

IN THE SUPREME COURT OF OHIO

**Supreme Court Case Numbers: 22-1419
23-0126**

KELLY D. KYSER

Appellant

v.

**SUMMIT COUNTY CHILDREN
SERVICES**

Appellee

**SUPPLEMENTAL BRIEF OF APPELLEE
SUMMIT COUNTY CHILDREN SERVICES
AND REQUEST TO STAY ORAL ARGUMENT**

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ISSUE RAISED BY THE COURT

WHETHER THE SUMMIT COUNTY CHILDREN SERVICES' DECISION UPHOLDING THE SUBSTANTIATED REPORT DISPOSITION CONSTITUTED A FINAL, APPEALABLE ORDER WITHIN THE MEANING OF R.C. 2506.01.

LAW AND ARGUMENT

Standard of review: De novo

In the case *sub judice*, Appellee moved to dismiss on the basis of subject-matter jurisdiction, arguing that the appeal was untimely. On this basis alone, the trial court sustained Appellee's motion and dismissed the case. Although Appellee did not raise the lack of a final appealable order below, jurisdiction can be raised at any time. "It is axiomatic that subject-matter jurisdiction cannot be waived, cannot be conferred upon a court by agreement of the parties, and may be the basis for *sua sponte* dismissal." *Carroll Cty. Bur. of Support v. Brown* (Nov. 6, 2001), Carroll App. No. 00AP0742. In other words, lack of subject-matter jurisdiction is not a waivable defense and may be raised for the first time on appeal. *Id.* Subject-matter jurisdiction focuses on the court as a forum and on the case as one of a class of cases, not on the particular facts of a case or the particular tribunal that hears the case. *Jenkins v. Keller* (1966), 6 Ohio St.2d 122, 35 O.O.2d 147, 216 N.E.2d 379, paragraph five of the syllabus. Because the judgment of a court lacking subject-matter jurisdiction is void *ab initio*, authority to vacate the order is derived from the reviewing court's inherent power. *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph four of the syllabus.

Argument

This Court has directed the parties to brief the issue regarding the appealability of the substantiated report disposition within the meaning of R.C. 2506.01. Appellee submits that a review of the law and facts of this case support the conclusion that this report was not a final

appealable order within the meaning of R.C. 2506.01 as it did not determine rights, duties, privileges, benefits, or legal relationships. Thus, the instant appeal is void *ab initio* and Appellee submits that this appeal must be dismissed. What is more, Appellant has already availed herself of the review to which she is entitled under the administrative code. That decision regarding the report disposition appeal is final and not subject to further review. Accordingly, she is not entitled to a “second bite” at the apple in this forum. For this reason, Appellee respectfully requests that this Court postpone oral argument currently scheduled for September 13, 2023, pending a decision on this supplemental issue, which is dispositive of the instant matter.

BACKGROUND

SCCS, as the Public Children Services Agency (PCSA) serving Summit County, Ohio, is statutorily mandated to investigate allegations of child abuse, neglect, or dependency. R.C. 2151.421(G)(1). At the conclusion of its investigation, the PCSA must issue a disposition and notify the person alleged to have inflicted the abuse or neglect on a child in writing of the disposition. *Id.* Per the Ohio Administrative Code, this disposition for completed investigations is limited to one of three findings: “substantiated,”¹ “indicated,”² or “unsubstantiated.”³ The disposition will identify an individual, if that person is known, who was alleged to have inflicted

¹ “Substantiated report” means the report disposition in which there is an admission of child abuse or neglect by the person(s) responsible; an adjudication of child abuse or neglect; or other forms of confirmation deemed valid by the PCSA. Ohio Admin. Code 5101:2-1-01(B)(313).

² “Indicated report” means the report disposition in which there is circumstantial or other isolated indicators of child abuse or neglect lacking confirmation; or a determination by the caseworker that the child may have been abused or neglected based upon completion of an assessment/investigation. Ohio Admin. Code 5101:2-1-01(B)(161).

