisdictional, and is irrelevant in certain contexts, such as a constitutional attack on a regulation. That was the Sixth District’s approach here. Other courts have focused on how to resolve the factual disputes that usually arise, without necessarily linking that to an exhaustion inquiry. The Tenth District takes this latter approach, concluding that “valid service of process is presumed when the envelope is received by any person at the address; the recipient need not be an agent of the addressee.” *Chia v. Ohio Bd. of Nursing* (10th Dist.), 2004-Ohio-4709, ¶ 8. This presumption can be rebutted with “sufficient

evidence.” *Id.* ¶ 10. See also *Tripoldi v. Liquor Control Commission* (10th Dist. 1970), 21 Ohio App. 2d 110. In at least one case, a court of common pleas held an evidentiary hearing to determine whether a licensee had successfully rebutted this presumption. *Menon v. State Medical Bd.* (Franklin Cty 2006), 06-CVF-404.

The Court should resolve this problem by reviewing this case. That would allow agencies, private parties, and courts to know how to handle factual disputes regarding a claimed failure to notify.

ARGUMENT

The State’s merits arguments on both issues are also incorporated into the reasons for granting review, above, so the State summarizes them only briefly below.

Amicus Curiae State of Ohio’s Proposition of Law No. 1:

Ohio’s administrative procedure law for state agencies, R.C. Chapter 119, applies only to state agencies and not to county agencies, so it does not apply when a county department of job and family services revokes a Type B day care license.

As explained above, the General Assembly has identified only state agencies as “agencies” for the purpose of Chapter 119. An “agency” under Chapter 119 is defined as an “administrative or executive officer, department, division, bureau, board, or commission of the government of the *state* having the authority or responsibility of issuing, suspending, revoking, or canceling licenses. R.C. 119.01(A)(1) (emphasis added). This definition does not mention a county department of job and family services, nor does it mention any entity at the county level. It does not mention political subdivisions of any kind.

Moreover, expanding Chapter 119 to cover county agencies is impossible to harmonize sensibly with R.C. 119.10, which requires the Ohio Attorney General to represent the agency during any proceeding. “[T]he attorney general or any of his assistants or special counsel who have been designated by him shall represent the agency.” R.C. 119.10. If county entities are

“agencies,” the Attorney General would have to represent those county departments during proceedings. This interpretation conflicts with R.C. 109.02, which defines the Attorney General as “the chief law officer for the state and all its departments.” And such an interpretation also conflicts with R.C. 309.09(A), which provides that county prosecuting attorneys must “prosecute and defend all suits and actions which any such officer or board directs or to which it is a party[.]”

Some appeals courts, in erroneously concluding that Chapter 119 applies when counties revoke Type B family day care licenses, have looked to the language in R.C. 5104.011(G), which directed the predecessor to the Ohio Department of Job and Family Services (the former Department of Human Services) to “adopt rules pursuant to Chapter 119 of the Revised Code governing the certification of type B family day-care homes.” But that provision is best read to mean only that the State agency must follow Chapter 119’s rulemaking provisions when it initially adopts rules for counties to follow; it does not mean that those rules themselves must then incorporate all of Chapter 119’s content. See R.C. 119.03 (establishing rulemaking procedures for state agencies).

In sum, the state administrative procedure statute, R.C. Chapter 119, does not apply to county agencies to begin with. Consequently, the appeals court erred in finding a conflict between the R.C. 119.07’s 30-day deadline for requesting a hearing and Ohio Admin Code 5101:2-14-40(C)’s 10-day deadline.

Amicus Curiae State of Ohio's Proposition of Law No. 2:

A court of common pleas does not have subject matter jurisdiction to hear an appeal under R.C. 119.12 if the appellant has failed to exhaust her administrative remedies. A party fails to exhaust when she does not request an administrative hearing by the relevant deadline; such a hearing is needed to develop the case's factual and legal issues and to allow an agency to apply its expertise to a case.

Parties must generally exhaust their administrative remedies before seeking relief in the courts. Requiring parties to exhaust protects “administrative agency authority” by giving an agency the opportunity to fix its own errors before being haled into court. *Woodford v. Ngo* (2006), 548 U.S. 81, 126 S.Ct. 2378, 2385. The exhaustion requirement allows an agency to “afford the parties and the courts the benefits of its experience and expertise, and to compile a record which is adequate for judicial review.” *Nemazee v. Mt. Sinai Medical Ctr.* (1990), 56 Ohio St.3d 109, 111-112 (quotations and citations omitted). In the administrative appeal context, the requirement to go through proper agency channels is even stronger, and must be jurisdictional, because an “administrative appeal can be perfected only in the method prescribed by statute” *Grill*, 2003-Ohio-1139, ¶ 27; see *Hughes*, 2007-Ohio-2877, ¶ 17.

The courts that have found exhaustion to be merely an affirmative defense, even in administrative appeals, have misunderstood the Court’s opinion in *Jones v. Village of Chagrin Falls* (1997), 77 Ohio St. 3d 456. In *Jones*, the Court held that, in a declaratory judgment action, exhaustion of administrative remedies is an “affirmative defense that may be waived if not timely asserted and maintained.” *Id.* at syllabus. But as *Grill* explained, the declaratory judgment context is different. *Grill* rightly noted that a failure to comply with Chapter 119’s provisions means that a party has not satisfied the statutorily mandated basis for *jurisdiction*, and *Hughes* confirms the importance of statutory jurisdictional prerequisites.

A strict jurisdictional requirement would not prevent courts from finding ways to grant relief for those rare parties whose failure to exhaust was caused because they legitimately did not

receive notice. A court reviewing an agency decision on appeal could review a factual dispute regarding notice as part of meeting its duty to assure itself that it has proper jurisdiction. If the factual predicate of lack-of-notice is proven, on remand for factfinding where needed, courts could then find other ways to relieve a party facing that situation. Cf. *Hughes*, 2007-Ohio-2877, ¶ 19 (finding that agency's failure to use proper certification method in sending notice precedes the party's failure to properly perfect an appeal, so that agency must re-issue notice).

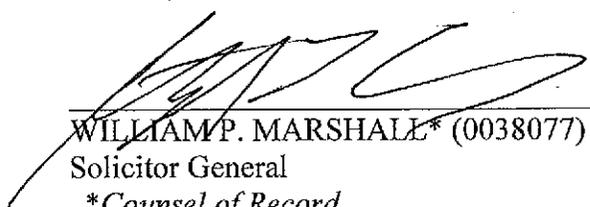
In sum, the Court should find that a party's failure to exhaust her administrative remedies is a jurisdictional flaw, and not merely an affirmative defense, in the administrative-appeal context.

CONCLUSION

For the above reasons, this Court should grant jurisdiction in this case.

Respectfully submitted,

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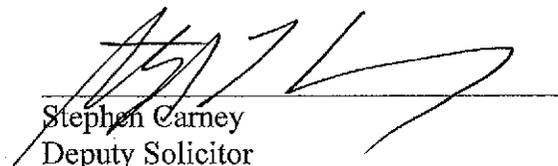
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