

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**10-2044**

**STATE OF OHIO, EX. REL.,  
OHIO DEPARTMENT OF EDUCATION,**

Plaintiff-Appellee,

-v-

**MINISTERIAL DAY CARE ASSOCIATION,**

Defendant-Appellant.

Case No.

*On Discretionary Appeal from the  
Cuyahoga County Court of Appeals,  
Eighth Appellate District*

Court of Appeals Case  
No. 94062

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**APPELLANT MINISTERIAL DAY CARE ASSOCIATION'S MEMORANDUM  
IN SUPPORT OF JURISDICTION**

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**FILED**  
NOV 29 2010  
CLERK OF COURT  
SUPREME COURT OF OHIO

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**I. EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.**

This case involves a substantial constitutional question and an opportunity for the Court to decide an issue of great public interest regarding judicial interpretation of the statutory term “factual findings” in R.C. §117.36.<sup>1</sup> Simply stated, the Ohio Department of Education (“ODE”) filed suit pursuant to R.C. §117.28 against Appellant Ministerial Day Care Association (“MDCA”) for the recovery of public money. At trial, the court interpreted “factual findings” to include inadmissible hearsay, conjecture and other extraneous commentary as *prima facie* evidence of ODE’s claim. The trial court then erroneously instructed the jury to deliberate on the report containing the assailed “factual findings” which lead to the judgment against MDCA for \$2,582,735.00. MDCA appealed the judgment and the Eighth District Court of Appeals affirmed.

The interpretation rendered below contravenes the strictures of the Fourteenth Amendment, the Ohio Rules of Evidence and this Court’s opinion in **Hoare v. Cleveland**, 126 Ohio St. 625 (1933). See **U.S. Const., Amend. XIV**, and **Evid. R. 802**. Specifically, the interpretation violated due process in that it circumvented fundamental principles of fairness by depriving MDCA of property without using the applicable legal measures to do so, and skirted the rules of evidence through the admission of a state auditor’s report not intended to be used for that purpose. The purpose of R.C. §117.36 is simply to facilitate the pleading of state claims for the recovery of public money. **State, ex rel. Smith, Pros. Atty., v. Maharry**, 97 Ohio St. 272 (1918). It must be

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<sup>1</sup> R.C. §117.36, provides in pertinent part that “[i]n any action it is sufficient for the plaintiff to allege in the petition so much of the factual information contained in the report of the auditor of state as relates to the claim or action against the defendant therein and that the amount claimed against the defendant is unpaid... A certified copy of any portion of the report containing factual information is prima-facie evidence in determining the truth of the allegations of the petition...”

read in harmony with both the Fourteenth Amendment and this Court's rules of evidence. **Hoare**, *supra*; *c.f.*, **United States v. Williams**, 128 S. Ct. 1830 (2008).

Here the Eighth District's construal erroneously sets a precedent for trial courts in the future to permit juries to consider irrelevant, speculative, conclusory and unfairly prejudicial commentary as factual information "in determining the truth of the allegations of the petition" where the State arbitrarily demands repayment of public money. See R.C. §117.36. Furthermore, in **Hoare**, this Court enunciated the principle that in public money recovery actions initiated on the basis of an auditor's report, like the one presented here, the jury should be guided by relevant evidence, which meant the numbers based on MDCA's funded enrollment, and not by "conclusions, hearsay, and [other] evidential statements." **Id.** at 628.

In the case *sub judice*, ODE's theory of liability was predicated on the assertion that representatives from the State Auditor's office physically counted no more than 1,045 students in attendance at MDCA's Head Start facilities while simultaneously MDCA was being funded to serve 1654 students. The evidence, however, revealed through ODE's own witness that MDCA served at least 1671 students. And yet ODE was permitted to mislead and improperly influence the jury to take millions of dollars from MDCA based on unilateral observations, biased opinions and misunderstood industry standards in an auditor's report cloaked with the authority of the State. With this being so, this Court is here presented with an opportunity to rectify the due process violation which resulted in substantial injustice against MDCA. Moreover, because the evidence in support of ODE's claim was not in any sense overwhelming, these defects in the trial constituted reversible error. *Ibid.*

This Court clearly declared in **Hoare** that the closer the call, the grosser the defect in admitting this kind of extraneous evidence. *Ibid.* See also **Heiser Bros. v. City of Cleveland**, 44 Ohio App. 560 (1932). In other words, where the evidence is not overwhelming, the need for

corrective action is strong. One might ask: what is a “close call” case? Is it a case where the Attorney General opens the evidence, as it failed to do here by presenting facts which support a finding that money was erroneously given to MDCA, using the appropriate industry standards and applying them to what the State Auditor’s office found or did not find in MDCA’s records and other business documents; or, as it did by introducing unsubstantiated allegations of fraudulent spending by MDCA from MDCA’s two disgruntled ex-employees?

