

IN THE SUPREME COURT OF OHIO

Patricia Crawford-Cole,) Sup. Ct. Case No. 2008-0462
Appellant-Appellee,)
-vs-) On Appeal from the Lucas
Lucas County Department of Job &) County Court of Appeals
Family Services,) Court of Appeals C.A.
Appellee-Appellant.) L-200701188
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AMENDED MEMORANDUM IN RESPONSE TO MEMORANDUM IN SUPPORT
OF JURISDICTION OF LUCAS COUNTY
DEPARTMENT OF JOB AND FAMILY SERVICES
AND AMICUS STATE OF OHIO

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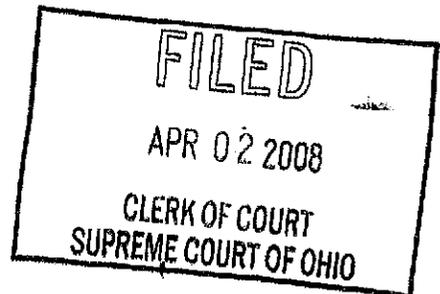


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**STATEMENT OF APPELLEE CRAWFORD-COLE AS TO WHETHER THE CASE
IS OF PUBLIC OR GREAT GENERAL INTEREST**

While this case may be of academic interest, this Court should not conclude that it is of "public and great general interest" based upon the sweeping representations of the Lucas County Department of Job and Family Services. While all 88 counties would be affected by the Court's disallowance of Lucas County's petition, there is no basis to conclude that "upheaval and delay" would follow this Court's affirmance, for the simple reason that there are likely very few appeals of the revocation of Part B day care licenses pending in any county, populous or not. Day care providers are forever in short supply; it is a casual cottage industry with providers moving in and out of the "market" continually. The rules for appeal are obscure. It is often impractical or economically impossible for a day care contractor to afford or even find competent legal counsel who might understand the ramifications of initiating an appeal within the 10 days allotted by the now-stricken rule.

Lucas County has essayed a Chicken Little argument, craftily pointing out the theoretical ramifications of affirmance while offering no metrics about the dimension or depth of those portions of stratosphere which, it is feared, might succumb to gravity. The theory is hefty; the reality, one suspects, *de minimis*. The Court need only examine the paucity of unreported as well as reported cases to get a foretaste of how few Administrative Procedures Act appeals are ever launched, and how minor the trickle that would sluice through the floodgates Lucas County fears will be opened. Affirmance might directly affect a vanishingly small number of cases; after all, the affected

appeals must be those brought since 2007 outside the 10-day limitation contained in O.A.C. § 5101:2-14-40(C), but still within the 30-day limit of O.R.C. § 119.06. The real effect of affirmance or *stare decisis* would simply be an invisible, **prospective** expansion of the period in which one might initiate and appeal the revocation of her Part B day care license.

The reasons the State of Ohio states in support of this matter being heard by the Supreme Court are also weak. The record of this case contradicts the State's assertion that Crawford-Cole never actually appealed to have an administrative hearing before the Lucas County Department of Job and Family Services. As is discussed *infra*, she did. The State's belief that an exhaustion-of-remedies appeal can be made from this case is factually void.

And merely because the State is concerned that a common-sense interpretation of Chapter 119 applies State Department of Job and Family Services to the county-level analogues does not mean that the Court need waste precious judicial resources making the obvious clear even to the Attorney-General.

Were this Court to decline jurisdiction, it would revolutionize neither the manner nor means by which one may challenge the arbitrary loss of her livelihood by a regulatory enforcement actions of government.

RESPONSE TO LUCAS COUNTY'S PROPOSITION OF LAW

Lucas County Department of Job and Family Services has the audacity to suggest a ground for its appeal for the very first time in its petition to this Court. The County's proffered O.R.C. § 5101.09 issue was not addressed by the Lucas County Court of Appeals in its decision because it was not raised by the Lucas County DJFS when this matter was an administrative appeal before Lucas County Court of Common Pleas, nor was it later raised when this case was briefed to the court of appeals.

Failure to timely advise a trial court of possible error, by objection or otherwise, generally results in a waiver of the issue for purposes of appeal. See *Gallagher v. Cleveland Browns Football Co.* (1996), 74 Ohio St.3d 427, 436-437; *Buchman v. Wayne Trace Local School Dist. Bd. of Education* (1995), 73 Ohio St.3d 260, 271.

