

ORIGINAL

IN THE SUPREME COURT OF OHIO

MEDCORP, INC.

Appellee,

Case No. 2008-0584 and 2008-0630

v.

OHIO DEPARTMENT OF JOB  
AND FAMILY SERVICES

Appellant.

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

**FILED**  
MAY 18 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF RECONSIDERATION  
OF *AMICUS CURIAE* THE OHIO ACADEMY OF NURSING HOMES, INC.

*Amicus Curiae* The Ohio Academy of Nursing Homes, Inc. (the "Academy"), respectfully submits this memorandum in support of reconsideration, pursuant to Rule XI § 2 of the Rules of Practice of the Supreme Court of Ohio, in the above referenced matter. The Academy urges the Court to vacate its decision and adopt the dissenting opinions of Justice Lundberg Stratton and Justice O'Donnell.

As the Justices note in their dissents, the plain language of R.C. 119.12 does not require an appealing party to state the "grounds of the party's appeal" with any specificity. When the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation; in such a case, this Court does not resort to rules of interpretation in an attempt to discern what the General Assembly could have conclusively meant or intended in a particular statute, but relies only on what the General Assembly has actually said. *State ex rel. Jones v. Conrad*, 92 Ohio St.3d 389, 2001-Ohio-207. If the plain language of R.C. 119.12 is to be modified, it should be done, as this honorable court

has often said, only within the purview of the General Assembly's lawmaking power, not by this court.

In the event the Court does not vacate its decision, the Academy respectfully urges the Court to modify its decision to operate prospectively only in accordance with the *Sunburst* Doctrine, recognized by the United States Supreme Court in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358. Consistent with the *Sunburst* Doctrine, courts have broad authority to determine whether their decisions shall operate prospectively only as a means of avoiding injustice in cases dealing with questions having widespread ramifications. See *Hoover v. Franklin Cty. Bd. Of Commrs.* (1985), 19 Ohio St. 3d 1, 9 (Douglas, J., concurring).

Generally, the decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation. *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209. However, the Court recognizes two exceptions to this general rule: When "contractual rights have arisen" or when "vested rights have been acquired under the prior decision," the decision is applied prospectively only. *DiCenzo v. A-Best Products Company, Inc.*, 120 Ohio St. 3d 149, 152, 2007-1628. Moreover, this Court has never mandated the blind application of the *Peerless* Doctrine. *Id.* See also, *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St. 3d 287, 290; and *Roberts v. United States Fid. Guar. Co.* (1996), 75 Ohio St. 3d 630, 633.

In *OMCO v. Lindley* (1987), 29 Ohio St.3d 1, this Court first applied the *Sunburst* Doctrine when it held that its decision in a Board of Tax Appeals case would only receive prospective application to transactions occurring subsequent to the date of the issuance of the decision and that the decision "will have no application to transactions occurring prior to the date, regardless of whether such transactions were the subject of litigation pending before any administrative body or court as of the date" of the decision.

In *Minister Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St. 3d 459, 2008-Ohio-1259, the Court applied the *Sunburst* Doctrine when it declined to retroactively apply a decision that established the method for implementing interest rates exceeding the statutory maximum on a book account pursuant to R.C. 1343.03(A). The Court reasoned that it did not want to “create shock waves throughout the many sectors of Ohio’s economy that rely on book accounts to do business.” *Id.* at 465.

Most recently, the Court applied the *Sunburst* Doctrine in *DiCenzo v. A-Best Products*, 120 Ohio St. 3d 149, where it determined, in an opinion by Justice Stratton concurred in by Justices Oconnoer, Ondonnell and Cupp, that its 1977 decision in *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, which held nonmanufacturing suppliers liable for defective products, should be applied prospectively only. The Court reaffirmed the doctrine stating that “a court has discretion to impose its decision only prospectively after considering whether retroactive application would fail to promote the rule within the decision and/or cause inequity.” *DiCenzo* at 153.

This present case falls squarely within the equitable principles of the *Sunburst* Doctrine because a retroactive application of this case will have widespread ramifications and cause tremendous injustice. There are an untold number of administrative appeals currently pending before the courts of this state, and many hundreds, and maybe thousands, more which have been settled and decided since the General Assembly adopted the “grounds of the party’s appeal” language in 1943. Many of these appeals, if not the majority of them, used the statutory language plainly set forth in R.C. 119.12, without more, to obtain subject matter jurisdiction. Under the *Peerless* Doctrine, any decision by a court having considered such an appeal is now void, and any such case currently pending appeal has no subject matter jurisdiction. However,

each of these cases acquired certain vested rights under the previous interpretation of this statute, i.e., a well-settled, 65-year old – and until now, unopposed – practice of filing a notice of appeal using the statutory language of R.C. 119.12. Under these circumstances, the Court’s decision should be applied only prospectively. As Justice O’Donnell notes in his dissent, “Tinkering with statutes as the majority has chosen to do here only complicates the practice of law for practitioners, who rely on the words used by the legislature to determine what they must do to properly file a notice of appeal.” Dissent at ¶ 34.