Electing to pursue the latter approach, which focused on irrelevant conjecture designed to confuse and mislead the jury, ODE demonstrated this was a close call case. The fact that these ex-employees were allowed to testify about extraneous and highly prejudicial matters makes this inference inescapable, especially when ODE vigorously argued these points before the jury during its summation. As a result, it could not be clearer that MDCA suffered unfair prejudice from the prior emasculation of its ability to successfully rebut the allegations made in the special auditor’s report which were masqueraded throughout the trial as “factual findings.” Accordingly, the Court should accept jurisdiction to rectify the action taken below in violation of the constraints of due process, the evidentiary rules and the Court’s declaration in **Hoare**.

## II

This case also presents a question of great public interest essentially for four reasons. First, unless this Court takes jurisdiction, the decision that R.C. §117.36 allowed extraneous comments to become part of the proof against MDCA will set a dangerous precedent which potentially and negatively affects any person or entity in this state that is sued for the recovery of public money. Second, the trial court’s ruling that the jury would be allowed to deliberate on such information, and the appeals court’s ratification of it, added a statutory requirement to §117.36 where none existed. This is so because MDCA was placed in the untenable position of having to rebut character assassinations that had nothing to do with the allegations in ODE’s complaint. Third, the

appeals court penalized MDCA without just cause by placing a burden on MDCA to rebut evidence that was inadmissible hearsay, irrelevant or impermissibly speculative and could not survive any meaningful scrutiny under Evid. R. 402 or Evid. R. 403.

And fourth, to the extent that R.C. §117.36 can be considered ambiguous, the courts below ignored the applicable statutory rules of construction by resolving the statute's ambiguity against MDCA's right to rely on the custom and practice ODE set for allowing its state-funded Head Start grantees to operate on the basis of the federal definition of "funded enrollment" instead of actual attendance ("feet in the seat") for meeting and satisfying the applicable standard of compliance. See 45 C.F.R. §1305, part B; also see fn 6, *infra*.

Instead of adhering to these rules, the appeals court side-stepped them, ignoring the issues MDCA presented in connection therewith, and resolved the liability issue in ODE's favor on what the General Assembly *should* have said rather than what it actually *did* say. As such, the Eighth District ratified the trial court's conversion of MDCA, a well-respected community asset, into an institution which at trial was undeservedly shrouded in suspicion, thereby depriving it of the fundamental fairness to which MDCA was due. In other words, at MDCA's unjustified and unnecessary expense, both lower courts by-passed this Court's admonishment set forth in **Hoare** and engaged in the wholesale rewriting of R.C. 117.36.

Furthermore, this decision threatens a broad assault on fundamental principles governing statutory construction by Ohio courts. Application of this Court's rules of statutory construction buttresses MDCA's contention: the seminal rule being that a statutory term even arguably susceptible of more than one definition should be afforded its plain and ordinary meaning. **Performing Arts Sch. of Metro. Toledo v. Wilkins**, 104 Ohio St. 3d 284, 286-87 (2004), citing **Kimble v. Kimble**, 97 Ohio St.3d 424 (2002), ¶ 6; also see R.C. § 1.42. Here the word "factual" by definition, *inter alia*, does not include conjecture or opinion. Without this Court's intervention,

a trial court may now expose juries, and perhaps in many cases unwittingly so, to inadmissible and unfairly prejudicial evidence under the guise of "factual findings" pursuant to R.C. 117.36. In this way the intent of the statute, indeed the very effect of the statute itself, can be altered merely by expanding or limiting the meaning of this term, at whim. The appeals court's imposition of a "statutory precondition" through pure judicial fiat requires reiteration because it does set such a disturbing precedent. Even more troubling, a court may now, as the appeals court did here, penalize a party for failing to meet a statutory requirement that does not exist in the statute.

More important here, beyond vindication of the rights of MDCA, is that the public interest is clearly impacted. Thousands of children across Ohio attending state-funded Head Start programs will be affected if the decision below is not reversed. No longer will these programs, which serve Ohio's neediest children, have the comfort of knowing that they will be able to provide the care they have provided in the past because funds may have to be repaid that have already been committed. For these reasons, MDCA respectfully requests the Court to issue an Order that jurisdiction to hear this case is granted.