Although in criminal cases "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court," Crim. R. 52(B), no analogous provision exists in the Rules of Civil Procedure. *Goldfuss v. Davidson*, 79 Ohio St. 3d 116, 1997-Ohio-401. The Plain Error Doctrine originated as a criminal law concept. In applying the Doctrine in a civil case, reviewing courts must proceed with the utmost caution, limiting the Doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings. *LeFort v. Century 21-*

Maitland Realty Co. (1987), 32 Ohio St.3d 121, 124; *Cleveland Elec. Illum. Co. v. Astorhurst Land Co.* (1985), 18 Ohio St.3d 268, 275; *Goldfuss, supra* at 121.

This is not one of the "extremely rare" cases which should invite application of the Doctrine of Plain Error.

Even if this Court were to allow Lucas County to appeal on this just-revealed basis, the Appellant is incorrect in its assertion that (Appellant's Memorandum p. 9) "Section 5101.09 specifically exempts the rule from the requirements of R.C. Sections 119.06 to 119.13 which includes the 30-day limit." The reason Lucas County is wrong lies in O.R.C. § 5101.09(B), which begins with the clause, "[e]xcept as otherwise required by the Revised Code. . . ."

The Revised Code requires day care certificate revocation proceedings to comply with the entirety of O.R.C. Chapter 119. Where a revocation regulation departs from the standards appearing in Chapter 119, it cannot be authorized by O.R.C. § 5104.011¹. *Gamblin v. Montgomery Cty. Dept. of Human Serv.*, (1993), 89 Ohio App.3d 808, 812 ("Ohio Adm.Code 5101:2-14-06 does not comply with R.C. Chapter 119 and hence is not authorized by R.C. 5104.011"²). Consistent with this principle, in the present case, the Revised Code "otherwise" requires the department of job and family services subject to the notice,

¹O.R.C. § 5104.11(B) authorizes the county department of job and family services to revoke certificates to provide Type B day care.

²In *Gamblin*, the court of appeals read O.R.C. § 5104.011 - part (A) of which obligates the state director of job and family services to "adopt rules pursuant to Chapter 119. of the Revised Code", including (at subparagraph (9)) "[p]rocedures for issuing, renewing, denying and revoking a license that are not otherwise provided for in Chapter 119. of the Revised Code" - as subordinate to the administrative appellate procedures contained within O.R.C. Chapter 119., specifically, that O.R.C. § 119.12 controlled § 5104.011.

hearing and other requirements of §§ 119.06 to 119.13. Hence O.A.C. § 5101:2-14-40's 10-day limitation on initiating certificate revocations must give way to § 119.07's 30-day requirement.

Indeed, the same court of appeals that favored Crawford-Cole - the Sixth District - has reached these very conclusions:

R.C. 119.12 permits the appeal of an agency's revocation of a license. Thus, we must read the relevant provisions of the two statutes together [O.R.C. §§ 119.12 and 5104.011(G)] and, in order to give each full force and effect, find *that the rules promulgated by the director governing the revocation of a Type B daycare certificate include the procedures found in R.C. 119.01 to 119.13. For these reasons, we conclude, as did the Gamblin court, that the revocation of a Type B day-care certificate is appealable pursuant to R.C. Chapter 119.*

McAtee v. Ottawa Cty. Dept. of Human Serv. (1996), 111 Ohio App.3d 812, 816.

Lucas County's argument that the certificate revocation process will somehow lose its "streamlining" if 20 additional days are added to the time for appeal belies a heavy-handed agenda: Lucas County would rather have an obscure 10-day window to catch the mostly *pro se* certificate holders unaware of their procedural due process before time runs out. The court of appeals wisely and justly overruled this philosophy, 3-0, and it should be respected.

RESPONSE TO AMICUS CURIAE STATE OF OHIO'S EXHAUSTION CLAIM

The State incorrectly maintains that the record in the common pleas court shows that Patricia Crawford-Cole failed to exhaust her administrative remedy by "never request[ing] a hearing." That is completely false and relies upon Lucas County's equally wrong assertion.

At the common pleas court stage, Crawford-Cole filed for record

the "Affidavit of Appellant" by which she introduced certain documentary evidence into the record, including a letter from Crawford-Cole to Deborah Ortiz, Director of Lucas County Department of Job and Family Services, dated August 10, 2006.

