

In the
Supreme Court of Ohio

08-0584

MEDCORP, INC.,

Appellee,

v.

OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES,

Appellant.

Case No. 2008-_____

On Appeal from the
Franklin County
Court of Appeals,
Tenth Appellate District

Court of Appeals Case
No. 07 APE 04-312

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

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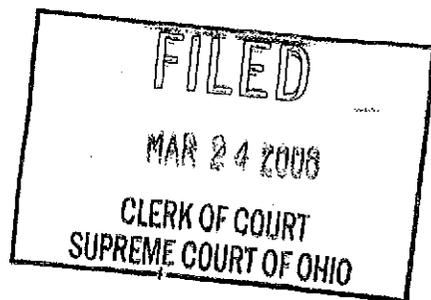


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INTRODUCTION

This case involves a recurring question of administrative procedure on which the lower courts are sharply split, so the Court's review is needed to ensure that all citizens filing administrative appeals are subject to a consistent set of rules. The specific issue is a party's duty, when filing a notice of administrative appeal under R.C. 119.12, to state the "grounds of the party's appeal." The court below held that Medcorp, Inc.—the administrative appellant and the Appellee here—stated sufficient grounds when it filed a notice of appeal stating that the order it appealed "is not in accordance with law and is not supported by reliable, probative, and substantial evidence." As such, Medcorp's language simply restated the statutory standard of review for all appeals under R.C. 119.12; that statute calls for a reviewing court to affirm an agency order if "the order is supported by reliable, probative, and substantial evidence and is in accordance with law." The appeals court, in holding that such a recitation of the statutory formula was enough, rejected the objections of the Ohio Department of Job and Family Services ("ODJFS"), the administrative appellee and the Appellant here. ODJFS asks the Court to review that decision, because (1) the courts below are split on this precise issue, (2) the ongoing split threatens to confuse litigants and to cause unfair, differential treatment in thousands of cases, and (3) the appeals court's reading improperly reduces the statutory requirement to nothingness.

First, the courts below are undeniably split over whether a party meets its duty to state the "grounds" for an administrative appeal when the party merely restates the statutory standard of review. The court below held that such a recitation suffices. See *Medcorp v. ODJFS* (10th Dist. 2008), 2008-Ohio-464 ("App. Op.," Ex. 1), ¶¶ 8, 12. In contrast, the Second District, reviewing a near-verbatim notice of appeal, ruled that was not enough. *David May Ministries v. Petro* (2d Dist.), 2007-Ohio-3454, ¶¶ 3, 28. The court below has not yet acted on a motion to certify a conflict, but regardless of formal certification, the split is undeniable.

Second, this is precisely the type of conflict that should be resolved as soon as possible, because it affects thousands of litigants and threatens to cause unequal treatment among Ohio's citizens. To be sure, all conflicts threaten unequal treatment, as by definition parties are treated differently in different appellate districts. But this conflict is especially harmful, because it affects a procedural step involved in literally every administrative appeal filed under R.C. 119.12. And until the issue is settled, those parties will be unsure how far they need to go in stating grounds in their notices. If someone relies on the Tenth District's *de minimis* standard, but the appeals district hearing that party's case sides with the Second District rather than the Tenth, her appeal will be dismissed, regardless of its merit. The Court should ensure that all parties know what rule to follow.

Third, the Court should review the decision below because the Tenth District's view cannot be right, for that view reduces the statutory requirement to meaninglessness. The General Assembly adopted the "grounds" requirement for a reason: to ensure that a party notifies an agency, with some degree of specificity, why the party is appealing. Reciting the statutory formula is meaningless because *every* appeal must assert that the appealed order fails the standard of review. Such a statement of grounds says nothing more than "I am appealing because the order is wrong." Indeed, such a statement could literally be used in every appeal filed, regardless of whether the topic is Medicaid payments, liquor-license violations, regulation of doctors and other professions, and so on. Reasonable minds may differ on precisely how much specificity is needed, but it must be something more than zero. Yet the decision below did reduce the standard to zero, thus eliminating, as a practical matter, a requirement that the General Assembly imposed as a fundamental prerequisite of subject-matter jurisdiction.

Consequently, the Court should review this case and reverse the appeals court's decision.

STATEMENT OF THE CASE AND FACTS

- A. Medcorp sought to appeal an ODJFS decision, and Medcorp's notice of appeal recited the statutory standard of review as the "grounds" for its appeal.**

ODJFS appeals solely the procedural holding below, so the substance of Medcorp's appeal is not relevant. Nevertheless, ODJFS summarizes those facts here briefly. Medcorp is an Ohio Medicaid provider that provides ambulance and "ambulette" services to qualified patients. Ohio's Medicaid program, run by ODJFS, reimburses the company for allowed expenses. ODJFS audited Medcorp and concluded that Medcorp had improperly billed the Ohio Medicaid program by \$534,719.27 for ambulette services from March 1, 1996 through September 30, 1997. Consequently, ODJFS issued an adjudication order ("Order") directing Medcorp to repay that sum plus interest.

