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## SUMMARY OF MEMORANDUM

### Introduction

In this Court's August 4, 2009 Order, the parties were requested to specifically address two interrelated questions: "Whether the decision in this case should be applied prospectively only and, if so, to what cases should it be applied?"

Appellee Medcorp, Inc. ("Medcorp") submits that the appropriate exercise of the Court's powers in regards to these questions is to apply the May 7, 2009 Decision prospectively only and to all actions filed after the publication (not announcement) of a Decision on the reconsideration motion. The May 7, 2009 Decision in this action should not apply to *any* person who filed an appeal prior to the publication of the reconsideration decision, including Medcorp. To retroactively apply this Decision to cases that went to final judgment before the Decision's issuance would be so fundamentally unfair as to raise federal constitutional due process concerns. To apply it to pending matters, such as Medcorp's, when the time period to amend a notice of appeal has expired is also fundamentally unfair.

Medcorp respectfully submits that it and all other pending matters affected by the Decision should be granted thirty (30) days from publication of the Court's decision on reconsideration to submit an amended notice of appeal, permitting affected person's an opportunity to conform to the requirements for submission of a notice of appeal from an administrative adjudication order. This accords to all parties the benefit of the Decision: the State achieves for all future appeals the "precise" statement of errors it seeks and Medcorp receives its statutory right to independent judicial review of administrative action.

## LAW AND ARGUMENT

The consideration to apply a decision prospectively only involves examination of three elements:

“An Ohio court has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions, (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision, and (3) whether retroactive application of the decision causes an inequitable result.” *Dicenzo v. A-Best Prods. Co., Inc.* (2008), 120 Ohio St. 3d 149.

In the memorandum in support of the motion for reconsideration this Court’s prior decisions on the application of the “*Sunburst Doctrine*” (*Great Northern Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358) were cited and discussed. (*Hoover v. Franklin Cty. Bd. Of Commrs.* (1985), 19 Ohio St. 3d 1; *Dicenzo v. A-Best Prods. Co., Inc., supra*; *OMCO v. Lindley* (1987), 29 Ohio St.3d 1; *Minister Farmers Coop. Exchange Co., Inc. v. Meyer*, (2008) 117 Ohio St. 3d 459; *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317). Other than *Temple*, these matters considered the application of substantive law holdings. In *Temple*, the matter was a limitation of actions and was prospectively only applied. Here the issue is also one of procedural law and to apply it retroactively defeats the overriding principle that matters are to be decided on the merits and destroys for Medcorp the merit decision it received and which the State did not appeal to this Court. See e.g., *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189; *AMCA Intern. Corp. v. Carlton* (1984), 10 Ohio St.3d 88, 91

A decision of this Court is generally retrospective in operation because it declares the law “as it always has been” when interpreting law. See *DiCenzo, supra*, at pg. 152. Here retrospective application imposes substantial harm upon Medcorp and all other similarly situated

persons, as well as their counsel. That harm has already begun to manifest itself as discussed below and supported in the appendix attached.

**A. The decision establishes a new principle of law not foreshadowed in prior decisions.**

The accepted administrative law practice in past appeals of adjudication orders was to state, as grounds of the appeal, the failure of the order to have the proper evidentiary support and/or to not comply with governing law. In the undersigned's experience as an Assistant Attorney General and in private practice for a combined 34+ years, it has been rare to see more stated. There are a multitude of reported decisions from courts of appeals which have reviewed lower court decisions where the notices of appeal differed in no material respect from that at issue in this matter. See e.g., *Derakhshan v. State Med. Bd. of Ohio* (10/30/2007), Franklin App. No. 07AP-261, 2007-Ohio-5802; *WCI v. Ohio Liquor Control Comm.*, 116 Ohio St. 3d 547, 2008-Ohio-88 (2008); *Henry's Cafe, Inc. v. Board of Liquor Control* (1959) 170 Ohio St. 233; *Appeal of Stocker* (1968), 16 Ohio App. 2d 66, 71; *Weissberg v. State of Ohio* (12/22/1977), Cuyahoga App. 37207, 1977 WL 201689. In fact, we suspect the format used constitutes the rule rather than the exception, from a practical perspective.