## **II. STATEMENT OF THE CASE**

ODE filed suit against MDCA on July 24, 2006 in Cuyahoga County for the recovery of public money owed. A jury returned a verdict in favor of ODE for \$2,582,787.00. MDCA appealed to the Eighth District Court of Appeals. A Stay of Execution of Judgment was requested and granted. The Eighth District released an opinion and affirmed the judgment on October 14, 2010. MDCA now seasonably files its Notice of Appeal, Request for Stay of Execution of Judgment and Memorandum in Support of Jurisdiction.

### III. STATEMENT OF THE FACTS

MDCA operated a Head Start Program at more than 45 sites within the Cleveland area to assist impoverished families and children. Initially MDCA managed exclusively on federal funding. The federal government audited MDCA at least once every three years during the past 40 years, each time passing it with commendations. Due in large part to MDCA's impeccable federal record, in 1993 the State of Ohio began providing funds to MDCA. MDCA was also audited annually by the State without incident and was found to be in compliance.

The alleged basis for ODE's claim in this case was that MDCA supposedly mishandled public funds it received. Thus, ODE complained it was entitled to a refund of 3.8 million dollars. At trial the evidence showed that ODE received an anonymous letter which prompted an audit and subsequent lawsuit. The letter charged that MDCA's executive director ordered MDCA employees to create a ghost roster of approximately children to increase state funding, which was untrue. Such a roster, even if one had existed, would not have affected the amount MDCA's funding.

None of ODE's witnesses testified that the executive director ever requested them to pad MDCA's roster to allow MDCA to receive more public money. Two of these witnesses, disgruntled ex-MDCA employees, nevertheless were permitted to speculate in front of the jury to the extreme prejudice of the MDCA<sup>2</sup> about irrelevant expenditures on furniture and computer equipment. Speculation about these expenditures was also recorded in a special audit report that was handed to the jury to determine the verdict against MDCA.

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<sup>2</sup> It cannot be denied that their testimony was presented at the commencement of ODE's case to confuse, mislead and prejudice the jury. These witnesses charged that certain MDCA actions constituted fraud, forgery and frivolous spending. This testimony was both irrelevant and prejudicial. Each witness had been terminated from employment with MDCA. Thus, the motivation of each witness for offering testimony was clearly a vital factor in establishing the reliability of the witness' evidence, which meant impeachment could have been determinative of the ultimate issue. Under these circumstances, credibility considerations certainly made the case a close one and took any errors affecting the credibility of these witnesses, and that of the audit supervisors, out of the realm of harmless error. **State v. Thomas**, 33 Ohio App.2d 7 (1973).

The audit report covered a five day period, from the first to the fifth of December, 1997. It was only six pages, but also included a 35 page supplement which also contained inadmissible hearsay, and other irrelevant material that was unfairly prejudicial to MDCA. See **Appellee's Exhibit "L."** Moreover, the trial court compounded the prejudicial effect of this material when it allowed two high level executives within the State Auditor's office to testify that the special audit was initiated on allegations that MDCA committed fraud. The complaint, however, revealed not only was there no count of fraud advanced therein, but the word "fraud" was not even mentioned.

Yet the trial court permitted the jury to consider these very inflammatory and disparaging remarks about MDCA and its Executive Director, effectively silencing any hopes that MDCA had of receiving a fair trial. Moreover, the trial judge repeatedly failed to sustain MDCA's timely objections regarding these remarks. Even this is not all. The trial court in error permitted an ODE associate director to interpret the contract between MDCA and its providers, which was one of the essential issues before the court at that time, i.e., whether the parties had an agreement that stated MDCA would pay private providers a daily flat fee of, or "up to," \$19 dollars per child. Despite ODE's repeated professions that such an agreement existed, ODE failed to produce any documentation to substantiate its contention that MDCA surreptitiously changed the contract. This left the jury with the unmistakable and erroneous impression that MDCA had scammed ODE.

And finally, an assistant state auditor testified that he was actually given an office at MDCA headquarters where he and others conducted the audit of MDCA. He kept a daily journal from November, 2000 to May, 2002 of statements made by various MDCA employees: *a document-book replete with hearsay evidence*, marked and identified as **Appellee's Exhibit "I,"** that eventually was admitted into evidence over MDCA's objection.