Medcorp appealed the ODJFS Order to the Franklin County Common Pleas Court pursuant to R.C. 119.12. As that statute requires, Medcorp filed a notice of appeal with the agency, with a copy to the court. The entire text of the body of Medcorp's Notice of Appeal was as follows:

Pursuant to sections 119.12 and 511.06 of the Ohio Revised Code, Medcorp, Inc., by and through counsel, hereby appeals from the Adjudication Order issued by the Ohio Department of Job and Family Services dated April 19, 2006, a copy of which is attached and incorporated by reference and styled: In the Matter of: Medcorp, Inc., Docket No. 01SUR25. *The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence.*

App. Op. at ¶ 8 (emphasis added).

- B. Both lower courts rejected ODJFS's request to dismiss Medcorp's appeal for failure to properly invoke the courts' jurisdiction.**

ODJFS asked the common pleas court to dismiss Medcorp's appeal, arguing that its notice of appeal failed to satisfy the "grounds" requirement of R.C. 119.12. The common pleas court disagreed, and on appeal, the Tenth District affirmed and held that Medcorp's notice sufficed.

The appeals court explained that it “declined to adopt a requirement that an appellant set forth specific facts to support the grounds for appeal.” App. Op. at ¶ 12. Thus, the court concluded that “[w]e find the notice of appeal at issue currently before us did . . . set forth grounds for the appeal sufficient to invoke the jurisdiction of the trial court.” *Id.*

ODJFS now appeals that procedural decision, seeking to have Medcorp’s appeal dismissed for failure to meet the statutory “grounds” requirement. ODJFS does not appeal the substantive issue regarding the audit. ODJFS also moved the appeals court to certify a conflict, but as of the date of this filing (March 24, 2008), the appeals court has not yet ruled on that motion.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

A. The lower courts are split over whether a party satisfies R.C. 119.12 when the party merely recites the standard of review as the grounds for its appeal.

First, the Court should review this case because the lower courts are split on the precise issue. Indeed, this split is so sharp that two courts facing near-identical notices of appeal reached different conclusions regarding the notices’ sufficiency. See App. Op. at ¶ 8, 12; compare *David May Ministries*, 2007-Ohio-3454 at ¶¶ 3, 28. See also *Green v. State Bd. of Registration for Prof’l Eng’rs & Surveyors* (2d Dist.), 2006-Ohio-1581, ¶¶ 13-14 (rejecting notice that said only that party was “adversely affected” by order); *In re Wheeler* (8th Dist.), 2007-Ohio-3919, ¶¶ 12, 15 (rejecting notice that cited only the order’s date with nothing more). In the decision below, the Tenth District held that Medcorp had adequately met the “grounds” requirement by identifying the order being appealed and by stating that “the Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence.” App. Op. at ¶¶ 8, 12. The Court said that such a statement “set forth grounds for the appeal sufficient to invoke the jurisdiction of the trial court.” *Id.* at ¶ 12. But in *David May Ministries*, the Second District held that a notice of administrative appeal was jurisdictionally defective when it

merely restated, near-verbatim, the statutory standard of review for such appeals, i.e, when it merely stated that an order was contrary to law and/or was not supported by reliable, probative, and substantial evidence.

This conflict is demonstrated beyond doubt by comparing the full text of the body of the notice found sufficient in this case with the notice found insufficient in *David May Ministries*.

Medcorp's notice said this:

Pursuant to sections 119.12 and 5111.06 of the Ohio Revised Code, Medcorp, Inc., by and through counsel, hereby appeals from the Adjudication Order issued by the Ohio Department of Job and Family Services dated April 19, 2006, a copy of which is attached and incorporated by reference and styled: In the Matter of: Medcorp, Inc., Docket No. 01SUR25. ***The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence.***

App. Op. at ¶ 8 (emphasis added). The one in *David May Ministries* said this:

Pursuant to Ohio Revised Code § 119.12, David May Ministries, a.k.a. Miami Valley Ministries hereby gives notice of its appeal to the Greene County Court of Common Pleas for the Adjudication Order issued by the Office of Attorney General of the State of Ohio, Charitable Law Section, dated November 15, 2006 (copy attached). ***The Adjudication Order is not supported by reliable, probative or substantial evidence, and is contrary to law.***

David May Ministries, 2007-Ohio-3454 at ¶ 3 (emphasis added). The sole differences between the two are (1) that the Medcorp notice of appeal says “not in accordance with law,” while the *David May* one says “contrary to law,” and (2) that the *David May* notice places the language asserting that the order is “not supported by reliable, probative or substantial evidence” earlier in the sentence. These differences, of course, are surely not substantive, so the conflict cannot be explained away by distinguishing the facts of one case from the other. In other words, the cases meet the ultimate test of a conflict: the outcome in this case would have been different if this case had been heard in the Second District, and the outcome in *David May Ministries* would have been different if it had been heard in this Court.