Until the two conflicting courts of appeal decisions that led to the certification of a conflict, even Appellant herein must acknowledge, the customary, accepted practice in the appeal of adjudication orders issued under R.C. §119.12 employed the language used in the Medcorp appeal at issue. The May 7, 2009, *Medcorp* Decision sets a new standard. Only the *David Day Ministries* Appellate Decision (not applicable law in any other District and not accepted by the first District Court to substantively review the premises of that Decision) is the only decision in the entire prior jurisprudential history of R.C. §119.12 interpretations that found the Bar's uniform and accepted practice was not in compliance with the requirements of R.C.

§119.12 in stating grounds. It is noteworthy and telling that the majority's Opinion referenced two dictionary definitions and no case law in the part of the *Medcorp* Decision (¶¶10, 11) that reached the heart of the issue. No one can say the requirement to state more specifically the grounds of an appeal should have been known to Ohio's legal practitioners prior to May 7, 2009. In fact, unless one weekly checks the Supreme Court of Ohio's website, an attorney in Ohio would not know of the *Medcorp* Decision until the publication of the Decision in Vol. 82 #24, Ohio State Bar Association Report, June 15, 2009, 39 days after the requirement "to designate precise errors" (*Medcorp* Decision ¶21) became the required language to vest jurisdiction pursuant to R.C. §119.12.

**B. Retroactive application of the decision retards the purpose behind the rule defined in the decision.**

The provisions of R.C. Ch. 119 vests common pleas courts with jurisdiction to hear appeals of agency orders. Ohio Constitution Art. IV Section 4(B). The General Assembly could just as well have given that power to the Supreme Court (Ohio Constitution Art. IV Section 2(B)(2)(d)) or courts of appeal (Ohio Constitution Art. IV, Section 3(B)(2)). Ohio Constitution Art. IV Section 5(B) provides:

"The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken affect."

Legislative enactments in conflict with the Ohio Constitution's provisions of Article IV, Section 5(B) fail. See, *State v. Weiland*, 127 Ohio Misc.2d 138 (2004). Rules promulgated pursuant to Ohio Constitution Article IV, Section 5(B) must be procedural in nature; where a conflict arises between a rule and statute, the rule controls the statute on matters of procedure.

Conversely, a rule may not abridge, enlarge, or modify any substantive right and the statute will control a rule on matters of substantive law. *State v. Slatter* (1981), 66 Ohio St.2d 452.

The *Medcorp* Decision affects a procedural right and is the functional equivalent of a rule of the Supreme Court adopted pursuant to Article IV, section 5(B). Because that portion of R. C. §119.12 at issue is solely procedural (the manner of perfecting an appeal to a court to review an administrative determination), this Court could enact specific rules governing the manner of appeal to a court of general jurisdiction for review of an administrative agency's adjudication order and declare the provision of R. C. §119.12 at issue thereby void.

Instead, this court has, by Decision, interpreted the General Assembly's terminology to require specificity in stating the grounds for appeal in a manner greater than the accepted practice of the Bar and reviewing courts (save only *David Day Ministries*) have in prior actions. No rule has been adopted by the Supreme Court (be it civil procedure, rule of evidence, appellate rule, or rule of superintendence) which has been applied retroactively. The Bar is given notice of the change and an opportunity to establish a course of practice consistent with the rule change. A conscientious practitioner must know how to conform to legal requirements in advance. It should be no different in the application of the *Medcorp* Decision.

The purpose of judicial review of parties' actions is foremost to resolve disputes on the merits. In the absence of resolution on the merits, and in the event of a decision based upon a previously unannounced procedural requirement, the acceptance of a decision by the public at large in general and the parties specifically is less likely and the judiciary is less respected as an institution. Too many citizens now view courts as places where government and the wealthy make out "better" than the common man. A citizen should not be treated so as to believe the agency that proposed the sanctioning activity that led to a hearing, that hired the hearing

examiner, and wrote the rules under which the hearing was conducted, now has maneuvered a course in court that trapped him into losing.

Members of the Bar can read the *Medcorp* Decision and conform their conduct prospectively, but they can do nothing about past events as detailed below. The unrepresented citizen for whom Appellant voiced great concern in oral argument will still face an unenviable, difficult task to even find the *Medcorp* Decision, let alone draft a notice of appeal meeting its terms. And if the *Medcorp* Decision is retroactively applied, the due process rights' of Ohio's citizens are sacrificed to the better informed state agency that initiated the proposed sanction.