#### IV. ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

**FIRST PROPOSITION OF LAW: THE STATUTORY TERM “FACTUAL FINDINGS” IN OHIO REVISED CODE SECTION 117.36 DOES NOT ALLOW A JURY TO CONSIDER INADMISSIBLE HEARSAY, UNSUPPORTED CONJECTURE AND OTHER UNFAIRLY PREJUDICIAL STATEMENTS AS *PRIMA FACIE* PROOF OF FINANCIAL LIABILITY, AND WHEN IT OCURRED IN THIS CASE, MDCA’S RIGHT TO DUE PROCESS WAS VIOLATED.**

MDCA objected to the admission of numerous portions of the Special State Auditor’s Report and its subsequent supplement on the ground that both contained impermissible hearsay, were irrelevant, speculative and unfairly prejudicial. The trial court permitted the jury to consider the report, including statements concerning irrelevant expenditures and fraud. In a companion case to **Hoare, supra, Heiser Bros. v. City of Cleveland**, 44 Ohio App. 560 (1932), the Eighth District cited the following inherent danger regarding the factual findings of a special audit report:

The admission in evidence of this report as a whole presents a serious question... the report of the examiners as to their findings of fact would unquestionably be competent, but this report goes much further than this. It incorporates hearsay evidence. It sets forth arguments, deductions, inferences, conclusions of law, and alleged acts of misconduct by one of the parties and by others not parties to the suit. Its admission as a whole violates almost every recognized rule of evidence... *Id.* at 563.

The Eighth District felt constrained to affirm the report’s admission in light of the holding in **Graves v. Board of Education**, 24 Ohio App. 428 (1927). **Graves**, however, not only misinterpreted this Court’s decision in **State, ex rel. Smith, Pros. Atty., v. Maharry**, 97 Ohio St. 272 (1918), but dealt merely with whether the allegations contained in the report coupled with the claims in the complaint stated a cause of action, not whether the content of the report violated the rules of evidence and deprived the defendants of due process. This Court in **Hoare** addressed the situation directly:

Many parts of this report embody hearsay statements, arguments, deductions, inferences, conclusions of law, etc., which should not have been offered in evidence. The trial court, when the report was presented, and objected to by the

defendant, should have rejected all such inadmissible statements. Section 286-1<sup>3</sup> does not permit the admission in evidence of such conclusions, hearsay, and evidential statements. The section specifically states that the "findings of such report" shall be "considered... as constituting a single cause of action," and that "a certified copy of any portion thereof shall constitute prima facie evidence of the truth of the allegations of the petition." This last sentence immediately follows the sentence containing the provision as to the "findings of such report," above referred to, and relates to and *authorizes the admission in evidence of "such findings" only*. The case of **State, ex rel. Smith, Pros. Atty., v. Maharry**, 97 Ohio St. 272, supports this view, for in that case *only the "findings" were admitted in evidence*. Id. at 627-28. Other citation omitted. Emphasis added.

The Court is here presented with an opportunity to close the chapter on the unfinished business of **Hoare**, where the Justices neither affirmed nor reversed the decision in **Heiser**<sup>4</sup> but did cite with approval the principle that in recovery actions initiated on the basis of an auditor's report, like the one here, the jury should be guided by the numbers and not "conclusions, hearsay, and [other] evidential statements." **Hoare**, at 628.

The Court then acknowledged that the closer the call, the grosser the defect in admitting this kind of extraneous evidence: "If this were a closer controversy, the reception in evidence of such objectionable material would compel us to reverse the case upon that one ground." Ibid. See also **Heiser, supra**. In other words, an error may be prejudicial and harmful in a close case, but loses its prejudicial and harmful quality when the evidence of liability is overwhelming. It is surely being contended here no such overwhelming evidence of liability existed to dissipate the taint of the errors in this case. It could not be clearer that what happened below was a close call.

Once again the question is asked: what is a "close call" case? Is it a case where the Attorney General (1) opens the evidence by presenting the facts in an attempt to support a finding that money was erroneously given to MDCA based on the agency's records and other business

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<sup>3</sup> The statute in question, section 286-1, mirrors the language of §117.36.

<sup>4</sup> "The Judges of this court participating in these cases have divided equally upon the merits of the main legal question presented, and hence no judgment can be rendered. This leaves the judgment of the Court of Appeals affirmed." **Hoare** at 626.

documents; or (2) by introducing unsubstantiated allegations of fraudulent spending from the agency's disgruntled ex-employees that were not being pursued by the ODE at trial? Firmly armed with any understanding that the basic premise of the complaint could not be proved by the numbers, ODE seized the second option, which prejudiced and confused the jury; and violated MDCA's right to due process and any notion of a level playing field.

The Eighth District relied on its assessment that the issues raised before it were subject to review for an abuse of discretion. It correctly noted that a judgment should not be disturbed unless the abuse affected the substantial rights of the adverse party or was inconsistent with substantial justice. **Beard v. Meridia Huron Hosp.**, 106 Ohio St.3d 237 (2005), at ¶ 20. It was incorrect, however, in asserting that MDCA's substantial right to due process was not adversely affected. Indeed, this Court said in **Beard** that "[w]e conclude that the trial court did not abuse its discretion in allowing appellant's testimony, because his references to the professional literature did not constitute *inadmissible hearsay*." Id. at ¶ 22. Emphasis supplied. Clearly, this is a case where the trial court *did* allow the jury to consider, *inter alia*, inadmissible hearsay which caused MDCA to suffer a substantial injustice, and without it, the outcome would have been different.

