

In the
Supreme Court of Ohio

MEDCORP, INC.,

Appellee,

v.

OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES,

Appellant.

Case No. 2008 **08-0630**

On Appeal from the
Franklin County
Court of Appeals,
Tenth Appellate District
Court of Appeals Case
No. 07 APE 04-312

**NOTICE OF CERTIFIED CONFLICT OF
APPELLANT, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

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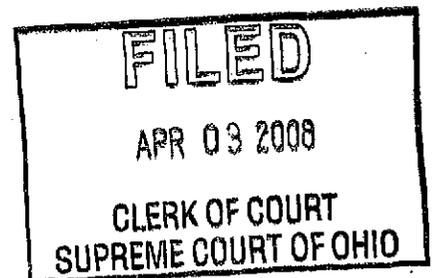
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**NOTICE OF CERTIFIED CONFLICT OF APPELLANT
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

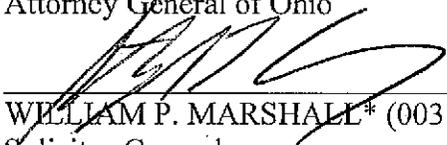
The Ohio Department of Job and Family Services hereby notifies the Court, pursuant to S. Ct. Rule IV, that the Tenth District Court of Appeals has certified a conflict. See Journal Entry and Memorandum Decision, March 27, 2008, in *Medcorp, Inc. v. Ohio Department of Job and Family Services* (10th Dist.), 07 APE 04-312 (Ex. 1). The Tenth District certified a conflict between its initial decision, 2008-Ohio-464 (Ex. 2), and the decision in *David May Ministries v. State ex rel. Petro* (2d Dist.), 2007-Ohio-3454 (Ex. 3). The Tenth District certified this issue:

Does R.C. 119.12's "grounds" requirement, which provides that a notice of administrative appeal must state the "grounds" for the appeal, require 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"?

See Journal Entry, Ex. 1, at 1, and Memorandum Decision, Ex. 1, at ¶ 10. Appellant has also filed a discretionary appeal in this case; that appeal is Case No. 08-0584 (filed March 24, 2008).

Respectfully submitted,

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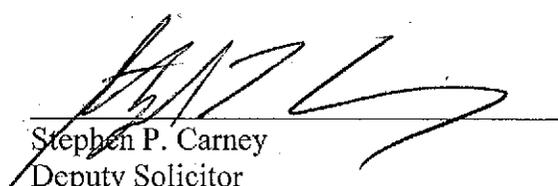
Ohio Department of Job and Family
Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Certified Conflict of Appellant Ohio Department of Job and Family Services was served by U.S. mail this 3rd day of April, 2008, upon the following counsel:

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Stephen P. Carney
Deputy Solicitor

EXHIBIT 1

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2008 MAR 27 PM 3:35
CLERK OF COURTS

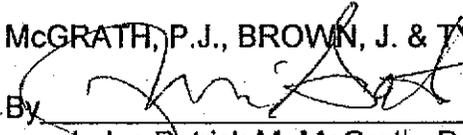
MedCorp, Inc.,
Appellant-Appellee,
v.
Ohio Department of Job & Family
Services,
Appellee-Appellant.

No. 07AP-312
(C.P.C. No. 06CV-5622)
(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on March 27, 2008, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of the Court of Appeals for Greene County in *David May Ministries v. State ex rel. Petro*, Greene App. No. 2007 CA 1, 2007-Ohio-3454, is sustained and, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

Does R.C. 119.12's "grounds" requirement, which provides that a notice of administrative appeal must state the "grounds" for the appeal, require 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"?

McGRATH, P.J., BROWN, J. & TYACK, J.
By 
Judge Patrick M. McGrath, P.J.

HEALTH & HUMAN
APR 01 2008
SERVICES SECTION

Counsel

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

MedCorp, Inc.,

Appellant-Appellee,

v.

Ohio Department of Job & Family Services,

Appellee-Appellant.

No. 07AP-312

(C.P.C. No. 06CV-5622)

(REGULAR CALENDAR)

MEMORANDUM DECISION

Rendered on March 27, 2008

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

Marc Dann, Attorney General, and *Ara Mekhjian*, for appellant.

