

IN THE SUPREME COURT OF OHIO

MEDCORP, INC.
Appellee,

Case No. 2008-0584
2008-0630

v.

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

OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES,
Appellant.

Court of Appeals Case
No. 07-APE04-312

**BRIEF OF AMICI CURIAE, THE OHIO CONVENIENCE STORE ASSOCIATION,
THE OHIO COUNCIL OF RETAIL MERCHANTS, THE OHIO LICENSED
BEVERAGE ASSOCIATION AND THE WHOLESALE BEER & WINE ASSOCIATION
OF OHIO IN SUPPORT OF APPELLEE MEDCORP. INC.'S RECONSIDERATION**

J. RICHARD LUMPE (0013266)
DAVID A. RABER* (0059502)

**Counsel of Record*

LUMPE & RABER
37 West Broad Street, Suite 730
Columbus, Ohio 43215.
(614) 221-5212
(614) 221-6944 fax
draber@lumpeandraber.com

*Counsel for Amici Curiae,
Ohio Council of Retail Merchants,
Ohio Convenience Store Association,
Ohio Licensed Beverage Association,
The Wholesale Beer & Wine
Association of Ohio*

GEOFFREY E. WEBSTER (0001892)

**Counsel of Record*

J. RANDALL RICHARDS (0061106)
ERIC B. HERSHBERGER (0055569)
Chester, Wilcox & Saxbe L.L.P.
65 East State Street, Suite 1000
Columbus, Ohio 43215
(614) 221-4000
(614) 221-4021 fax
gewebster@cwslaw.com

*Counsel for Appellee
Medcorp, Inc.*

RICHARD CORDRAY (0038034)
Ohio Attorney General

BENJAMIN C. MIZER (0083089)
Solicitor General*

**Counsel of Record*

STEPHEN P. CARNEY (0063460)

Deputy Solicitor

REBECCA L. THOMAS (0066650)

Assistant Solicitor

ARA MEKHJIAN (0068800)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

(614) 466-8980

(614) 466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for Appellant

*Ohio Department of Job and Family
Services*

FILED
AUG 24 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	i
STATEMENT OF FACTS	2
INTEREST OF <i>AMICI CURIAE</i>	2
ARGUMENT	4
PROPOSITION OF LAW: Whether the decision in this case should be applied prospectively only and, if so, to what cases should it be applied?	4
A. The dissenting opinions clearly state that the Court has a duty to enforce R.C. 119.12 as it is written and may not make either additions to that statute or subtractions therefrom.	4
B. The Court’s decision should not have retroactive application.	5
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF AUTHORITIES

Cases

<i>DiCenzo v. A-Best Prod. Co., Inc.</i> 120 Ohio St.3d 149, 2008-Ohio-5327	5,6
<i>Great N. Ry. Co. v. Sunburst Oil & Refining Co</i> (1932), 287 U.S. 358, 77 L.Ed. 360	5
<i>Hubbard v. Canton City Sch. Bd. of Educ.</i> 97 Ohio St.3d 451, 2002-Ohio-6718.....	4
<i>OAMCO v. Lindley</i> (1987), 29 Ohio St.3d 1, 503 N.E.2d 1388	5

TABLE OF AUTHORITIES
(Continued)

<i>Peerless Elec. Co. v. Bowers</i> (1955), 164 Ohio St. 209, 129 N.E.2d 467	5
<i>State ex rel. Lee v. Karnes,</i> (2004), 103 Ohio St.3d 559, 817 N.E.2d 76	4
<i>State ex rel. Foster v. Evatt</i> (1944), 144 Ohio St.65, 56 N.E.2d 265	4
 Statutes	
R.C. 119.12	<i>passim</i>

STATEMENT OF FACTS

The relevant facts giving rise to the appeal pending before the Court are set forth in Appellee's Merit Brief file in the Ohio Supreme Court. Those facts are adopted by reference and incorporated herein.

INTEREST OF *AMICUS CURIAE*

The Ohio Council of Retail Merchants ("OCRM") and the Ohio Association of Convenience Stores ("OACS") are non-profit associations that represent licensed businesses from the "third-tier" of the Ohio's three-tier alcohol distribution system. The OCRM membership consists of over 3,184 retailers, of which, hundreds have "off-premises" consumption beer and wine permits. The OACS consists of approximately 239 convenience stores and is an affiliate of the OCRM.