³ “Unsubstantiated report” means the report disposition in which the assessment/ investigation determined no occurrence of child abuse or neglect. Ohio Admin. Code 5101:2-1-01(B)(344).

the abuse or neglect. The dispositional information is reported to law enforcement, as well as the State of Ohio, Department of Job and Family Services (ODJFS). Law enforcement officials may, in their discretion, conduct a criminal investigation.

In general, ODJFS receives dispositional information from all 88 counties in Ohio and maintains this information in a Statewide Automated Child Welfare Information System “SACWIS.”⁴ ODJFS’s SACWIS is a confidential database with limited access. It is not a “public record,” and a background check would not disclose information from SACWIS without a specific Ohio SACWIS Alleged Perpetrator Search “OSAPS.”⁵ An OSAPS would be completed, generally, as a cross-check for persons caring for or working with children. For example, those seeking day care licensure are cross-checked against information contained in SACWIS. If the agency reviewing a day care application denies licensure due to the information contained in SACWIS, a due process hearing is conducted, and the licensure statutes provide for judicial review. SCCS does not maintain SACWIS and the State of Ohio, which is the statutory entity responsible for SACWIS, is not a party to this action.

In the present case, after receiving a report on November 9, 2020, alleging child abuse identifying Kelly Kyser as the perpetrator of the abuse, SCCS conducted a child abuse investigation. (Docket Entry 4, Ex. B) At the conclusion of this investigation, the allegation of

⁴ <https://sacwis.ohio.gov/sacwislogin/>

⁵ Information contained in SACWIS is confidential and not subject to disclosure pursuant to the Ohio Public Records Act (R.C. 149.43) or R.C. 1347.08. Only individuals who are authorized to do so may access the information contained within SACWIS. No person shall access or use information contained in SACWIS other than in accordance with state law and ODJFS rule. No person shall disclose information obtained from SACWIS in any manner not specified by rule. Whoever violates this is guilty of a misdemeanor of the fourth degree.
<https://sacwis.ohio.gov/sacwislogin/>.

physical abuse was “substantiated,” and an alleged perpetrator disposition letter was sent to Kelly Kyser on December 16, 2020. (Id.) On January 11, 2021, Kelly Kyser filed an administrative appeal of this disposition with SCCS pursuant to Ohio Admin. Code rule 5101:2-33-20. (Docket Entry 4, Ex. A) Thereafter, a Client Rights Officer conducted a thorough review of the matter and found that the disposition shall stand, “having carefully considered the investigatory record and the information presented at the administrative hearing on February 25, 2021.” (Id.) A copy of this letter was sent to Kelly Kyser on March 16, 2021, and this information was reported to ODJFS’s SACWIS in accordance with SCCS’s mandate. (Id. and Docket Entry 15-Exhibit A) Kelly Kyser sought a second appeal with the Summit County Court of Common Pleas on April 19, 2021, pursuant to R.C. 2506.01, appealing SCCS’s disposition of “substantiated” abuse. (Docket Entry 4).

In defining a final appealable order, adjudication, or decision, R.C. 2506.01(C), provides that the decision must affect rights:

As used in this chapter, “final order, adjudication, or decision” means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

This Court has held that “ ‘the party appealing must have a “present” and “substantial” interest in the subject matter of the litigation and must be “aggrieved or prejudiced” by the decision.’ ” *In re Petition for Incorporation of the Village of Holiday City*, 70 Ohio St.3d 365, 371, 1994-Ohio-405, 639 N.E.2d 42, quoting *Ohio Contract Carriers Assn. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 161, 42 N.E.2d 758. “Such an interest must affect a substantial right and it must be ‘immediate and pecuniary, and not a remote consequence of the judgment; a

future, contingent or speculative interest is not sufficient.’ ” *Village of Holiday City*, supra, at 371, 639 N.E.2d 42, quoting *Ohio Contract Carriers*, supra, at 161, 42 N.E.2d 758.