**SECOND PROPOSITION OF LAW: WHERE A CONSTITUTIONAL QUESTION WAS RAISED AT TRIAL WHICH CHALLENGED THE JUDICIAL INTERPRETATION OF A STATUTE THAT ALLOWED, INTER ALIA, INADMISSIBLE HEARSAY TO BE USED AS PRIMA FACIE EVIDENCE OF THE ULTIMATE ISSUE OF FINANCIAL LIABILITY, THE SUPREME COURT MAY CONSIDER THE ERROR EVEN IF IT WAS NOT BRIEFED ON APPEAL.**

On appeal, the Eighth District dismissed MDCA's third assignment of error, which implicitly incorporated our first legal proposition:

MDCA urges that the court erred by failing to exclude "extrinsic, irrelevant, hearsay and prejudicial matters from the witness stand by overruling Appellant's objections." We disregard this assignment of error because appellant has not separately argued it. App. R. 12(A)(2) and 16. Citation to testimony in the statement of facts, without any argument or explanation why appellant believes the testimony was inadmissible or why it prejudiced appellant, is insufficient.

The audit report contained numerous allegations that were said to be “factual findings,” including assertions that the MDCA’s Executive Director illegally spent public funds on entertainment, furniture and computers that were converted to her personal use. While the assignment of error regarding these defects were cited but not briefed on appeal, these concerns, as a constitutional issue, were preserved at the trial level for appellate review. The trial court clearly was put on notice that MDCA believed that its right to due process was in jeopardy well before the trial court permitted the auditor’s report to be admitted and the witnesses to testify on these allegations.

The fact that the appellate court did not address these issues does not mean that they were not raised. Nor did it waive MDCA’s constitutional right by failing to do so. This court has held on numerous occasions that the waiver doctrine is discretionary. See, *e.g.*, **In re M.D.**, 38 Ohio St.3d 149, syllabus (1988). See also **Hill v. Urbana**, 79 Ohio St.3d 130, 134 (1997). In fact, the Court specifically held that “[e]ven where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or *where the rights and interests involved may warrant it.*” **In re M.D.**, at syllabus. (Emphasis added.) MDCA respectfully submits, for the reasons given herein, this is a case that warrants such review.

Although error may have been deemed waived, this Court may even rule on the error *sua sponte* to insure that substantial justice is done. In **Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.**, 67 Ohio St.3d 274 (1993), this Court presented an analytical framework for deciding when it will consider legal issues not raised in the trial or appellate courts: “[w]hen an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, we may consider and resolve that implicit issue. To put it another way, if we must resolve a legal issue that was not raised below in order to reach a legal issue that was raised, we will do so.” *Id.* at 279. Pursuant to **Belvedere**, this Court should consider MDCA’s first legal

proposition in order to reach a constitutional issue that MDCA did explicitly raise at trial and was implicitly cited on appeal.

The trial court's error cannot be considered harmless where its commission affected MDCA's substantial right to due process and prevented substantial justice. See Civ.R. 61; **Cappara v. Schibley**, 85 Ohio St.3d 403, 408 (1999). Substantial justice requires the reviewing court to weigh the prejudicial effect of the alleged errors and determine whether, if those errors had not occurred, the jury would probably have made the same decision. **Cappara**, at 408, quoting **Hallworth v. Republic Steel Corp.**, 153 Ohio St.349 (1950), paragraph three of the syllabus. MDCA contends the Eighth District failed to do this in accord with the directive set forth in **Cappara**. And that if it had, a different conclusion would have been reached.

**THIRD PROPOSITION OF LAW: WHERE THE JURY WAS PERMITTED TO DECIDE THE ISSUE DETERMINATIVE OF MDCA'S LIABILITY FOR THE RECOVERY OF PUBLIC MONEY ON THE BASIS OF ACTUAL CHILD ATTENDANCE AND NOT ON THE THEN EXISTING GOVERNMENT STANDARD OF FUNDED ENROLLMENT, THE RESULTING VERDICT AND JUDGMENT AGAINST MDCA MUST BE REVERSED.**

The record revealed that upon ODE's sudden demand for rosters to ascertain the number of children class attendance during the first week of December, 1997, MDCA responded with information from all its sources. This inevitably required some duplication and, in a small number of instances, triplication, of names. In all, over 2000 names were submitted to ODE and the State Auditor's office. MDCA had represented it registered 1654 children deemed eligible to participate in the Head Start Program and received State funding on this basis.