The Ohio Licensed Beverage Association ("OLBA") is a non-profit association that represents licensed businesses from the "third-tier" of the Ohio's three-tier alcohol distribution system. The OLBA membership consists of hundreds of retailers, of which, hold "on-premises" consumption beer, wine and liquor permits issued by the State of Ohio.

The Wholesale Beer and Wine Association of Ohio ("WBWAO") is a non-profit association that represents licensed businesses from the "second tier" of the Ohio's three-tier alcohol distribution system. The WBWAO membership consists of over 76 beer and wine distributors which are independent, family-owned companies.

The issues presented in this appeal are of great importance to all holders of liquor permits issued by the Ohio Department of Commerce, Division of Liquor Control who may file an administrative appeal, under R.C. 119.12, as a party “adversely affected” by any order of the Liquor Control Commission denying the renewal, issuance or suspending or revoking permit privileges. If this Court does not alter the conclusions in its decision, many members of the above trade associations will lose their remedy imposed by the General Assembly to redress the many decisions that have been appealed. As a result, convenience stores, supermarkets, mom & pop stores, carry-outs, bars, and wholesale distributors of beer and wine, as well as all those who also hold liquor permits, are directly affected by the decision of this Court.

ARGUMENT

PROPOSITION OF LAW

Whether the decision in this case should be applied prospectively only and, if so, to what cases should it be applied?

- A. The dissenting opinions clearly state that the Court has a duty to enforce R.C. 119.12 as it is written and may not make either additions to that statute or subtractions therefrom.**

The dissenting opinions clearly state that the Court has a duty to enforce R.C. 119.12 as it is written and may not make either additions to that statute or subtractions therefrom. *Hubbard v. Canton City Sch. Bd. of Educ.*, 97 Ohio St. 3d 451, 2002-Ohio-6718. Because the plain language of R.C. 119.12 does not specifically require an appealing party to articulate how the order it is appealing is not supported by reliable, probative, and substantial evidence, such a standard should not be inserted by judicial fiat into the statute. *See generally State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, 56 N.E.2d 265 (syllabus) (“[t]here is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for”).

It is significant that, if the General Assembly had intended to insert such a standard into the statute, it could have employed language in R.C. 119.12 to accomplish that result. *See generally State ex rel. Lee v. Karnes*, 103 Ohio St. 3d 559, 2004-Ohio-5718 at ¶27 (the General Assembly says in a statute what it means and means in a statute what it says there). Absent such language in R.C. 119.12 or elsewhere in the Revised

Code, the Court should refrain from actively inserting such a standard, and instead defer, as it has in the past, to enforcing law as it is written by the General Assembly.

B. The Court's decision should not have retroactive application.

However, if the Court deems it prudent not to vacate its decision, the OACS, the OCRM, the OLBA and the WBWAO respectively urge the Court to modify its decision to operate only prospectively. It is a well-recognized judicial practice that courts may require a decision in a case to operate only prospectively in order to avoid widespread injustice or inequality to persons that are not a party to the case. *See, e.g., Great N. Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358, 77 L.Ed 360; *DiCenzo v. A-Best Prod. Co., Inc.*, 120 Ohio St. 3d 149, 2008-Ohio-5327; *OAMCO v. Lindley* (1987), 29 Ohio St.3d 1, 503 N.E.2d 1388.

These cases have determined that, while a decision of this Court overruling a former decision is generally applied retroactively, *Peerless Elec. Co. v. Bowers*, (1955), 164 Ohio St. 209, 129 N.E.2d 467, exceptions to this general principle exist when “retroactive application interferes with contract rights or vested rights under the prior law” or when “retroactive application would fail to promote the rule within the decision and/or cause inequity.” *DiCenzo* at ¶14. As explained in *DiCenzo*:

‘[h]owever, blind application of the *Peerless* doctrine has never been mandated by this court’ *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St.3d 287, 290, 699 N.E.2d 507, citing *Roberts v. United States Fid. & Guar. Co.* (1996), 75 Ohio St.3d 630, 633, 665 N.E.2d 664. ‘Consistent with what has been termed the *Sunburst* Doctrine, state courts have *** recognized and used prospective application of a decision as a means of avoiding injustice in cases dealing with questions having widespread ramifications for persons not parties to the action.’ *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884

N.E.2d 1056, ¶30, quoting *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St. 3d 1, 9, 19 OBR 1, 482 N.E.2d 575 (Douglas, J., concurring). See also *OAMCO v. Lindley* (1987), 29 Ohio St.3d 1, 29 OBR 122, 503 N.E.2d 1388. In *Minster*, the court ‘establish[ed] the proper method for implementing interest rates exceeding the statutory maximum on a book account pursuant to R.C. 1343.03(A),’ but the court declined to apply the decision retroactively because the court did not want to ‘create shock waves throughout the many sectors of Ohio’s economy that rely on book accounts to do business.’ *Minster* at ¶30. (Footnote Omitted).