The stated purpose of the *Medcorp* Decision is to "...put the nonappealing party and the court on notice of the specific issues being appealed" and to aid a court in "... resolving the case summarily when it may be appropriate...." (*Medcorp* Decision ¶¶16 and 18, respectively.) These purposes are in no way served by retroactive application of the *Medcorp* Decision to a case already decided or which has been pending some undetermined period of time. Even if such reasons or effects of a "simply stated" notice of appeal were present in fully decided cases, parties and judges somehow "muddled through" to a decision. If a "simply stated" notice of appeal is present in a pending matter, the parties can clarify in briefs, status conferences, amendment of the notice, or in whatever manner the reviewing court feels it best needs to manage its docket and the cases before it and still arrive at a decision on the merits.

In this matter the Appellant Department *did not raise this issue until after* Merit Briefs were filed in the common pleas court. There was never raised any question of a lack of understanding of the issues, confusion or claim of an incomprehensible appeal. The State prepared and filed a brief on the merits, then while awaiting a merit decision filed the motion to dismiss which led to this Court's Decision.

No laudable purpose is served by retroactive application of the *Medcorp* Decision.

**C. Retroactive application of the decision causes inequitable results.**

The state's use of the *Medcorp* Decision was swift. See the Motions to Dismiss filed in *Larry Little, M.D. v. State Medical Board of Ohio*, Case No.09 CV 000416, Franklin County Common Pleas Court, App. A and *Mark A. DiLuciano v. Ohio Real Estate Commission, Division of Real Estate and Professional Licensing*, Case No. 09 CV 7537, Franklin County Common Pleas Court, App. B. Each of these appeals used the same format for a notice of appeal *Medcorp* used, consistent with the previous accepted practice in the State of Ohio.

Trial courts have also applied the *Medcorp* Decision to the detriment of the citizen appellants' seeking merit review. See *Bryant Health Care Center v. Ohio Department of Job & Family Services*, Case No. 06 CVF10-14496, App. C; *Gerald William Lane, D.O. v. State Medical Board of Ohio*, Case No. 09 CVF 03-4247, Franklin County Common Pleas Court, Decision and Entry, August 3, 2009, App. D; *Paul H. Volkman v. State Medical Board of Ohio*, Case No. 08CVF18288, Decision and Entry, July 22, 2009, App. E; and *Emad S. Atalla, M.D., v. State Medical Board of Ohio*, Case No. 09CV7750, App. F.

For *Medcorp*, the retroactive application of the May Decision is particularly hard to bear. After all, the state's own hearing examiner together with the judges who reviewed the merit record unanimously ruled that *Medcorp* prevailed on the merits and that little or no monies are due the state. The statistical sampling process, used to extrapolate the forty-eight (48) sample claims into a universe of more than ten thousand (10,000) claims falsely inflating the overpayment to nearly \$600,000, was found not only to be invalid by the court, but also was sharply discredited by the Ohio Inspector General in its Report of Investigation of Ohio's Medicaid agency issued on January 25, 2005. Appellant knew before this matter started it was

basing its audit upon false premises and without support. By this Court's ruling, the State gains money to which it was never entitled and Medcorp loses the funds it was paid for actual services delivered to sick, elderly and indigent people who needed medical transportation. If the term "equity" needed an illustration this is certainly it.

Medcorp is in between "a rock and a hard place," so to speak. If the Court determines the Decision is applied prospectively only, Medcorp loses as the Decision still affects its appeal. If the Decision is applied retrospectively, it loses. Medcorp could be in the position of having sought reconsideration to benefit all *but* itself, placing itself in the unique position of being the only person pursuing a R.C. §119.12 appeal prior to the *Medcorp* Decision to have it applied to their appeal.