FILED
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FRANKLIN CO. OHIO
2008 MAR 27 PM 1:19
CLERK OF COURTS

ON MOTION TO CERTIFY.

McGRATH, P.J.

{¶1} Pursuant to App.R. 25, the Ohio Department of Job and Family Services ("ODJFS"), moves this court for an order certifying to the Supreme Court of Ohio a conflict between our February 7, 2008 opinion in *Medcorp, Inc. v. Ohio Depart. of Job and Family Serv.*, Franklin App. No. 07AP-312, 2008-Ohio-464, and the opinion of the Second Appellate District in *David May Ministries v. State ex rel. Petro*, Greene App. No. 2007 CA

HEALTH & HUMAN
MAR 31 2008
SERVICES SECTION

1, 2007-Ohio-3454. Appellee, Medcorp, Inc., has filed a memorandum in opposition to appellant's motion.

{¶2} Section 3(B)(4), Article IV, of the Ohio Constitution gives the court of appeals of this state the power to certify the record of a case to the Supreme Court of Ohio "[w]henever * * * a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state." We have previously held that certification under the Ohio Constitution will be granted only where the judgments conflict upon the same question. *Johnson v. Indus. Comm.* (1939), 61 Ohio App. 535, 537. Such questions must be over a question that is material to both judgments as to be dispositive of the cases. *Lyons v. Lyons* (Oct. 4, 1983), Franklin App. No. 82AP-949.

{¶3} App.R. 25 provides, in part, that a motion to certify a conflict "shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed."

{¶4} The Supreme Court of Ohio has instructed that there are conditions that must be met before and during the certification of a case to the Supreme Court pursuant to Section 3(B)(4), Article IV, of the Ohio Constitution. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594. "[T]he alleged conflict must be on a rule of law – not facts." *Id.* at 596. "Factual distinctions between cases do not serve as a basis for conflict certification." (Emphasis sic.) *Id.* at 599.

{¶5} Appellant proposes the following question for certification to the Supreme Court of Ohio:

WAMUN & OTHER

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RECORDS SECTION

Does R.C. 119.12's "grounds" requirement, which provides that a notice of administrative appeal must state the "grounds" for the appeal, require 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"?

{¶6} Both *Medcorp* and *David May Ministries* concern appeals taken from a decision of an administrative agency. In *David May Ministries*, the appellant appealed to the Greene County Common Pleas Court from an adjudication order of the Charitable Law Section of the Ohio Attorney General's Office that rejected the appellant's application for charitable bingo licenses for years 2005 and 2006. The notice of appeal filed in *David May Ministries* stated:

"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 * * *. The Adjudication Order is not supported by reliable, probative or substantial evidence, and is contrary to law."

Id. at ¶3.

{¶7} In *David May Ministries*, the Second District Court of Appeals held the notice of appeal did not comply with the requirement that is set forth in the grounds for its appeal as mandated by R.C. 119.12 because the notice of appeal did not "indicate *how* the agency order is not supported by reliable, probative, and substantial evidence and is not in accordance with law." Id. at ¶28. (Emphasis sic.) Consequently, the court in *David May Ministries* concluded the trial court did not err in dismissing the appeal for lack of jurisdiction.

{¶8} In *Medcorp*, an appeal was taken from the ODJFS' adjudication order finding a \$534,719.27 overpayment to Medcorp. The notice of appeal filed in *Medcorp* 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.

Id. at ¶8.

{¶9} Relying on this court's opinion in *Derakhshan v. State Med. Bd. of Ohio*, Franklin App. No. 07AP-261, 2007-Ohio-5802, we held Medcorp's notice of appeal set forth grounds for the appeal as required by R.C. 119.12 sufficient to invoke the jurisdiction of the trial court.