Consequently, the conflict here is direct, as well as current, and that calls for review. ODJFS believes that the appeals court will certify a conflict here, but if for some reason the court does not do so, then this Court should grant discretionary review, because the conflict is so clear.

B. The need for guidance and for equal treatment is especially strong here, because this issue affects all parties filing administrative appeals under R.C. 119.12.

All cases claiming a conflict in the lower courts raise concerns about guidance to parties and courts, and about treating litigants equally in all parts of the state. Here, those concerns are especially sharp. This conflict does not concern a rarely-raised legal issue, such as an issue that arises only between private parties, and/or only in rare circumstances. Rather, this issue arises often—literally, in every administrative appeal filed under R.C. 119.12—and arises in the context of government regulation of its citizens. That impact means that the Court should review this case and resolve the uncertainty over this issue.

Surely no one doubts that all appealing parties should be treated the same, but that will not be the case until this Court resolves the issue. As explained above, Medcorp's notice would have been rejected as inadequate in the Second District. Conversely, litigants in the Second District are having their appeals dismissed when they file notices identical, in substance, to Medcorp's notice here. Further, the Eight District has dismissed an appeal that stated no grounds, *In re Wheeler*, 2007-Ohio-3919 at ¶¶ 12, 15, and as explained below (at 7-8), a notice such as Medcorp's, with the statutory formula, is the same as stating no grounds at all.

Until this Court provides guidance, parties appealing agency actions will be unsure how much to include in a notice of appeal. Unlike with other issues, such as the issue that this Court recently resolved regarding the proper place to file an original notice of appeal under R.C. 119.12, *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, the "grounds" issue does not offer a bright line reassuring parties of where the safe harbor lies. That is because

the “grounds” issue involves a matter of degree, not just an either-or choice, so parties might feel obliged to overcompensate by including more detail than needed. Conversely, parties following the Tenth District decision may come up short if filing in other districts.

Nor can the State’s agencies avoid the confusion by declining to move the courts to enforce the grounds requirement. First, the grounds requirement is a matter of subject matter jurisdiction, as are all of R.C. 119.12’s statutory requirements. See *id.* at ¶¶ 18-19; *Nibert v. Ohio Dept. of Rehab. & Corr.* (1998), 84 Ohio St. 3d 100, 102-03. Thus, courts are obliged to raise it sua sponte. Second, not only does the State believe that the grounds requirement must have real content (see below at 9-10), but also, the State has an obligation to raise this issue when it arises. The State, as a party, is obliged to inform a court when jurisdiction is lacking, as achieving a dismissal in this way ensures affirmance of the agency’s action automatically, without the need for costly and burdensome litigation over other procedural or substantive issues.

Consequently, the Court should review this issue and settle it, so that private parties, agencies, and courts alike all know the proper “grounds” rules, and so that all are treated alike.

C. Review is needed because the decision below reduces the statutory requirement to nothing, as every appeal must assert that the appealed order does not satisfy the statutory standard of review.

Finally, ODJFS urges the Court to review this case not only because of the split below, but also because the Tenth District’s ruling truly eliminates a requirement that the General Assembly sought to impose on all administrative appeals. While reasonable minds may differ on what degree of specificity is needed, it seems hard to deny that the Tenth District’s approach leaves nothing to the “grounds” requirement at all.

Two relevant lines of cases mandate that the requirement must mean something, and that the requirement must be strictly enforced. First, a fundamental canon of construction requires courts to read statutes so that all words in a statute have meaning, and no words are read out of

the statute. See R.C. 1.47(C); see *State v. Moaning*, 76 Ohio St. 3d 126, 128, 1996-Ohio-413; *Shover v. Cordis Corp.* (1991), 61 Ohio St. 3d 213, 218, *overruled on other grounds in Collins v. Sotka* (1998), 81 Ohio St.3d 506. Second, in the specific areas of R.C. 119.12's requirements and those of analogous administrative-appeal statutes, the Court has repeatedly held that the statutory requirements are both jurisdictional and to be enforced strictly. See, e.g., *Hughes*, 2007-Ohio-2877 at ¶ 17; *Nibert*, 84 Ohio St. 3d at 103; *Board of Ed. of Mentor v. Bd. of Revision* (1980), 61 Ohio St. 2d 332, 334; *McCruter v. Bd. of Review* (1980), 64 Ohio St. 2d 277, 279; *Holmes v. Union Gospel Press* (1980), 64 Ohio St.2d 187, 188. This is so because a litigant has no inherent right to appeal, so he may appeal only in the precise manner set forth by the law allowing the appeal. See, e.g., *Cooke v. Kinney* (1981), 65 Ohio St.2d 7, 8. Thus, the grounds requirement, whatever it means, must be enforced.

The Tenth District's approach surely eliminates the requirement, as it is hard to see what meaning is left in the "grounds" requirement if a party may satisfy it by merely repeating the statutory language. That is so because, in *every* appeal, an appellant must, to be successful, ultimately demonstrate either that the agency's order was not supported by law or was not supported by sufficient evidence.