The Ohio Academy of Nursing Homes’ members undergo annual audits of their costs which are subject to R.C. 119 administrative process (see R.C. 5111.06). There are many of those audits appealed to common pleas court and the language used in this Appellee’s notice of appeal has been commonly utilized in prosecuting those appeals. To re-open those appeals, decided adversely to the Appellant by a court, would create financial chaos in a time already known as the most financially chaotic since the Great Depression. It would be a great inequity and injustice to retrospectively apply this decision, calling into question due process principles of our Constitutions.

The equities of this case further dictate that the *Sunburst* Doctrine be applied to the parties in this action. Such an approach finds widespread support. See, e.g., *Molitor v. Kaneland Community Unit District No. 302* (1959), 18 Ill.2d 11, 163 N.E.2d 89 (and cases cited therein); *Holytz v. Milwaukee* (1962), 17 Wis.2d 26, 115 N.W.2d 618; *Smith v. State* (1970), 93 Idaho 795, 473 P.2d 937. Here, the Appellant’s appointed hearing examiner and the judges who reviewed the administrative record, unanimously ruled that Medcorp prevailed on the merits and that little or no monies are due the state (long ago paid back). The statistical sampling process, used to extrapolate the 48 sample claims reviewed into a universe of more than 10,000 claims

which falsely inflated the overpayment to nearly \$600,000.00, was not only found to be invalid by the court, but also was sharply discredited by the Ohio Inspector General in its report of investigation of the Ohio Department of Job and Family Services issued on January 25, 2005.

The concurring opinion in *Hoover v. Franklin Cty. Bd. Of Commrs.* (1985), 19 Ohio St. 3d 1, 9, observed:

The parties to this appeal should not be the recipients of a Pyrrhic victory. If this court were to merely announce this new rule without applying it, such announcement could be considered mere dictum. See *Molitor v. Kaneland Community Unit District No. 302*, supra; *Kitto v. Minot Park District* (N.D.1974), 224 N.W.2d 795, 804. Application of this decision to the parties in this action will not only remove this decision from the status of obiter dictum, it will also serve, in keeping with our system of private enforcement of legal rights, to reward the present parties for their industry, expense, and effort for having given to this court the opportunity to rid the body of our law of an unjust rule. *Id.*; *Becker v. Beaudoin* (1970), 106 R.I. 562, 573, 261 A.2d 896, 902.

The resolution of issues having broad public interest should be encouraged. As was stated in *Willis v. Dept. of Conservation & Economic Dev.* (1970), 55 N.J. 534, 541, 264 A.2d 34, 38, “ \* \* \* case law is not likely to keep up with the needs of society if the litigant who successfully champions a cause is left with only that distinction.

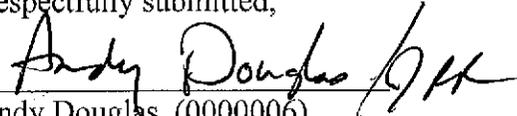
On a final note, the *Hoover* concurrence stands for the proposition that the *Sunburst* Doctrine applies to parties who effect a change in the law and should therefore benefit the law. The inverse applies in this case. Here, the Appellee is preserving the law and should also benefit, i.e., should not be penalized by the law being preserved. Accordingly, the *Sunburst* Doctrine should apply prospectively to matters for which appeals have been filed after the issuance of the Court’s decision.

### CONCLUSION

For the foregoing reasons, the Academy respectfully urges the Court to vacate its decision and adopt the dissenting opinions of Justice Lundberg Stratton and Justice O’Donnell

or, in the alternative, modify the decision so as to restrict its effect to matters for which appeals have been filed after the issuance of the Court's decision.

Respectfully submitted,



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#### **PROOF OF SERVICE**

I hereby certify that a copy of this Memorandum in Support of Reconsideration was served U. S. mail, postage prepaid, to counsel for appellants, Benjamin C. Mizer, Solicitor General, Stephen P. Carney, Deputy Solicitor, Ara Mekhjian, Assistant Attorney General, Health and Human Services Section, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, and Geoffrey E. Webster, counsel for Medcorp, Inc., 65 East State Street, Suite 1000, Columbus, OH 43215. on this 18<sup>th</sup> day of May, 2009.



Andy Douglas (0000006)