Id. at ¶12. See generally *OAMCO* at 2 (where justice and fairness require that a decision from a case receive only prospective application to transactions occurring subsequent to the date of the issuance of the decision, 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). Accordingly, “strong public policy supporting the finality of judicial and quasi-judicial pronouncements” requires that a decision receive only prospective application so as to avoid injustice or inequality to persons that are not a party to the case. *Id.*; accord *DiCenzo* at ¶¶11-14.

In the case currently before this Court, the retroactive application of the new standard of requiring an appealing party to indicate how the order is not supported by reliable, probative, and substantial evidence will have a far reaching impact and result in unfairness to persons that have appealed decisions without knowing about the new standard. Since 1943 parties have consistently relied on the statutory language set forth in R.C. 119.12 to obtain subject matter jurisdiction when filing appeals. In light of the Court’s decision, any decision previously rendered in such appeals is rendered void on the grounds that the court hearing the appeal lacked subject matter jurisdiction and subject to attack by a party that wants the decision set aside. Moreover, any appeal

currently pending before a court is subject to dismissal on the grounds that the court lacks subject matter jurisdiction in the case.

Because parties have acquired certain vested rights under the previous interpretations of R.C. 119.12, great injustice and inequity would be served if these cases are subject to overturning or dismissal on the basis of a new interpretation of R.C. 119.12. As so eloquently stated by Justice O'Donnell in his dissent, "[t]inkering 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." Further, a retroactive application of such a radical change in the standard necessary to bring an appeal fails to adhere to the strong public policy supporting the finality of judicial and quasi-judicial pronouncements.

Members of *Amici Curiae* OCRM, OACS, OLBA and WBWAO, as part of an extensive and highly regulated industry, must be able to rely on judicial precedent since they are routinely investigated by the Division of Liquor Control to ensure their compliance with Ohio's liquor laws. In addition, the members distribute beer and wine to beer and wine retailers, who are also investigated for violations of Ohio's liquor laws, for distribution to consumers.

Over the last 65 years there have been a great many investigations that have resulted in appeals where the litigants have not indicated the specific grounds for appealing an adverse decision. Instead, the appealing party merely relied on the language of R.C. 119.12 and stated that the order was not supported by reliable, probative, and substantial evidence. The possible re-opening of these cases on the basis that the court

lacked subject matter jurisdiction would result in a great injustice and expense to the parties to such appeals. Further, because parties have a right to the finality of judicial and quasi-judicial pronouncements, such a re-opening of old, closed cases raises possible constitutional violations, including, but not limited to, a denial of due process.

In conclusion, *Amici Curiae* OCRM, OACS, OLBA and WBWAO respectfully urge, for the reasons set forth above, the Court to vacate its decision and adopt the dissenting opinions of Justices Lundberg Stratton and O'Donnell. Or, in the alternative, modify the decision so as to apply its effect prospectively to matters for which appeals are filed after the date on which the Court rendered its judgment.

Respectfully submitted,



J. Richard Lumpe (#0013266)

David A. Raber* (#0059502)

Counsel of Record

Lumpe & Raber

37 West Broad Street, Suit 730

Columbus, Ohio 43215-4132

(614) 221-5212

(614) 221-6944 – fax

draber@lumpeandraber.com

Counsel for Amicus Curiae

Ohio Convenience Store Association

Ohio Council of Retail Merchants

The Ohio Licensed Beverage Association

The Wholesale Beer & Wine

Association of Ohio

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Merit Brief of Amicus Curie in support of Appellee was sent via U.S. Mail, this 24th day of August, 2009 to:

Geoffery E. Webster
Chester, Wilcox & Saxbe L.L.P.
65 East State Street, Suite 1000
Columbus, Ohio 43215

*Counsel for Appellee
Medcorp, Inc.*

Benjamin C. Mizer, Solicitor General
Stephen P. Carney, Deputy Solicitor
Ara Mekhjian, Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

*Counsel for Appellant
Ohio Department of Job and Family
Services*



David A. Raber (#0059502)
Lumpe & Raber