ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX. REL., OHIO DEPARTMENT OF EDUCATION,	}	Case No. 10-2044
Plaintiff-Appellee,	}	*On Discretionary Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District*
-v-	}	
MINISTERIAL DAY CARE ASSOCIATION,	}	Court of Appeals Case No. 94062
Defendant-Appellant.	}	

MOTION FOR STAY OF EXECUTION OF COURT OF APPEALS JUDGMENT BY APPELLANT MINISTERIAL DAY CARE ASSOCIATION

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FILED
NOV 29 2010
CLERK OF COURT
SUPREME COURT OF OHIO

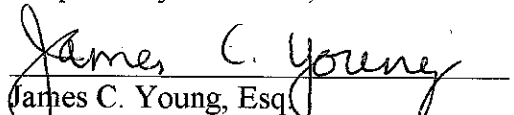
MOTION FOR STAY

Appellant Ministerial Day Care Association hereby moves this Court, pursuant to Supreme Court Rule II, Section 2(A)(3)(a), for a stay of the Court of Appeals' Judgment entered by the Eighth District Court of Appeals on October 14, 2010. A stay of the court of appeals' judgment is required in this case because the award is contrary to law. As is explained in Appellant's Memorandum In Support of Jurisdiction, the court of appeals below affirmed an award of $2,582,735.00 against Appellant on the basis of a State Auditor's report that was replete with inadmissible hearsay, conjecture and other unfairly prejudicial commentary that violated Appellant's right to due process and this Court's pronouncement in **Hoare v. Cleveland**, 126 Ohio St. 625 (1933).

Due to the presence of serious constitutional issues in this case and the size of the award at issue, Appellant asks this Court to stay the appeals court judgment so that a determination can be made as to whether this Court will accept jurisdiction over this case. A copy of the Opinion and Entry are attached. A Notice of Appeal and a Memorandum in Support of Jurisdiction have been tendered to the Court separately.

WHEREFORE, Appellant Ministerial Day Care Association prays that this Court will grant its motion to stay execution of the judgment issued in the court below.

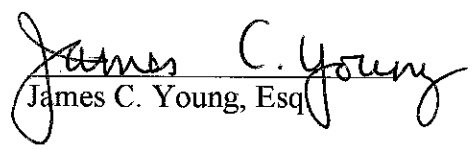
Respectfully submitted,



James C. Young, Esq.
Counsel for Appellant Ministerial Day Care Association

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Motion for Stay of Execution of Court of Appeals Judgment by Appellant Ministerial Day Care Association** 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, 16th Floor, Columbus, Ohio 43215-3400 on this 29th day of November, 2010.



James C. Young, Esq

Court of Appeals of Ohio

OCT 14 2010

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94062

STATE OF OHIO EX REL. OHIO DEPARTMENT OF EDUCATION

PLAINTIFF-APPELLEE

vs.

MINISTERIAL DAY CARE ASSOCIATION

DEFENDANT-APPELLANT

CA09094062
65522049

JUDGMENT: AFFIRMED

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

OCT 14 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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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.[1] The auditor also determined that MDCA paid for

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[1]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.[2] 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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[2]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