Indeed, the Second District observed precisely that problem when it rejected a notice of appeal that merely recited the statutory standard. The court that such a statement "could be advanced in any appeal under R.C. 119.12 and fails to inform the State of the portions of the adjudication order with which it takes issue. Moreover, it fails to inform the court of the basis for the appeal, which could hinder a prompt disposition of the appeal." *David May Ministries*, 2007-Ohio-3454 at ¶ 32. The Second District was right: a notice such as Medcorp's could be used in every appeal filed against every agency order—changing only the dates and the parties'

names—so such a notice cannot fairly be said to provide any meaningful notice to an agency or a court. Indeed, such a notice is no different from those that merely cite an order and its date, with nothing more, *In re Wheeler*, 2007-Ohio-3919 at ¶¶ 12, 15, or those that say only that a party was “adversely affected” by an order, *Green*, 2006-Ohio-1581 at ¶¶ 13-14.

Consequently, the Court should review this case to restore some life to a provision that the appeals court has eviscerated.

ARGUMENT

Appellant ODJFS’s Proposition of Law:

R.C. 119.12’s “grounds” requirement, which provides that a notice of administrative appeal must state the “grounds” for the appeal, requires an appellant to specify something beyond restating the statutory formula that the order appealed from is “not in accordance with law” and is “not supported by reliable, probative, and substantial evidence.”

The appeals court’s decision below not only conflicted with other appeals courts’ decisions, but it also conflicts with this Court’s precedent regarding the importance of strictly complying with the rules for statutory appeal. In short, the appeals court was wrong.

The “grounds” requirement is plainly established in the statute. When a party appeals from an agency adjudication order pursuant to R.C. 119.12, that party must file a notice of appeal that sets forth the order appealed from and the “grounds of the party’s appeal.” See R.C. 119.12.

The Court has repeatedly enforced similar provisions in R.C. 119.12 and in other statutes establishing rules for statutory appeals; the Court has explained that failure to follow statutory appeal procedures deprives the appellate tribunal of jurisdiction. See, e.g., *Hughes*, 2007-Ohio-2877 at ¶ 17 (“Just as we require an agency to strictly comply with the requirements of R.C. 119.09, a party adversely affected by an agency decision must likewise strictly comply with R.C. 119.12 in order to perfect an appeal.”); *Nibert*, 84 Ohio St. 3d at 103 (court “was without jurisdiction to hear the matter” when party did not file a copy of the notice with the court on

time, even though the party did timely file the original notice of appeal with agency); *Board of Ed. of Mentor*, 61 Ohio St. 2d at 334 (requirement to dual-file notice of appeal both with Board of Tax Appeals and with Commissioner of Tax equalization was “mandatory and jurisdictional;” failure to do so required dismissal); *McCruter*, 64 Ohio St. 2d 277 at 279 (dismissing appeal for failure to comply with statutory requirements); *Holmes*, 64 Ohio St. 2d at 188 (“where a statute confers a right of appeal . . . strict adherence to the statutory conditions is essential for the enjoyment of the right to appeal.”). Both the need for strict application of the rules, and the jurisdictional nature of such rules, arises because a litigant has no inherent right to appeal, so he may appeal only in the precise manner set forth by the law allowing the appeal. *Cooke*, 65 Ohio St. 2d at 8; see *Zier v. Bur. of Unemp. Comp.* (1949), 151 Ohio St. 123, 125.

The requirement of stating appeal grounds serves several purposes. For example, it serves a valuable gatekeeping function. Many administratively appealable decisions are issued each year by ODJFS, and requiring an appellant to state valid grounds at the outset can help lower the number of appeals filed with little or no merit, e.g., appeals filed in hopes of settling or filed in hopes that ODJFS will miss a deadline that results in an automatic win for the appellant. See R.C. 119.12 (appellant prevails if agency fails to timely file the complete record with the court). Further, “[s]pecifying the grounds for the appeal in the notice of appeal informs the court of the basis for the appeal and assists the court in disposing of the appeal in an expeditious manner.” *David May Ministries*, 2007-Ohio-3454 at ¶ 34.

Thus, the rule is an important one, and it is mandatory and jurisdictional, and Medcorp failed to comply with it. Because Medcorp failed to state grounds in its notice of appeal to the common pleas court, that court lacked jurisdiction to hear the appeal. That lack of jurisdiction carried through to the appeals court, too, so neither court had the power to review or reverse the

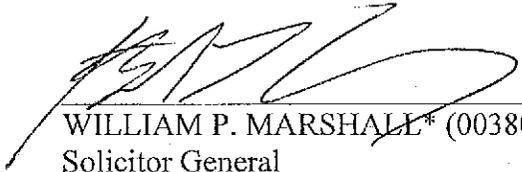
underlying ODJFS Order. The common pleas court should not have reversed, and once it improperly did so, the appeals court should have reversed the common pleas court's decision. This Court, then, should vacate reverse the appeals court's decision to hear the administrative appeal, and it should continue its established path of strictly enforcing the statutory requirements for administrative appeals.