There are many more people at risk and open to claims. Consider *Derakhshan v. State Medical Board of Ohio* (Ohio App 10 Dist.), 2007-Ohio-5802. In that case the State revoked his license to practice and Derakhshan appealed, using the same language as Medcorp. The State moved to dismiss on the same grounds as in *Medcorp*, and the Tenth District reversed a decision in favor of the State and remanded. The Clerk of Court's website only reveals that after remand an entry disposing of the case was filed. All of that is meaningless; and if Derakhshan retained his license, or agreed to a suspension period, his troubles, and those of an even more expansive similar group, may only have just begun.

The order of a court which has no subject matter jurisdiction is void and subject to collateral attack. *Black's Law Dictionary* defines "collateral attack" as an attack of a judgment in a proceeding other than a direct appeal; especially, an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective. The objective of a collateral attack is to modify a

previous judgment because it is allegedly ineffective or flawed for some fundamental reason. See, *Ohio Pyro, Inc. v. Ohio Department of Commerce, Division of State Fire Marshall*, 115 Ohio St.3d 375, 875 N.E.2d 550 (October 3, 2007).

This court has long recognized two principal exceptions to the general impermissibility of collateral attacks. If the issuing court lacked jurisdiction or if the order was a product of fraud, the reasons for disfavoring collateral attacks do not apply. See *Coe v. Erb* (1898), 59 Ohio St. 259, 267-268, 52 N.E. 640.

This Court has also established that any failure to comply with the filing requirements of Ohio Administrative Code Chapter 119 creates a jurisdictional defect. See *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, at ¶ 17. Any judgment issued by a court without subject matter jurisdiction is void *ab initio*. See *Pratts v. Hurley*, 102 Ohio St.3d 81, 806 N.E.2d 992, ¶ 12.

As for the *Derakhshan* example above, or any physician or licensed professional who has overturned a revocation or suspension in an appeal to court (using the standard previously accepted language), litigation by a patient for malpractice during the term of the revocation/suspension is entitled to have determined the common pleas court's reversal of the Medical Board was void; and, therefore, the physician had at law engaged in the practice of medicine while under a revocation/suspension of the physician's license. Such a scenario would have two effects in that litigation: (1) an instruction to the jury of negligence *per se*, opening up a punitive damages claim, and (2) no insurance coverage, because malpractice liability insurance is not effective during the period one practices without a license or while under suspension. No one should think a client would sit idly by and not assert a claim against their counsel for contribution. Again, if inequity needed a picture this paints it.

The practicing bar, in fact, is horribly exposed to a multitude of malpractice claims. An example of a member of the bar most at risk for a virtually uncontestable malpractice claim is any attorney who filed an appeal pursuant to R. C. §119.12 to a common pleas court in the 39 days between the court's issuance of the *Medcorp* Decision, May 7, 2009, and the publication of the decision in the June 15, 2009 Ohio State Bar Association report (Vol. 82, #24). The requirement for specificity became binding upon the bar with the issuance of the Court's Decision. Unless an attorney knew to look for that specific decision, there would be no reason for that attorney to know the degree of specificity determined necessary by the Supreme Court in this Decision, at least prior to publication in the OSBA Report.

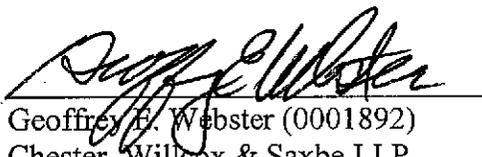
The range of potential inequities spans a broad range of Ohio's citizens, businesses, and professions. It is difficult to find an area of business or professional practice that is not in some way regulated by state agencies with powers subject to R. C. Chapter 119. It is equally apparent from the knowledge and experience of *Medcorp*'s counsel, the amount of contact from other practitioners of administrative law, and the documents forwarded by administrative law attorneys that the language used in the *Medcorp* notice of appeal is clearly not unique and is the routine, customary, and accepted standard of practice pre-*Medcorp* Decision in the bar throughout the state.

The inequity seems as clear as unbounded. Recently while doing research on a matter unrelated to this, the undersigned made a request to the Ohio Bureau of Motor Vehicles to review adjudication orders issued by a particular hearing examiner. OBMV advised they would make available all adjudication orders issued but could not separate them by hearing examiner and there were more than 1.3 million. How many of those were appealed and overturned and citizens driving on licenses that are void?