The crux of the dispute at trial should not have been class attendance, but the definition and application of the term "funded enrollment," which determined whether an institution such as MDCA could provide the standard level of child care required to receive public money when ODE began funding its Head Start Programs. Funded enrollment is the number of children that are registered with the state as the basis of eligibility for assistance and is a federal standard that ODE

used to measure compliance as ODE had instituted no separate standard of its own. Prior to its involvement with the State Head Start program, MDCA had established a reputation with federal authorities for quality student care. As result of that reputation, the State awarded funding for its own Head Start Programs to MDCA. The level of state funding is based on "funded enrollment," a phrase with a specific meaning in custom and practice, as well as under federal law. See 45 C.F.R. §1305.2 (f).

It is primarily for this reason that admission of the audit report was so prejudicial: it contained incorrect assumptions, misunderstood industry standards, and an overall bias in the State's favor for recovering money from MDCA. Moreover, these biased opinions, one-sided observations, and improperly defined regulations were cloaked with the authority of the State. At trial, the court read Ohio Revised Code section 117.36 to allow an erroneous version of the report to be admitted into evidence. The defense objected, and eventually some, but not all requested, portions of the report were redacted. Nevertheless, the Eighth District affirmed the decision, presumably on the basis that the primary assignment of error, which is being raised earlier, was not briefed.

ODE persisted on presenting evidence of liability before the jury based on the numbers of children actually in attendance at MDCA and not the funded enrollment numbers which determined the amount of state funding. ODE's evidence misled and confused the jury, especially when the trial court instructed the jurors that the report containing those numbers should be used as evidence in support of ODE's claim. Since the actual attendance standard was improper, the trial court's decision to permit ODE's presentation and the report was more than an abuse of discretion. It ignored not only a host of contingencies that accounted for less than perfect attendance, but fatally ignored both custom and practice and the prevailing federal standard of "funded enrollment." ODE presented the evidence in the audit report as if actual attendance was equivalent

to “funded enrollment” or that “funded enrollment” was not the prevailing standard. Thus, the jury was presented with a State-authorized report as evidence to prove its own contents through use of opinion and application of the wrong industry standard.

The effects of these errors were indeed far-reaching in that the jury was misguided. At the time of trial, state funding was based on the number of eligible families and children MDCA registered at the commencement of the school year.<sup>5</sup> This action (see footnote 5) highlights the magnitude of the injustice visited upon MDCA in this case and shows why the judgment below must be reversed.

Otherwise, Head Start programs that have been funded to a sustainable point (unlike many Ohio schools) no longer will have the comfort of knowing that they will be able to provide the care they have provided in the past, and may have to repay funds that have already been committed. All of this without a single cross-examination of the report on which the verdict was based. Furthermore, based on the improper substitution of “funded enrollment,” not only has MDCA been denied due process, but as an unknowing result of the judgment (and resulting precedent), every State-funded Head Start Program will now be exposed to refunding money that may have been committed elsewhere. Thus, the Court is being implored to rectify the improper application of Ohio Revised Code section 117.36 and the denial of MDCA to the protection of its constitutionally mandated right to due process of law.

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<sup>5</sup> ODE later implemented a “funded number” or “funded enrollment” directive where none existed before. Indeed, ODE’s own Office of Early Learning and School Readiness now defines “funded enrollment,” also called “funded number,” as “the minimum number of eligible children that are expected to be served by the Early Childhood Education grant.” The office concludes by making the pronouncement that “[c]ontinuation dollars [will be] based upon the number of eligible children served and verified through the December count process. This number may be decreased and subsequently restored depending on fluctuations in *enrollment*.” Emphasis added. <https://ccip.ode.state.oh.us/documentlibrary/ViewDocument.aspx?DocumentKey=1163>.

## V. CONCLUSION

In sum, it cannot here be said with impunity that the jury's finding against MDCA did not result from ODE's presentation of evidence that was calculated to mislead and confuse the jury by focusing on a few isolated expenditures of MDCA's executive director that were proved to be neither illegal or against ODE's established policy. More important is these expenditures were irrelevant since ODE abandoned them as part of its case, but nevertheless were placed before the jury for deliberation toward resolving the ultimate issue of liability against MDCA. Because of the prejudicial nature of this conjecture and the inadmissible hearsay that accompanied it, the trial court's admission of the evidence did not constitute harmless error. The proof should have centered on the special audit's "factual findings" within the meaning this Court set forth in **Hoare** to determine if MDCA fell short of servicing its funded enrollment.