{¶10} Though Medcorp argues to the contrary, we agree with ODJFS that our judgment in *Medcorp* conflicts with the Second District Court of Appeals' judgment in *David May Ministries* on the same question of law and that the cases are not distinguishable on their facts. Accordingly, we certify the present case as being in conflict with the opinion of the Second District Court of Appeals in *David May Ministries* in the following question:

Does R.C. 119.12's "grounds" requirement, which provides that a notice of administrative appeal must state the "grounds" for the appeal, require 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"?

{¶11} For the foregoing reasons, we grant appellant's motion to certify, and certify the above-stated question to the Supreme Court of Ohio for resolution of the conflict pursuant to Section 3(B)(4), Article IV, Ohio Constitution.

Motion to certify granted.

BROWN and TYACK, JJ., concur.

EXHIBIT 2

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2008 FEB -7 PM 12:1
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 ambulette 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.

3 of 36 DOCUMENTS

DAVID MAY MINISTRIES aka MIAMI VALLEY MINISTRIES, Plaintiff-
Appellant v. STATE OF OHIO ex rel JIM PETRO, ATTORNEY GENERAL OF
OHIO, Defendant-Appellee

C.A. CASE NO. 2007 CA 1

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, GREENE
COUNTY

2007 Ohio 3454; 2007 Ohio App. LEXIS 3198

July 6, 2007, Rendered

PRIOR HISTORY: [**1]

(Civil Appeal from Common Pleas Court). T.C. NO.
06 CV 1074.

COUNSEL: RICHARD A. BOUCHER and DOUGLAS
A. FANNIN, Dayton, Ohio, Attorneys for Plaintiff-
Appellant.

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JUDGES: WOLFF, P.J. FAIN, J. and DONOVAN, J.,
concur.

OPINION BY: WOLFF

OPINION

WOLFF, P.J.

[*P1] David May Ministries, also known as Miami Valley Ministries, appeals from a judgment of the Greene County Court of Common Pleas, which dismissed David May Ministries' administrative appeal of an adverse decision by the Charitable Law Section of the Ohio Attorney General's Office for failing to comply with *R.C. 119.12*. For the following reasons, the trial court's judgment will be affirmed.

[*P2] On November 15, 2006, the Charitable Law Section of the Ohio Attorney General's Office issued an adjudication order which rejected David May Ministries' applications for charitable bingo licenses for 2005 and 2006. On November 28, 2006, David May Ministries filed a notice of appeal with the Charitable Law Section. The notice of appeal stated:

[*P3] "Pursuant to *Ohio Revised Code § 119.12*, David May Ministries, a.k.a. Miami Valley Ministries hereby gives notice of its appeal [**2] 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."

[*P4] On November 29, 2006, David May Ministries filed a notice of appeal in the Greene County Court of Common Pleas, which also indicated that it was appealing from the November 15, 2006 adjudication order and that the order "is not supported by reliable, probative or substantial evidence, and is contrary to law." A copy of the notice of appeal that was filed with the Charitable Law Section was attached as Exhibit 1.

[*P5] On December 4, 2006, the State of Ohio filed a motion to dismiss the appeal for want of jurisdiction, arguing that David May Ministries had failed to comply with *R.C. 119.12*. The court held a hearing on the motion on December 14, 2006. On December 20, 2006, the court dismissed the appeal, stating:

[*P6] "In this case, the Appellant filed one notice of appeal with the Attorney General's office and a different notice of appeal with the Court although Appellant attached a copy [**3] of his notice of appeal to the Attorney General's office to the notice filed with the Court. However, the notice filed with the Court was not filed with the Attorney General's office.

[*P7] "In addition, *Section 119.12* requires that the Appellant set forth the grounds of the party's appeal. Appellant's position is that the statement in both notices of appeal 'the adjudication order is not supported by

reliable, probative or substantial evidence, and is contrary to law' constitutes grounds of the Appellant's appeal. A review of *Berus v. Ohio Dept. of Admin. Serv.* 2005 Ohio 3384 (2005), and *Green v. State Board of Registration for Professional Engineers & Surveyors* 2006 Ohio 1581 (2006) support the fact that the Appellant has failed to set forth the grounds of the party's appeal and consequently has failed to invoke the jurisdiction of the Common Pleas Court by failing to set forth the grounds of the party's appeal."