CONCLUSION

For the above reasons, the Court should review and reverse the decision below.

Respectfully submitted,

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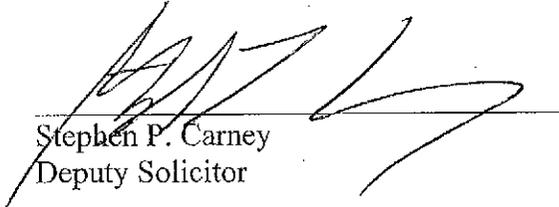
Ohio Department of Job and Family
Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Ohio Department of Job and Family Services was served by U.S. mail this 24th day of March, 2008, upon the following counsel:

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Stephen P. Carney
Deputy Solicitor

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**IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT**

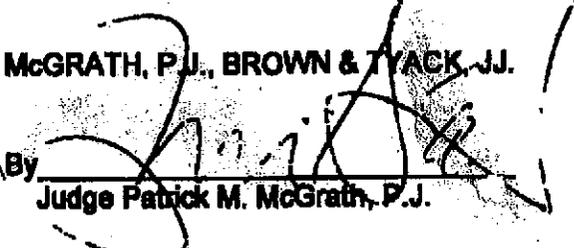
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CLEVELAND COURTS

Medcorp, Inc.,	:	
	:	
Appellant-Appellee,	:	
	:	
v.	:	No. 07AP-312
	:	(C.P.C. No. 06CVF-5622)
	:	
The Ohio Department of Job	:	(REGULAR CALENDAR)
and Family Services,	:	
	:	
Appellee-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on February 7, 2008, appellant's two assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

McGRATH, P.J., BROWN & YACK, JJ.

By  _____
Judge Patrick M. McGrath, P.J.

OHIO ATTORNEY
GENERAL'S OFFICE
FEB 12 2008
HEALTH AND
HUMAN SERVICES

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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COURT OF APPEALS
FRANKLIN CO. OHIO
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CLERK OF COURTS

Medcorp, Inc., :
Appellant-Appellee, :
v. : No. 07AP-312
The Ohio Department of Job : (C.P.C. No. 06CVF-5622)
and Family Services, : (REGULAR CALENDAR)
Appellee-Appellant. :

O P I N I O N

Rendered on February 7, 2008

Geoffrey E. Webster and J. Randall Richards, for appellant-appellee.

Marc Dann, Attorney General, and Ara Mekhjian, for appellee-appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, P.J.

{¶1} Appellee-appellant, The Ohio Department of Job and Family Services ("ODJFS"), appeals from the decision of the Franklin County Court of Common Pleas reversing a decision of ODJFS that found a \$534,719.27 overpayment to appellant-appellee, Medcorp, Inc. ("Medcorp").

{¶2} This matter arose from a post-payment audit of Medicaid claims paid to Medcorp between March 1, 1996 and September 30, 1997. Medcorp is a medical

transport company that provides ambulance and ambulance services in various Ohio counties. In 1998, the Surveillance and Utilization Review Section ("SURS") of ODJFS, the agency that administers Ohio's Medicaid program, audited Medcorp.

{¶3} Between March 1, 1996 and September 30, 1997, Medcorp made claims for and was paid \$534,719.27 for 10,462 medical transports. For the 1998 audit, SURS asked for Medcorp's records based upon 48 random claims. After review of the 48 claims, SURS disallowed all 48 claims upon one or more bases. This random sample was then extrapolated to the entire number of claims, resulting in all 10,462 claims being disallowed. Therefore, repayment was sought for the \$534,719.27 that had previously been paid on those claims, plus interest. Medcorp challenged the overpayment determinations in an administrative hearing. A hearing examiner for ODJFS heard the matter on two days in April 2002, and on July 16, September 29, 30, and October 1, 2003. On January 10, 2005, the hearing examiner issued a report and recommendation in which he determined that an overpayment of \$1,850.02 had occurred, but determined that the remaining amount was properly billed. ODJFS's director reviewed the record, including the hearing examiner's report and recommendation. Upon review, the director found the hearing examiner based his recommendation on erroneous findings of fact and conclusions of law. Therefore, the director reinstated the full amount of the \$534,719.27 to be repaid and issued an adjudication order directing Medcorp to repay \$534,719.27 plus statutory interest.

{¶4} Medcorp appealed to the Franklin County Court of Common Pleas in accordance with R.C. 119.12. The trial court found the director's findings were not based on reliable, probative and substantial evidence and were not in accordance with law.

Therefore, the trial court essentially reinstated the hearing examiner's findings and agreed that ODJFS's statistical sampling methodology and its application to this audit were invalid. ODJFS timely appealed to this court and asserts the following two assignments of error for our review:

Assignment of Error No. 1:

THE LOWER COURT ERRED BY FAILING TO DISMISS MEDCORP'S APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION.