## CONCLUSION

Medcorp graciously thanks the Court for agreeing to reconsider the questions presented. It is respectfully submitted that the standard set forth in the May 7 Decision should have prospective application to any person filing an appeal from an adjudication order on and after a reasonable period from publication of the reconsideration decision, permitting the Bar an opportunity to conform its practices to the stated standard. No past Judgment Entry should be set aside or affected by this decision; the people who would be affected did nothing to deserve vacation of an Entry filed after briefing and judicial review, nor did those parties' counsel. As to Appellee, Medcorp should be given a reasonable time in which to prepare and file an amended notice of appeal.

Respectfully submitted,

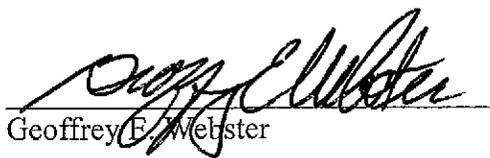


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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of Appellee's Brief was served upon Benjamin C. Mizer, Stephen P. Carney, Rebecca L. Thomas, and Ara Mekhjian, 30 East Broad Street, 15<sup>th</sup> Floor, Columbus, OH 43215, via regular U.S. mail, postage prepaid, this 29<sup>th</sup> day of August, 2009.

  
Geoffrey E. Webster

## APPENDIX

- A. *Larry Little, M.D. v. State Medical Board of Ohio*, Case No. 09 CV 000416, Franklin County Common Pleas Court
- B. *Mark A. DiLuciano v. Ohio Real Estate Commission, Division of Real Estate and Professional Licensing*, Case No. 09 CV 7537, Franklin County Common Pleas Court
- C. *Bryant Health Care Center v. Ohio Department of Job & Family Services*, Case No. 06 CVF10-14496
- D. *Gerald William Lane, D.O. v. State Medical Board of Ohio*, Case No. 09 CVF 03-4247, Franklin County Common Pleas Court, Decision and Entry, August 3, 2009
- E. *Paul H. Volkman v. State Medical Board of Ohio*, Case No. 08CVF18288, Decision and Entry, July 22, 2009
- F. *Emad S. Atalla, M.D., v. State Medical Board of Ohio*, Case No. 09CV7750

# APPENDIX A

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

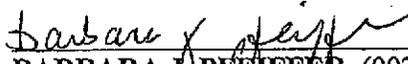
LARRY LITTLE, M.D. :  
Appellant, : Case No.: 09 CV-000416  
: JUDGE: PATRICK E. SHEERAN  
STATE MEDICAL BOARD OF OHIO, :  
Appellee. :

**APPELLEE'S MOTION TO DISMISS FOR LACK OF JURISDICTION**

Appellee, State Medical Board of Ohio, respectfully requests this Court to dismiss the above-captioned appeal for lack of jurisdiction pursuant to Civ. R. 12(B)(2) and R.C. Section 119.12. The basis for this motion is that Appellant's notice of appeal failed to set forth the grounds of his appeal as required by statute. A memorandum in support follows.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### I. INTRODUCTION AND FACTS

This case is an attempt by Appellant to appeal the Adjudication Order issued December 10, 2008 by the State Medical Board of Ohio (“Board”) imposing a “stayed” permanent revocation of appellant’s license to practice medicine and surgery in the state of Ohio and imposing an indefinite suspension of at least one year with conditions for reinstatement.

Pursuant to R.C. 119.12, Appellant had fifteen days from the date of the mailing of the Adjudication Order to “file a notice of appeal with the agency setting forth the order appealed from **and the grounds of the party’s appeal**” and to file a copy with this Court. [Emphasis Added] Appellant filed a document titled “Appellant’s Notice of Appeal”, hereafter referred to as “Notice of Appeal”, with the Board on January 9, 2009 and a copy with this Court on January 9, 2009.<sup>1</sup>

However, appellant failed to set forth the grounds of his appeal in his Notice of Appeal. More specifically, appellant failed entirely to identify specific legal or factual errors in his Notice of Appeal and instead, simply stated the standard of review of the Common Pleas Court in a Revised Code Chapter 119 appeal. The Notice of Appeal (a copy of which is attached hereto and marked Exhibit 1) consists of four sentences and states as follows:

Appellant, Larry Little, M.D., by and through counsel, and pursuant to Ohio Revised Code Section 119.12, hereby gives notice of his appeal of the Entry of Order of the Appellee, State Medical board of Ohio (“Board”), which stayed the permanent revocation of his license to practice medicine and placed Appellant’s medical license on indefinite suspension in the State of Ohio. The Entry of Order is dated December 10, 2008, and was mailed and effective on January 7, 2009. **The basis of the Appellant’s Appeal is that the Board’s Entry of Order is not**

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<sup>1</sup> The Board’s Order was mailed on January 7, 2009.