[*P8] David May Ministries appeals, raising two assignments of error.

[*P9] I. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING A MOTION TO DISMISS FOR THE FAILURE OF APPELLANT TO FILE A COPY OF ITS NOTICE OF APPEAL OF AN AGENCY DECISION THAT IT FILED WITH THE AGENCY WITH THE COMMON PLEAS COURT PURSUANT TO *ORC* § 119.12."

[*P10] In its first assignment of error, David May Ministries argues that it complied with the dual filing requirements of *R.C. 119.12*, and that there were no grounds for dismissing its appeal on that basis.

[*P11] The relevant portion of *R.C. 119.12* provides:

[*P12] "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 such notice of appeal shall also be filed by the appellant with the court. ****"

[*P13] The timely filing of an original notice of appeal with the agency and a copy of the notice of appeal with the court is a jurisdictional requirement. *Wheat v. Board of Embalmers and Funeral Directors* (July 2, 1998), *Montgomery App. No. 16918*, 1998 Ohio App. LEXIS 2963; *Nibert v. Ohio Dept. of Rehab. and Corr.*, 84 Ohio St.3d 100, 102-03, 1998 Ohio 506, 702 N.E.2d 70. In order to invoke the jurisdiction of the trial court, the appellant must strictly comply with the requirements of *R.C. 119.12*. *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007 Ohio 2877, P16-17, 868 N.E.2d 246.

[*P14] David May Ministries asserts that the trial court did not, in fact, rule that it failed to satisfy the filing requirements. [**5] It further asserts that it complied with the dual filing requirements of *R.C. 119.12* when it filed a notice of appeal with the Charitable Law Section and then a copy of that notice of appeal with the court. In response, the State argues that David May Ministries' first notice of appeal, filed with the Attorney General's Office, was not the true notice of appeal and that the true notice of appeal was the one filed

with the court. The State thus argues: "David May Ministries only filed a copy of the second notice, the true notice of appeal to the Court, with the Attorney General after the statutory period to appeal had lapsed," thus rendering the court without jurisdiction.

[*P15] We agree that the court's ruling does not clearly indicate whether it found that David May Ministries failed to comply with the dual filing requirement of *R.C. 119.12*. Regardless, we agree with David May Ministries that it met the requirement, and we find the State's argument unpersuasive.

[*P16] David May Ministries filed a timely notice of appeal with the Charitable Law Section on November 28, 2006, which stated that it hereby "gives notice of its appeal to the Greene County Court of Common Pleas." This notice unambiguously [**6] stated that David May Ministries was appealing the November 15th administrative decision to the common pleas court. We reject the State's assertion that this was not a "true" notice of appeal. The following day, David May Ministries filed another notice of appeal with the Greene County Court of Common Pleas, and it attached a copy of the notice of appeal that was filed with the Charitable Law Section. Both notices of appeal used identical language concerning the order from which David May Ministries had appealed and the grounds for the appeal. In sum, David May Ministries filed a timely original notice of appeal with the Charitable Law Section and subsequently filed a copy of that notice of appeal, albeit as an exhibit, with the court. In our view, David May Ministries complied with the literal requirements of *R.C. 119.12* that it file an original notice of appeal with the agency and a copy of that notice of appeal with the court. We see no jurisdictional defect in David May Ministries' filing of its notices of appeal. Accordingly, the trial court erred to the extent that it found that it lacked jurisdiction because David May Ministries failed to file its notices of appeal as required [**7] by *R.C. 119.12*. This error, however, is harmless given our disposition of the second assignment of error.

[*P17] The first assignment of error is overruled.

[*P18] II. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING A MOTION TO DISMISS FOR FAILURE OF APPELLANT TO PROPERLY SET FORTH ITS GROUNDS FOR APPEAL IN ITS NOTICE OF APPEAL PURSUANT TO *ORC* § 119.12."

[*P19] In its second assignment of error, David May Ministries claims that the trial court erred in concluding that it failed to set forth the grounds for its appeal, as required by *R.C. 119.12*.