Appellant cannot establish a present and identifiable intrusion on her rights as a result of the substantiated report disposition. Future harm, that could arise as a result of subsequent registry information, does not qualify as immediate and pecuniary harm. As laid out above, R.C. 2506.01(C) administrative appeals are limited to final orders, adjudications, or decisions of an agency “that determines rights, duties, privileges, benefits, or legal relationships of a person * * *.” SCCS’s decision does not fit into any of those categories. *See, e.g., Ferren v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 8th Dist. Cuyahoga No. 92294, 2009-Ohio-2359 (granting children services agency’s Civ.R. 12(B)(1) motion to dismiss for lack of subject-matter jurisdiction upon finding R.C. 2506.01 did not provide the common pleas court with jurisdiction to review the agency’s decision upholding an “indicated” report of child sexual abuse by the appellant where the agency’s decision was not a final order that had determined appellant’s rights, duties, privileges, benefits, or legal relationships); *Moore v. Franklin Cty. Children Servs.*, 10th Dist. Franklin No. 06AP-951, 2007-Ohio-4128 (granting children services agency’s Civ.R. 12(B)(1) motion to dismiss upon finding R.C. 2506.01 did not provide the common pleas court with jurisdiction to review the agency’s decision upholding an “indicated” report of child sexual abuse where the agency’s decision was not a final order, adjudication, or decision that had affected the legal rights, duties, or privileges of appellant).

In *Ferren v. Cuyahoga Cty. Dep’t of Child. & Fam. Servs.*, 2009-Ohio-2359, ¶ 12, after Ferren appealed the county department of children and family services report, which found that sexual abuse against a child was indicated against him, Ferren appealed to the Cuyahoga County Court of Common Pleas. The court dismissed his appeal for lack of jurisdiction and the Eighth

District Court of Appeals affirmed the trial court's dismissal, specifically finding that the letter was not a final order under R.C. 2506.01. In reaching this conclusion, the reviewing court agreed with the Tenth District Court of Appeals in *Moore v. Franklin Cty. Children Services*, Franklin App. No. 06AP-951, 2007-Ohio-4128:

The Tenth District agreed with the trial court's finding that the decision Moore attempted to appeal from was not a "final order" because it did not affect his legal rights, duties, or privileges. In so holding, the court stated the following:

{¶ 14} "Here, the placing of appellant's name on a confidential registry does not, as appellant suggests, *per se* foreclose his ability to work as a respite care worker in Franklin County or any other county in this state. Under Ohio law, the data entered into the central registry is 'confidential,' and the unauthorized dissemination of the contents of a central registry report constitutes a misdemeanor of the fourth degree. Ohio Adm.Code 5101:2-34-38.1(A). See, also, *Cudlin v. Cudlin* (1990), 64 Ohio App.3d 249, 254, 580 N.E.2d 1170 (child abuse reports received by agencies are confidential). Further, the law allows limited access to the information. For instance, a public children services agency is limited to requesting and receiving information from the central registry 'because it has received a report of child abuse or neglect.' Ohio Adm.Code 5101:2-34-38.1(B). The law also sets forth timeframes, whereby the identifying information in the registry is automatically removed. See Ohio Adm.Code 5101:2-35-19 ('[e]xpunction of identifying information from the central registry').

{¶ 15} "As noted by the trial court, appellant is still employed by Parenthesis, and there is no indication that appellant, subsequent to the allegations in this case, applied for or was denied respite service opportunities based upon information in the central registry. Given the limited disclosure requirements, appellant's concern that he may not be able to provide respite services in the future is merely speculative, rather than direct and consequential. Federal courts have recognized that 'listing on a confidential registry is not an injury in itself.' *Battles v. The Anne Arundel Cty. Bd. of Edn.* (D.Md.1995), 904 F.Supp. 471, 477. See, also, *Hodge v. Jones*

(C.A.4, 1994), 31 F.3d 157, 165 (retention of records in confidential central registry does not implicate liberty interest where alleged loss, as set forth in the complaint, ‘reveals no more than a conclusory allegation of reputational injury’). Nor has appellant demonstrated, as found by the trial court, an immediate impact to his pecuniary interests by the mere placement of his name on the registry. While there may be circumstances in which the placing of a name on a central registry directly and adversely threatens a provider’s employment, e.g., such as an impact on licensure, etc., appellant’s purported ‘understanding’ that his future employment opportunities working with children may be impaired is speculative and remote at best.” *Moore* at ¶ 20-21.