Assignment of Error No. 2:

THE LOWER COURT ERRED BY DETERMINING THAT ODJFS SHOULD HAVE USED AN EXTENDED SAMPLE SIZE BEFORE EXTRAPOLATING THE RESULTS OF THE INITIAL SAMPLE TO ALL OF THE CLAIMS AT ISSUE IN THE AUDIT.

{¶5} In the first assignment of error, ODJFS contends Medcorp's notice of appeal filed in the trial court was defective as a matter of law because it did not state "grounds" for the appeal as required by R.C. 119.12, and thereby deprived the trial court of subject-matter jurisdiction.¹ Subject-matter jurisdiction is a question of law, which we review de novo. *Village of Hills & Dales v. Ohio Dept. of Edn.*, Franklin App. No. 06AP-1249, 2007-Ohio-5156 at ¶16, citing *Yusuf v. Omar*, Franklin App. No. 06AP-416, 2006-Ohio-6657, at ¶7.

{¶6} An appeal from an adjudication of ODJFS may be taken under R.C. 119.12. In order to properly invoke the jurisdiction of the reviewing court, the appellant must

¹ ODJFS additionally argued in its merit brief that the trial court lacked subject-matter jurisdiction over this appeal because Medcorp did not file a bond as required by R.C. 2505.06. However, as noted by Medcorp, a motion for a reduced bond was pending at the time the trial court rendered its decision on the merits. Further, it appears ODJFS has since abandoned this argument.

comply with the requirements of R.C. 119.12. In pertinent part, that section provides as follows:

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of the party's appeal. A copy of notice of appeal shall also be filed by the appellant with the court. Unless otherwise provided by law relating to a particular agency, the notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section. * * *

{¶7} Where the right of appeal is conferred by statute, an appeal may be perfected only in the manner prescribed by statute. E.g., *Zier v. Bur. of Unemployment Comp.* (1949), 151 Ohio St. 123, paragraph one of the syllabus. Parties must strictly adhere to the filing requirements in order to perfect an appeal and invoke the jurisdiction of the court of common pleas. *Harrison v. Ohio State Med. Bd.* (1995), 103 Ohio App.3d 317; *Hughes v. Ohio Dept. of Commerce, Div. of Fin. Inst.*, Franklin App. No. 04AP-1386, 2005-Ohio-6368, and cases cited therein. If a party fails to comply with the requirements of R.C. 119.12, the common pleas court does not have jurisdiction to hear the appeal. *Zier, Hughes, supra.*

{¶8} Medcorp's notice of appeal in this matter, stated:

Pursuant to sections 119.12 and 5111.06 of the Ohio Revised Code, Medcorp, Inc., by and through counsel, hereby appeals from the Adjudication Order issued by the Ohio Department of Job and Family Services dated April 19, 2006, a copy of which is attached and incorporated herein by reference and styled: In the Matter of: Medcorp, Inc., Docket No. 01SUR25. The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence.

{¶9} In support of its argument that Medcorp failed to adhere to the filing requirements of R.C. 119.12, ODJFS relies on the Second District Court of Appeals

decisions in *David Day Ministries v. State ex rel. Petro*, Greene App. No. 2007 CA 1, 2007-Ohio-3454, and *Green v. State Bd. of Registration For Professional Engineers and Surveyors*, Greene App. No. 05CA121, 2006-Ohio-1581, as well as this court's decision in *CHS-Windsor, Inc. v. Ohio Dept. of Job & Family Services*, Franklin App. No. 05AP-909, 2006-Ohio-2446. However, since the time *David Day Ministries* and *CHS-Windsor* were decided, this court has confronted an issue similar to that presented here in *Derakhshan v. State Med. Bd. of Ohio*, Franklin App. No. 07AP-261, 2007-Ohio-5802. The appellant in *Derakhshan* appealed the revocation of his medical license. The notice of appeal filed in the trial court stated:

- A. The revocation of [appellant's] medical license is not supported by reliable, probative, and substantial evidence.
- B. The revocation of [appellant's] medical license is contrary to law.
- C. The revocation of [appellant's] medical license was arbitrary and capricious.
- D. The revocation of [appellant's] medical license constitutes an abuse of discretion.

Id. at ¶6.

{¶10} The Medical Board argued that the notice of appeal was defective and deprived the trial court of subject-matter jurisdiction because it failed to set forth grounds for appeal in accordance with R.C. 119.12. The Medical Board relied, as ODJFS does here, on the Second District's decision in *Green*. This court agreed with the line of cases holding that a notice of appeal pursuant to R.C. 119.12 that contains no grounds for appeal deprived the trial court of jurisdiction. However, we went on to distinguish the

notice of appeal at issue in *Derakhshan*, finding that it stated four grounds for appeal.

This court stated:

In each of these prior cases from this court, the notice of appeal at issue contained no grounds for the appeal. That critical fact distinguishes these prior cases from the appeal before us, where appellant identified four separate grounds for his appeal to the trial court. While we can appreciate appellee's desire for more detail about appellant's arguments, R.C. 119.12 only requires an appellant to "set[] forth * * * the grounds of the party's appeal." It does not require an appellant to set forth specific facts to support those grounds, and we expressly decline to adopt such a requirement. Because we find that appellant's notice of appeal stated the grounds for his appeal and invoked the jurisdiction of the trial court, we reject appellee's contrary arguments.