[*P20] Our disposition of this matter is governed by *Green, supra*, in which we addressed the degree of specificity that *R.C. 119.12* requires in setting forth the grounds for the appeal. We stated:

[*P21] "The Board argues that Green's notice of appeal failed to set forth the 'grounds' of his appeal, and that the failure is a jurisdictional defect that renders the trial court's order void. The Board argues that the necessary grounds for appeal are those set out in *R.C. 119.12*, which are that the Board's order is not 'supported by reliable, probative, and substantial evidence and is (not) in accordance with law.'

[*P22] "*The standards of review that R.C. 119.12 imposes are not [**8] themselves grounds for appeal, but only the findings on which the court may affirm, reverse, vacate, or modify the agency's order. To state or set forth grounds means to recite some basis in law or fact for a claim. Black's Law Dictionary, Seventh Ed. To satisfy the grounds requirement in R.C. 119.12, an appellant's notice of appeal must therefore 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.*

[*P23] "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.*

[*P24] "In *Berus*, the Tenth District Court of Appeals held that an appellant's similar failure to satisfy the grounds [**9] requirement of *R.C. 119.12* created a jurisdictional defect that requires dismissal. The *Berus* court relied on *Zier v. Bureau of Unemployment Compensation (1949), 151 Ohio St. 123, 84 N.E.2d 746.*

[*P25] "In *Zier*, the section of the General Code authorizing an appeal to the common pleas court required the appellant's notice of appeal to 'set forth the errors' in the order appealed from. The notice merely referenced an order denying the appellant's right to unemployment compensation and the statutory section on which the denial was made. The *Zier* court held that 'compliance with the requirements as to the filing of the notice of appeal -- the time of filing, the place of filing and the content of the notice as specified in the statute -- are all conditions precedent to jurisdiction.' *Id., at 127, 84 N.E.2d 746.* Because the notice of appeal in *Zier*

failed to 'set forth the errors' in the order appealed from, as the statute required, the Supreme Court held that common pleas court lacked jurisdiction to review the appeal. *Id.*

[*P26] "'Errors' may be more particular than 'grounds,' but grounds, in relation to the relief requested in an *R.C. 119.12* appeal, likewise contemplates some particular error or [**10] defect in the agency's proceedings. In *Berus*, the Tenth District Court of Appeals held that the grounds requirement concerning the contents of the *R.C. 119.12* notice of appeal is not satisfied by the kind of claims that Green presented in his notice of appeal. We agree. We also agree, on the authority of *Zier*, that the defect is jurisdictional." (Emphasis added). *Green at P12-17.* In the present case, David May Ministries' notice of appeal states that "[t]he Adjudication Order is not supported by reliable, probative or substantial evidence, and is contrary to law." These "grounds" merely reiterate the basis upon which the court may reverse, vacate or modify an order. Specifically, *R.C. 119.12* states:

[*P27] "The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. [**11] ****"

[*P28] David May Ministries' notice of appeal does not indicate *how* the agency order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. In the absence of some facts or legal basis indicating the nature of its claims, David May Ministries has failed to comply with the requirement that it set forth the grounds for its appeal.

[*P29] David May Ministries asserts that *R.C. 119.12* should be liberally construed to effectuate the remedial purpose of the statute, and that its notice of appeal substantially complies with the statute. In support of its assertion, David May Ministries relies upon *Tripplett v. Board of Review (1963), 118 Ohio App. 515, 196 N.E.2d 107*, and *Moore v. Foreacher (1951), 91 Ohio App. 28, 61 Ohio Law Abs. 265, 105 N.E.2d 80, aff'd, 156 Ohio St. 255, 102 N.E.2d 8*, both of which post-date *Zier*. In *Tripplett* and *Moore*, this court noted that statutes relating to appeals are remedial in nature and should be liberally construed to ensure that the right to appeal is not defeated. *Tripplett, 118 Ohio App. at 517; Moore, 91 Ohio App. at 34.*