Crawford-Cole begins her *pro se* appeal letter with these words: "I would like an opportunity to apply for an appeal based on a revocation letter dated July 24, 2006 that I did not receive until August 9, 2006 @ approximately 7:25 p.m." The four-page letter recounts Crawford-Cole's steps upon learning that administrative revocation proceedings had been instituted against her. In it, she states that the violations are correctable; cites O.A.C. regulations which Crawford-Cole alleges were not properly followed by Lucas County Job and Family Services; she articulates facts by way of a defense to the citations; and she requests Ortiz to respond. The letter is unassailably a *pro se* notice of appeal, and a high-quality one.

The State's proposition that this Court should use this case as a chance to resolve a claimed split among the appellate districts over whether the failure to exhaust administrative remedies is a jurisdictional flaw or an affirmative defense is therefore *inapropos*. The record does not support a factual basis for that error.

**RESPONSE TO AMICUS CURIAE STATE OF OHIO'S
PROPOSITION THAT COUNTIES ARE NOT REQUIRED
TO FOLLOW O.R.C. CHAPTER 119 IN TYPE B
DAY-CARE REVOCATIONS**

Common sense suggests that when county agencies are obliged to follow regulations promulgated by a state agency, as county departments of job and family services do for the Ohio Department of Job and Family Services, the county agencies are in some way "deputized" to

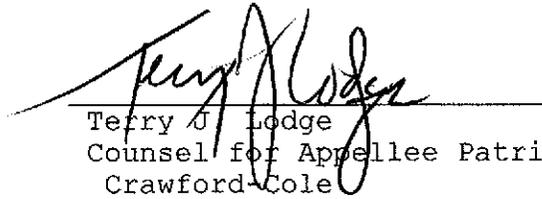
stand in the shoes of the state government. Indeed, the Franklin County Court of Appeals agrees that in Part B day care certification controversies, the "FCDJFS [Franklin County Department of Job and Family Services] is an 'agency' for purposes of R.C. 119.01." *Cosby v. Franklin Ct. Dept. of Job & Family Servs.*, 2007-Ohio-6641, unreported, para. 26.

The Sixth District Court of Appeals likewise has concluded that "the statutes delegate the authority to certify and allocate funds to Type B homes *to the county as an agent of the state.*" (Emphasis supplied). *McAtee v. Ottawa Cty. Dept. of Human Serv.* (1996), 111 Ohio App.3d 812, 816. The *McAtee* court further reasoned:

. . . [T]he intent of the legislature in enacting R.C. Chapter 119 was to provide due process rights to persons affected by orders of state agencies. R.C. Chapter 5104 and the rules promulgated in furtherance of the statute make numerous references to R.C. Chapter 119 and also express an intent to grant due process rights to a particular group of licensees. R.C. 5104.011(G) requires the director to promulgate rules for type B day-care homes in accordance with R.C. Chapter 119. R.C. 119.12 permits the appeal of an agency's revocation of a license. Thus, we must read the relevant provisions of the two statutes together and, in order to give each full force and effect, find *that the rules promulgated by the director governing the revocation of a Type B daycare certificate include the procedures found in R.C. 1119.01 to 119.13. For these reasons, we conclude, as did the Gamblin court, that the revocation of a Type B day-care certificate is appealable pursuant to R.C. Chapter 119.*

McAtee is a reasonable interpretation of the counties' roles and obligations under Chapter 119, and was issued from the same court of appeals that wrote the decision under challenge here.

The Supreme Court should prudently decline jurisdiction of this appeal.


Terry J. Lodge
Counsel for Appellee Patricia
Crawford Cole

CERTIFICATION

I hereby certify that on the 31st day of March, 2008 I sent a copy of the foregoing "Amended Memorandum in Response to Memorandum in Support of Jurisdiction of Appellant Lucas County Department of Job and Family Services and *Amicus* State of Ohio" via regular U.S. mail, postage prepaid, to John Borell, Esq., and Karlene Henderson, Esq., Assistant Prosecutors, Lucas County Courthouse, Suite 250, Adams at Erie Sts., Toledo, OH 43604; and to William P. Marshall, Esq., Solicitor-General, 30 East Broad St., 17th floor, Columbus, OH 43215.


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