Id. at ¶22.

{¶11} We find no meaningful difference between the grounds for appeal set forth in *Derakhshan*'s notice of appeal and the grounds for appeal set forth in the notice of appeal currently before us. As we explained in *Derakhshan*:

In its opinion, id. at P14, the Second District described Green's notice of appeal as follows:

The notice of appeal that Green filed merely states that he "is adversely affected" by the Board's order "finding that Appellant violated Revised Code Section 4733.20(A)(2)" and the sanctions the Board imposed. That bare contention, coupled with only a reference to the statutory authority under which the Board acted, is insufficient to satisfy the "grounds" requirement of R.C. 119.12. *Berus v. Ohio Dep't. Of Admin. Services*, Franklin App. No. 04AP-1196, 2005 Ohio 3384.

The Second District also explained that the "grounds" requirement in R.C. 119.12 required an appellant to "set forth facts sufficient on their face to show how the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. Otherwise, the agency is not put on notice of the claim or claims against which it must defend." *Green* at P13.

While we agree with the holding in *Green*—the notice of appeal did not state the grounds for the appeal, and that defect deprived the trial court of jurisdiction over the appeal—we do not agree with the court's explanation of R.C. 119.12 requirements.

Id. at ¶15-17.

{¶12} Thus, contrary to ODJFS's contention, this court has declined to adopt a requirement that an appellant set forth specific facts to support the grounds for appeal required by R.C. 119.12.² We find the notice of appeal at issue currently before us did, like that in *Derakhshan*, set forth grounds for the appeal sufficient to invoke the jurisdiction of the trial court.³ Consequently, we overrule appellant's first assignment of error.

{¶13} In its second assignment of error, ODJFS contends the trial court erred in determining that ODJFS should have used an expanded sample size. In an administrative appeal pursuant to R.C. 119.12, the common pleas court considers the entire record and determines whether the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-111. The common pleas court's "review of the

² We are mindful that *Derakhshan* did not discuss *David Day Ministries* as the two decisions were rendered in close proximity. However, in *Derakhshan*, this court denied a motion to reconsider based on *David Day Ministries*; therefore, we find *Derakhshan* instructive on the matter at hand.

³ ODJFS also suggests this court's decision in *CHS-Windsor* supports its position. However, in *CHS-Windsor*, this court found the original notice of appeal, which stated in part that the order "is not in accordance with law in that it is not a "Final Order" as required by state law because it purports to exclude any collection of amounts which may be owed to the Department as a result of a certain audit identified within the Adjudication Order" did not set forth grounds for appeal in accordance with R.C. 119.12 sufficient to invoke the jurisdiction of the trial court. Id. at ¶10. The amended notice of appeal, which this court stated "added both the correct day of the adjudication order and, as grounds for the appeal * * * that the order 'is not based on substantive, reliable or probative evidence[.]'" However, because the amended notice of appeal was filed after the 15-day period allowed for amendments, this court stated it did not consider the amended notice of appeal. We find nothing to suggest the extension of *CHS-Windsor* would be to find that the notice of appeal at issue here fails to set forth grounds for appeal in accordance with R.C. 119.12 sufficient to invoke the jurisdiction of the trial court. This is so particularly in light of our more recent decision in *Derakhshan*.

administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. Furthermore, even though the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, the agency's findings are not conclusive. *Univ. of Cincinnati*, supra, at 111. If the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate or modify the administrative order. *Id.*

{¶14} On appeal to this court, the standard of review is more limited. Unlike the common pleas court, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the common pleas court's determination that the agency's order is supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the common pleas court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, on the question of whether the agency's order is in accordance with law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶15} In *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, the court defined the evidence required by R.C. 119.12 as follows:

* * * (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Id. (Footnotes omitted).

{¶16} As previously indicated, during the audit process, SURS extrapolated the results of the review of the preliminary 48 sample claims to the entire universe of 10,462 claims. According to Medcorp, this methodology is not provided for in the Case Review Procedure Manual ("the manual"), that was developed by Dr. Melvin Moeschberger for ODJFS, and has been judicially determined to satisfy constitutional requirements of due process. ODJFS asserts that the audit was done in this manner because present here is the rare instance where all of the preliminary 48 claims were disallowed.

{¶17} Section VI of the manual describes SURS use of "the statistical procedure known as random sampling to review a small portion of the larger group of Medicaid reimbursed services provided and to make inferences from the sampled portion to the larger universe in accordance with Standard Statistical Inferential Methods." From this method, it is determined what amount of services was incorrectly reimbursed and then the amount of incorrectly reimbursed services is projected to the larger group of services. Specifically, the manual states:

The procedure to be used by the [SUR] divides the review into the preliminary sample and the expanded sample. In the preliminary sample, a total of 48 claims are randomly selected

from a universe of all the claims paid to a provider for a predetermined time frame being reviewed. Based on the results of the preliminary sample, a decision is made by the analyst and supervisor to either not extend the sample and take a straight finding or to extend the sample size and project the findings for the entire universe.