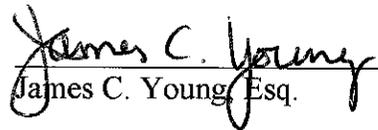
Every Head Start family and every Head Start Program is critically affected- without a single legislative vote being cast- simply by the State recalling funds at its discretion because one auditor's report redefined the entire Head Start funding system. This Honorable Court ought not to let this happen to Ohio's neediest children. For all the foregoing reasons, the Court should accept jurisdiction to effectively resolve the cogent propositions of law raised herein.

Respectfully submitted,

  
James C. Young, Esq.

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **Appellant Ministerial Day Care Association's Memorandum In Support of Jurisdiction** was sent via regular U.S. mail to the office of Richard Cordray, Ohio Attorney General c/o Amy Nash Golian, Assistant Ohio Attorney General, at 30 East Broad Street, 23<sup>rd</sup> Floor in Columbus, Ohio 43215-3400 on this 29<sup>th</sup> day of November, 2010.

  
James C. Young, Esq.

# APPENDIX

# Court of Appeals of Ohio

OCT 14 2010

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 94062

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**STATE OF OHIO EX REL. OHIO  
DEPARTMENT OF EDUCATION**

PLAINTIFF-APPELLEE

vs.

**MINISTERIAL DAY CARE ASSOCIATION**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-596945

**BEFORE:** Rocco, P.J., McMonagle, J., and Dyke, J.

**RELEASED AND JOURNALIZED:** October 14, 2010

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VOLO 714 000887



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FILED AND JOURNALIZED  
PER APP.R. 22(C)

OCT 14 2010

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *[Signature]* DEP.

COPIES MAILED TO COUNSEL FOR  
ALL PARTIES.-COSTS TAXED

KENNETH A. ROCCO, P.J.:

Defendant-appellant, Ministerial Day Care Association ("MDCA"), appeals from a jury verdict in favor of plaintiff-appellee, the Ohio Department of Education ("ODE"), on its claim to recover public money owed pursuant to R.C. 117.28. MDCA contends that the court erred by allowing two lay witnesses to identify signatures as forgeries; by allowing two witnesses to testify that this case was about fraud; by overruling MDCA's objections to irrelevant and prejudicial testimony; and by excluding independent audit reports prepared by MDCA's certified public accountant. In addition, MDCA argues that cumulative error deprived it of a fair trial.

Procedural and Factual History

ODE refiled this action on July 24, 2006, having previously dismissed its complaint without prejudice. The complaint contended that ODE is the agency responsible for allocating and distributing grant funding to Head Start agencies, and MDCA is a recipient of Head Start funds. The office of the Ohio Auditor of State issued a special audit report concerning MDCA on June 7, 2002 for the period from July 1, 1997 through September 30, 2000. This report concluded that MDCA illegally expended public monies totaling \$3,804,325.

After an extended period of discovery, both ODE and MDCA moved for summary judgment. The court denied both motions. The case then proceeded

to a jury trial. At the conclusion of the trial, the jury returned a verdict in favor of ODE in the amount of \$2,582,735, and the court entered judgment for ODE in that amount.

The auditor's report concluded that MDCA had represented that it provided services to some 1,654 children, although the documentation it provided to the auditors showed that the highest number of children enrolled and in attendance during any one month was 1,045. The auditors also concluded that MDCA had proposed to provide services to an additional 1,670 children, even though it could not demonstrate that it ever achieved its originally funded enrollment of 1,654. The ODE provided funding for 100 of these additional children. Furthermore, the ODE paid MDCA one-time funding for services provided to 1,609 children, but MDCA could not provide documentation to support 673 of those children. The auditors concluded that MDCA had received excess funds totaling \$2,582,735 because of these erroneous representations.

The auditor further determined that MDCA had accumulated \$1,221,590 in Head Start program funds which MDCA had represented to ODE would be paid to private providers.<sup>1</sup> The auditor also determined that MDCA paid for

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<sup>1</sup>This claim was based on a sample contract that MDCA allegedly provided to ODE which stated that MDCA would pay the private providers \$19 per day per child. The contract MDCA entered into with private providers stated that MDCA would pay the provider "up to" \$19 per day, and MDCA actually paid the providers a lesser amount.

computer equipment and software that was not delivered to MDCA, and purchased furniture that was delivered to the home of MDCA's executive director, Verneda Bentley. The ODE did not pursue the claim regarding the furniture and computer equipment at trial. It did present evidence regarding the funds it claimed should have been paid to private providers. The trial court ultimately directed the verdict for MDCA on this claim. Therefore, the case went to the jury solely on the question whether MDCA had received funding for children whom it could not document.