[*P30] *Tripplett*, however, does not stand for the proposition that an appellant may set forth the grounds for the appeal in general [**12] terms. In that case, *Tripplett* asserted two bases for appeal: (1) "The findings of facts of the Board of Review are contrary to the ultimate facts as clearly proved by the weight of the evidence[.]" and (2) "The conclusions of law of the Board of Review on decision that 'claimant voluntarily quit his employment without just cause of January 21, 1958' is not supported by the evidence and is contrary to law." Upon review, we concluded that the first alleged error "is general and standing alone might be held inadequate." *Tripplett*, 118 Ohio App. at 516. As to the second alleged error, we held that it was "specific, goes to the heart of the decision and clearly advises all concerned of the nature of appellant's complaint." We contrasted the second alleged error with those which are phrased with generalities "such as might be advanced in nearly any case and are not of a nature to call attention of the board to those precise determinations of the [agency] with which appellant took issue." *Id.* at 518, quoting *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, 120 N.E.2d 310. Our recent decision in *Green* reiterates *Tripplett*'s conclusion that generalities are insufficient.

[*P31] Moreover, the [**13] Supreme Court of Ohio has strictly construed the dual filing requirement of *R.C. 119.12*. The supreme court has stated that the statute unambiguously requires an original notice of appeal to be filed with the agency and a copy of the notice of appeal with the court, *Hughes, supra*, and that both documents must be filed within fifteen days, *Nibert, supra*. In *Nibert*, the Court noted that not applying a standard fifteen-day deadline to both the notice of appeal and the copy of the notice of appeal "would lead to unnecessary confusion, uncertainty, and delay." *Nibert*, 84 Ohio St.3d at 102-103. The Court further noted that *R.C. 119.12* requires the court of common pleas to give preference to *R.C. 119.12* appeals over all other civil cases, irrespective of the proceedings on the calendar of the court. "Obviously, the legislature recognized through *R.C. 119.12* the need for prompt disposition of such appeals." *Id.* at 102. We find the same rationales apply to *R.C. 119.12*'s requirement that the appellant set forth the grounds for its appeal in the notice of appeal, and, considering the supreme court's requirement that appellants strictly comply with the statute, we reject David May Ministries' assertion [**14] that *R.C. 119.12* should be liberally construed.

[*P32] As with the first alleged basis for appeal in *Tripplett*, the grounds stated in David May Ministries' notice of appeal -- that "[t]he Adjudication Order is not supported by reliable, probative or substantial evidence, and is contrary to law" -- 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.

[*P33] David May Ministries argues that the State was informed of its basis for appeal when it attached the Adjudication Order to the notice of appeal. It states that, in this case, "there was only one violation based upon one issue in the Adjudication Order." David May Ministries further asserts that State "had full knowledge and notice of what claim he would have to defend in this case," because counsel for both parties held multiple telephone conferences in which they discussed the Adjudication Order, the timing of its effect, the pending appeal, and the grounds for the appeal. David May Ministries states that they discussed, in particular, [**15] that David May Ministries believed that Jason May had the right not to answer certain questions from investigators on June 2, 2006, without the presence of counsel and that it would assert those grounds as the basis for its appeal.

[*P34] Although the State may have received actual notice through telephone conversations of the grounds for David May Ministries' appeal, *R.C. 119.12* requires that those grounds be specified in the notice of appeal in order for the court to have jurisdiction over the appeal. See *Nibert*, 84 Ohio St.3d at 102. Specifying 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. Although the parties may understand amongst themselves the basis for the appeal, the court would not ordinarily be privy to such conversations. Moreover, attaching the adjudication order to the notice of appeal merely informs the court of the decision which allegedly contains error. Although the order in this case may be limited to a specific issue, other appeals may contain multiple issues and, consequently, multiple potential bases for appeal. *R.C. 119.12* expressly places an [**16] obligation on the appellant to set forth the grounds for appeal; it does not place a burden on the court or the appellee to infer the grounds, which may not be readily apparent, from the adjudication order.

[*P35] Because David May Ministries failed to specify the grounds of its appeal, as required by *R.C. 119.12*, the court did not err in dismissing the appeal for want of jurisdiction.

[*P36] The second assignment of error is overruled.

[*P37] The judgment of the trial court will be affirmed.

FAIN, J. and DONOVAN, J., concur.