{¶18} The manual continues with specific instructions regarding the "Sampling Procedure." Under subsection C of Section VI, Step 3 of the five-step process fixes the preliminary sample at 48. Step 4 instructs that from the results of the preliminary sample, if "the decision is made to go to an expanded sample, the additional number of samples needed would be calculated * * *." Step 5 outlines the procedure to calculate the additional number of samples needed for the expanded sample. Subsection D provides a nine-step procedure for determining the "Calculation of Findings." It provides that "[a]fter the records for the *entire* sample have been obtained and a determination reached on whether a claim is appropriate or excepted, it is necessary to statistically evaluate the resulting data and project a monetary finding." (Emphasis added.) When discussing the calculations, subsection D consistently refers to the size of the "entire sample" and the results of the "entire sample." Chapter VI(D)(9) states:

In rare instances when most of the items sampled are disallowed, the mean estimate may be more than the total amount paid to the provider. In that instance, the estimated total disallowance can be calculated by using the following formula * * *.

{¶19} In this case, it is undisputed that ODJFS went directly to Chapter VI(D)(9) and did not calculate an expanded sample as provided for Chapter VI(C). According to ODJFS, Dr. Moeschberger explained that the method utilized here, though not expressly provided for in the manual, is impliedly provided for, and is known as a "second methodology." Acknowledging that it is rare to use the "second methodology," Dr.

Moeschberger explained it was also rare to have an instance, such as this, where all of the claims at issue in the preliminary sample are entirely disallowed. Therefore, it is ODJFS' position that Dr. Moeschberger's testimony provided reliable, probative and substantial evidence upon which the director could rely and the trial court abused its discretion in finding the director's order was not supported by the same.

{¶20} Dr. Warren B. Bilker, Medcorp's expert disagreed with Dr. Moeschberger. According to Dr. Bilker, the results of the preliminary sample of 48 were simply insufficient to extrapolate to the entire universe of 10,462 claims. Dr. Bilker further testified that the method used here, and testified to by Dr. Moeschberger, is not provided for in the manual.

{¶21} The trial court reviewed not only the extrapolation methodology, but also reviewed the claims that were disallowed. The trial court agreed with the hearing examiner that not 100 percent of all the preliminary 48 claims were improper. On appeal to this court, ODJFS takes issue only with that regarding the expanded sample and extrapolation.⁴

{¶22} The hearing examiner determined that a total disallowance of the preliminary sample was in error; therefore, the situation explained by Dr. Moeschberger, i.e., that obviating the need to compute an expanded sample, is not present. On this basis, the hearing examiner found the sample size was insufficient and created a risk of erroneous deprivation of a private property interest and deprived Medcorp of its right to due process. In contrast, the director found Dr. Moeschberger's testimony persuasive,

⁴ In its appendix, Medcorp attached an Ohio Inspector General Report dated January 26, 2005. The trial court declined to consider it, finding it was not permitted to be considered on appeal. Similarly, we decline to consider it as well.

and concluded the manual does contain two statistical sampling methodologies. Under the facts contained herein, the director found that the results of the preliminary 48 samples could be extrapolated to the entire universe of paid claims for the audit period.

{¶23} Contrary to the director, the trial court found that though the manual may give some leeway on the audit procedure, and that due process may not be violated where the provider agrees to allow sampling to be used instead of a full review, "the manual did not contemplate this type of circumlocution of [an] extended sample" and that Dr. Moeschberger's testimony is "at odds" with the manual's actual language. (Decision at 10-11.) Thus, the trial court found Dr. Moeschberger's testimony did not provide reliable, probative and substantial evidence and that the agency's order was not in accordance with law. Upon review of the record, we cannot find the trial court abused its discretion in this instance.

{¶24} ODJFS suggests the trial court failed to give due deference to the director's resolution of evidentiary conflicts. However, the trial court expressly made its findings in light of "according due deference to the Director." (Decision at 10.)

{¶25} As found by the trial court, the manual does not suggest it would be appropriate to apply the results of a preliminary sample to the entire universe of claims without using an expanded sample, and Dr. Bilker's testimony supported this reading of the manual. Though Dr. Moeschberger testified to the contrary, given the trial court's determination that the manual itself refuted Dr. Moeschberger testimony, this is not, as ODJFS suggests, merely a matter of deciding which expert opinion to follow. Rather it is the trial court reviewing the administrative record and finding that, based on the record as a whole, the agency order is not in accordance with law or supported by reliable,

probative and substantial evidence. Such is precisely the process required to be undertaken. *Univ. of Cincinnati*, supra (noting that an agency's resolution of evidentiary conflicts is not conclusive). Upon review, we are unable to find an abuse of the trial court's discretion. Accordingly, we overrule appellant's second assignment of error.

{¶26} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN and TYACK, JJ., concur.