Ferren v. Cuyahoga Cty. Dep’t of Child. & Fam. Servs., 2009-Ohio-2359, ¶ 15.

Similarly, in *Geyer v. Clinton Cty. Dep’t of Job & Fam. Servs.*, 2021-Ohio-411, ¶ 14, after conducting a thorough review of the record, the Twelfth District Court of Appeals found that Geyer’s legal rights, duties, privileges, benefits, and/or legal relationships were not affected by the Clinton County Department of Job and Family Services’ decision to uphold the substantiated disposition of abuse against him. Citing *Ferren* at ¶ 17; and *Moore* at ¶ 21, the court declined to engage in pure speculation as to alleged future harm. This included Geyer’s claims set forth in his affidavit submitted to the common pleas court claiming that the agency’s decision “will undoubtedly affect” his employment and would “affect [his] ability to adopt [his] stepson.” *Id.* at ¶14. In addition, the reviewing court expressly noted, “[t]his is particularly true here when considering CCDJFS’ decision is ordinarily confidential and may not be disseminated except under the limited circumstances as authorized by Ohio Admin. Code 5101:2-33-21. These limited circumstances do not include, for instance, an employee background check.” *Geyer* at ¶14. See also, *Gowdy v. Cuyahoga Cty. Dep’t of Child. & Fam. Servs.*, 2011-Ohio-2156, ¶ 18 (“Appellant failed to establish a present and identifiable intrusion on her rights as a result of the registry information. As stated in *Ferren*, this court has held that ‘a listing on a confidential

registry is not an injury in itself.' *Ferren*, citing *Battles v. Anne Arundel Cty. Bd. of Edn.* (D.Md.1995), 904 F.Supp. 471, 477."

In the instant case, there is no indication that Kelly Kyser, subsequent to the allegations in this case, applied for or was denied opportunities based upon information in the central registry. Thus, Kyser cannot establish a present and identifiable intrusion on her rights. Kyser could conceivably demonstrate such harm upon the denial of an application for foster home certification. See, for example, *State ex rel. K.S. v. Ashland Cty. Dep't of Job & Fam. Servs.*, 2021-Ohio-3065, ¶¶ 2-7.

Finally, R.C. 2506.01(C), unequivocally excludes the type of appeal sought here, providing in pertinent part:

....does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

(Emphasis added). “[W]hen the right to appeal is conferred by statute, an appeal can be perfected only in the manner prescribed by the applicable statute.” *Welsh Dev. Co. v. Warren Cty. Regional Planning Comm.*, 128 Ohio St.3d 471, 2011-Ohio-1604, ¶ 14.

As discussed above, Kyser was provided with and availed herself of the administrative review process. In the December 16, 2020 “Alleged Perpetrator Disposition Letter,” Kyser was provided with the mechanism for appealing the initial finding of “substantiated” pursuant to Ohio Admin. Code 5101:2-33-20. She took advantage of this process. In the March 16, 2021, letter, the Client Rights Officer set forth the following:

As the Executive Director’s designee, I have completed a thorough review of this matter, and carefully considered the investigatory record, and the information presented at the administrative hearing

on February 25, 2021. For the reasons stated herein, the disposition will stand.

(Docket Entry 4, Exhibit A, p. 1).

Ohio Admin. Code 5101:2-33-20 (H) clearly states that “[t]he decision of the PCSA regarding the report disposition appeals shall be final and the decisions are not subject to state hearing review under section 5101.35 of the Revised Code.” Accordingly, Kyser should not be afforded a second bite at the apple after being dissatisfied with the Client Rights Officer’s decision. See, e.g., *Bogan v. Mahoning Cty. Children Servs.*, 2021-Ohio-3933, ¶ 11.

CONCLUSION

For the foregoing reason, Appellee respectfully submits that the instant appeal should be dismissed for lack of jurisdiction as the report disposition letter is not a final appealable order.

Respectfully submitted,

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