At trial, the jury heard testimony from some thirteen witnesses on behalf of the ODE, including: Josephine Ward, the present Head Start director at MDCA; Sheila Sheppard, MDCA's former fiscal manager; Bernice McClendon, MDCA's former nutrition coordinator; Antoinette Whitaker, MDCA's former Head Start director; Betty Murray and Cheryl Sumpter, former family services workers at MDCA; Rhonda Osborne, a former MDCA accountant; Mary Lou Rush and Jane Weichel of the ODE; Sean Housley, Kevin Saionzkowski, and Daniel Schultz of the Ohio Auditor of State's office; and Leonard Palaibis, a forensic accountant with the Ohio Attorney General's office.

#### Law and Analysis

All of MDCA's assignments of error concern the admission or exclusion of evidence at trial. The trial court has broad discretion in determining whether

to admit or exclude evidence. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶20. “Even in the event of an abuse of discretion, a judgment will not be disturbed unless the abuse affected the substantial rights of the adverse party or is inconsistent with substantial justice.” *Id.*

In its first assigned error, MDCA argues that the court abused its discretion by allowing two lay witnesses to identify signatures as forgeries. First, MDCA’s former fiscal officer, Sheila Sheppard, was allowed to testify, over objection, that a signature of her name on an MDCA check was not hers, and that she had learned that MDCA’s director, Verneda Bentley, had signed her name. MDCA’s former Head Start director, Antoinette Whitaker, testified that a signature of her name on a document was not hers, but she recognized the handwriting as Josephine Ward’s.

Sheppard was certainly qualified to say that the signature on the MDCA check was not her own.<sup>2</sup> Sheppard never testified that she recognized the writing as Verneda Bentley’s, however, so we must reject MDCA’s challenge to Sheppard as a non-expert handwriting identification witness. Sheppard only said that she “learned” that Bentley had signed for her. The basis for this

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<sup>2</sup>She was also qualified to identify her signature on another document. The jury could compare the signatures itself and determine whether the signature on the MDCA check was Sheppard’s. See Evid.R. 901(B)(2).

knowledge was not explored in her testimony. Therefore, we reject MDCA's challenge to Sheppard's testimony as an improper identification of Bentley's handwriting.

Whitaker merely confirmed Josephine Ward's earlier testimony. Ward previously testified that the signature of Whitaker's name was in her own handwriting; Whitaker testified that the signature was not hers. Each witness was certainly qualified to identify whether the signature was in her own handwriting. Whitaker's testimony that she had seen this handwriting many times while working at MDCA and recognized it as Ward's also qualified her to identify the writing as Ward's. See *Cutshall v. Green* (May 6, 1993), Cuyahoga App. No. 62447. Therefore, we reject MDCA's challenge to Whitaker's testimony.

The first assignment of error is overruled.

MDCA's second assignment of error complains that it was deprived of a fair trial when two witnesses were allowed to testify that "this was a case about fraud." Leonard Palaibis, a forensic accountant who supervised the audit of MDCA, testified on re-direct examination that the ODE requested the audit of MDCA "based on allegations of fraud." Daniel Schultz, the former chief deputy auditor for the Auditor of State, testified that the audit of MDCA was "particularly difficult" because "[t]here was difficult[y] finding records" and "[t]here were allegations, public allegations of fraud and misuse of money."

Neither witness testified that MDCA committed fraud. They simply described the reasons why an audit was requested. MDCA was not unfairly prejudiced by this testimony.

Third, MDCA urges that the court erred by failing to exclude "extrinsic, irrelevant, hearsay and prejudicial matters from the witness stand by overruling Appellant's objections." We disregard this assignment of error because appellant has not separately argued it. App.R. 12(A)(2) and 16. Citation to testimony in the statement of facts, without any argument or explanation why appellant believes the testimony was inadmissible or why it prejudiced appellant, is insufficient.

Fourth, MDCA contends that cumulative error at trial violated due process and rendered the trial fundamentally unfair. MDCA has failed to demonstrate any error, much less any cumulative error. Therefore, we overrule the fourth assignment of error.

Finally, MDCA argues that the court abused its discretion by excluding the independent audit reports prepared by its own certified public accountants, which MDCA claims contradicted the ODE's audit. MDCA's certified public accountant, Robert Rice, testified that his firm, Watson, Rice and Company, conducted audits of MDCA for the purpose of determining whether MDCA was in compliance with regulations governing its receipt of federal funds. Watson,

Rice and Company did not audit MDCA's compliance with the state Head Start program. Appellant does not explain how audit reports relating to federal funding were relevant to the ODE's claim that MDCA misused state funds. Therefore, we overrule the fifth assignment of error.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KENNETH A. ROCCO, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and  
ANN DYKE, J., CONCUR