

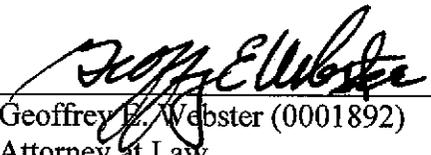
IN THE SUPREME COURT OF OHIO

THE OHIO ACADEMY OF, :
NURSING HOMES ET AL. :
 :
Appellants, :
 : Supreme Court Case No. 06-275
v. :
 : On Appeal from the Franklin
THE OHIO DEPT. OF JOB AND FAMILY : County Court of Appeals,
SERVICES, ET AL., : Tenth Appellate District
 : Case No. 05AP-562
Appellees. :

MOTION FOR RECONSIDERATION

Appellants, The Ohio Academy of Nursing Homes, *et al.*, by and through counsel, respectfully request this Court, pursuant to S. Ct. Prac. R. XI, to reconsider its syllabus conclusion that, when a state agency's decision is discretionary and by statute not subject to appeal, mandamus is the sole avenue of relief available to parties challenging an agency's decision. The bases supporting this motion are set forth in the memorandum attached hereto.

Respectfully submitted,


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SUPREME COURT OF OHIO

Counsel for Appellants

MEMORANDUM IN SUPPORT

This Court may reconsider a decision on the merits pursuant to S. Ct. Prac. R. XI in order to correct decisions which, upon reflection, are deemed to have been made in error. See, *DeRolph v. State* (2002), 97 Ohio St.3d 434, 441; and *State ex rel. Huebner v. W. Jefferson Village Council* (1996), 75 Ohio St.3d 381, 383.

Appellants respectfully urge the Court to reconsider its holding here that when a state agency's decision is discretionary and by statute not subject to appeal a party challenging the agency's decision must file two distinct mandamus actions. Appellants believe the Court may, upon reflection, deem this holding and its adoption of a two-step mandamus process to have been made in error.

The bases for this motion, as detailed below, are that (1) the decision is directly contrary to an explicit legislative pronouncement regarding the Declaratory Judgment Act; and (2) the decision creates an unworkable burden that effectively denies judicial challenge of state agency actions.

The General Assembly clearly did not intend for Ohio citizens to be subjected to the judicial inefficiency of a multi-step mandamus process in order obtain prospective equitable relief against the state. Nor could this Court have intended to create an inherent statute of limitation problem for challenging parties and an implicit immunity for state agencies, although that is the effect of this decision.

The majority acknowledges a "two-step" mandamus process, but sets up for all practical purposes a "three-step" process. Under this Court's syllabus, before a party may begin to engage in the "two-step" mandamus process, it must first determine whether the agency's decision is discretionary and not subject to statutory appeal. As

case law on the subject of what constitutes discretionary agency action reveals, such a determination is not a simple matter. See, *TBC Westlake, Inc. v. Hamilton County Bd. of Revision* (1998), 81 Ohio St.3d 58. Thus, rather than settle the issue of whether Appellant should have filed a mandamus action or an action for declaratory judgment, this Court has shifted the point of contention to whether or not a given determination by a state agency is discretionary. While in this particular action the Court and Appellees acknowledge the agency's act to be discretionary, in all future actions resolution of this issue will certainly be contested in light of this decision.

Thus, instead of allowing a court to determine a party's rights, status and legal relationship relative to a government agency in a single action, a challenging party must now engage in a process involving two or more steps in order to obtain relief. Such a process is simply rife for abuse. This Court need only look to *State, ex rel. Montrie Nursing Home, Inc. v. Creasy* (1983), 5 Ohio St.3d 124, to appreciate the due process implications lying beneath the surface of the multi-step process it has sanctioned. In that case, appellees filed a solitary mandamus action in the Franklin County Court of Appeals in 1976. This Court ultimately rendered its decision *remanding the cause for further proceedings* on June 8, 1983 – seven (7) years after it had been filed *in the Court of Appeals*. If Montrie Nursing Home had been required to seek relief through the multi-step process outlined by the majority here it would have encountered a significant statute of limitations barrier in its next step.

Pursuant to R.C. 2305.07, “an action ... upon a liability created by statute other than a forfeiture or penalty shall be brought within six years after the cause thereof accrued.” R.C. 2305.07. By mandating a multi-step mandamus process this Court

virtually guarantees application of the statute of limitations to preclude any challenge to a state agency's discretionary, non-appealable decision. The only option similarly-situated parties will have in order to avoid such a problem is to file the initial mandamus actions directly in the Ohio Supreme Court and cut off the years of appeals. Given the broad applicability of this Court's holding the self-imposed burden will be as overwhelming to this Court as unnecessary for Ohio's citizens.¹

The General Assembly recognized these same problems in 1999 when it legislatively overruled this Court's majority opinion in *Motorist Mutual Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d. 157. In *Brandenburg*, a case which considered the "further relief" clause of R.C. 2721.09, Justice Cook authored a dissenting opinion, joined by Chief Justice Moyer and Justice Wright, in which she described the use and purpose of the Declaratory Judgments Act:

R.C. 2721.09 provides, "[w]henever necessary or proper, *further relief* based on a declaratory judgment or decree previously granted may be given. * * *" The "further relief" in this and similar declaratory judgment statutes from other states allows a court to grant consequential or incidental relief such as . . . injunction, . . . mandamus, . . . The intent of the statute affording further relief in declaratory judgment actions is to grant the trial court the power to enforce its declaration of rights. . . . The benefit of the statute is the judicial economy of implementing the declaration of rights without the necessity of filing a separate action. [Underlined emphasis added.]

Brandenburg at 161.

¹ For example, three similar actions, stayed pending this decision, are presently pending in Ohio courts: *PNP, Inc., dab Calcutta Health Care Center v Dept. of Job and Family Services*, Case No. 06-0768, Supreme Court of Ohio; *Willow Park Convalescent Home v Dept of Job and Family Services*, Case No.. 06CV07-10175 and *Harding Pointe, Inc., v Dept of Job and Family Services*, Case No., 07CVH01-150 both Franklin County Common Pleas. It is unknown how many similar cases before other agencies pend which are affected.

Justice Cook correctly recognized not only the judicial economy of using the Declaratory Judgment Act to implement a declaration of rights without the necessity of filing separate actions, but also the ability of a court to grant *mandamus* relief under the declaratory judgment statute to affect *further relief*; the exact relief sought by Appellants here.

The 123rd General Assembly expressly adopted the language in this dissent when it enacted Sub. H. B. 58. That Act amended portions of R.C. Chapter 2721 and included language expressly declaring that the amendments were intended to supersede the majority opinion in *Brandenburg*.

More importantly, this Act confirms that Justice Cook's dissent accurately described the General Assembly's intended construction:

Section 3. The General Assembly hereby declares that . . . it is the intent of the General Assembly to do all the following . . .

(B) To recognize the dissent's accurate construction in *Brandenburg* of the "whenever necessary and proper" and "further relief" language in section 2721.09 of the Revised Code, as it existed prior to the effective date of this act.

Section 3(B), Sub. H. B. 58, 123rd General Assembly.

The benefit of the Declaratory Judgment Act "is the judicial economy of implementing the declaration of rights without the necessity of filing a separate action" which remains the intent of the General Assembly. With all due respect, that express intention supersedes any judicial pronouncement to the contrary. Mandamus relief is available pursuant to R.C. 2721.09, and there should be no need to engage in a judicially created, inefficient multi-step process to obtain relief against an administrative state agency. Justice Lanzinger recognized this in her dissent when she observed:

“Declaratory judgment is an adequate remedy at law for this determination, and therefore, mandamus is not the proper avenue of relief.”

Finally, in this case, Justices Pfeifer, Lanzinger and Lundberg Stratton each dissented from the conclusion that “mandamus is the sole avenue of relief available to a party challenging the agency’s decision” for good reason. The majority decision eviscerates declaratory judgment as a form of relief against a state agency. A party may no longer have its rights, status and legal relationship vis-à-vis a state agency declared by the courts. A party may no longer challenge the action of a state agency by relying on the remedial relief and liberally construed provisions of R.C. Chapter 2721. Perhaps most importantly, a party may no longer avail itself of nearly 100 years of declaratory judgment precedent and jurisprudence developed by Ohio courts all against an express legislative directive to the contrary.

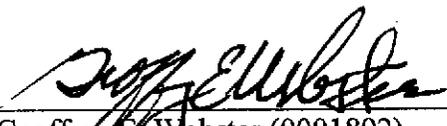
It is error that such a basic form of relief is no longer available to citizens upon a state agency’s unilateral determination that its decision is discretionary. Clearly, a state agency is considered a “person” within the meaning of Ohio’s Declaratory Judgments Act and therefore subject to judgments rendered thereunder. See *Board of State Teachers Retirement Sys. of Ohio v. Cuyahoga Falls City School Dist.* (1985), 26 Ohio App.3d 45, and *Board of State Teachers Retirement Sys. of Ohio v. Cuyahoga Falls City School Dist.* (Apr. 27, 1983), Summit App. No. 10871, unreported.

Moreover, as both dissents point out, there are, and in the future will be, cases in which a declaratory judgment is an adequate remedy at law to a party challenging the decision of a state agency. Appellants briefed many such cases in their merit and reply

briefs and, although Appellants will not re-argue those cases here, the majority has failed to overrule or meaningfully distinguish them.

For the foregoing reasons, Appellants respectfully request that this Court reconsider its decision and adjust its holdings accordingly.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION was served by hand delivery upon Rebecca L. Thomas, Assistant Attorney General, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215-3428, June 22, 2007.



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