**supported by substantial, probative, and reliable evidence nor is it in accordance with law.** A copy of the Board's Entry of Order is attached as Exhibit A. [Emphasis Added]

Thus, because Appellant failed entirely to identify specific legal or factual errors in his Notice of Appeal as required by R.C. Section 119.12, this Court lacks jurisdiction and this appeal should be dismissed.

## II. ARGUMENT

**Filing A Notice of Appeal That Does Not Set Forth The Grounds Of The Party's Appeal Is Insufficient To Meet The Requirements Of R.C. 119.12 And Deprives A Common Pleas Court Of Jurisdiction.**

Article IV, Section 4(b) of the Ohio Constitution provides the constitutional basis for jurisdiction and review by Courts of Common Pleas of decisions rendered by administrative agencies:

The courts of common pleas and divisions thereof have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law. (Emphasis added).

Pursuant to this constitutional mandate, the Ohio General Assembly enacted the Administrative Procedures Act, R.C. Chapter 119, which specifies the procedures for appealing administrative orders to courts of common pleas. An appeal from a decision of the Board is subject to these provisions. R.C. 119.12 states in pertinent part:

**\*\*\*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. Unless otherwise provided by law relating to a particular agency, such 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.\*\*\* (Emphasis added).

This statute sets forth a content specific requirement regarding the notice of appeal. The notice of appeal shall set forth two items: 1) the order appealed from and 2) the grounds of the

party's appeal. Since the right of appeal is conferred by statute, and since there is no common law or inherent right to appeal, there must be strict compliance with the conditions of the statute before an appeal can be taken. See *Lindblom v. Board of Tax Appeals* (1949), 151 Ohio St. 250.

The Ohio Supreme Court has addressed the failure of a party to comply with statutory mandates for perfecting an appeal and the resulting lack of jurisdiction. In *Zier v. Bureau of Unemployment Compensation* (1949), 151 Ohio St. 123, the first paragraph of the syllabus states:

An appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute. The exercise of the right conferred is conditioned upon compliance with the accompanying mandatory requirements.

In the opinion, the Court held:

We are in accord with the view that the procedures directed by the above provisions relative to parties and proofs of service of notice do not constitute conditions precedent to jurisdiction, but 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. (Emphasis added).

*Id.* at 127. The Court also reasoned that:

No one would contend that a notice of appeal need not be filed within the time fixed by statute. Compliance with a requirement that a notice of appeal shall be filed within the time specified, in order to invoke jurisdiction, is no more essential than that the notice be filed at the place designated and that it be such in content as the statute requires. (Emphasis added).

*Id.* at 125.

More recently, the Ohio Supreme Court held that to satisfy the “grounds of the party’s appeal” requirement in R.C. 119.12, parties appealing under that statute must identify specific legal or factual errors in their notices of appeal; they may not simply restate the standard of

review”. *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*,<sup>2</sup> Slip Opinion No 2009-Ohio-2058 @ ¶ 20. The Notice of Appeal filed with the Court of Common Pleas in *Medcorp* contained the following language: “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 \* \* \*. The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence.” *Id* at ¶ 5.

The language in the instant Notice of Appeal is nearly identical in terms of content to the appeal filed in *Medcorp*, in that it simply states the standard of review to be used by the Court of Common Pleas and fails to set forth the grounds of the appeal. The relevant language set forth in Appellant’s Notice of Appeal is as follows: “The basis of the Appellant’s Appeal is that the Board’s Entry of Order is not supported by substantial, probative, and reliable evidence nor is it in accordance with law.” The Notice of Appeal in the instant case is completely devoid of any specific legal or factual errors. (See Exhibit 1).

The Ohio Supreme Court in *Medcorp* also stated that:

While an extensive explanation of the alleged errors is not required at that point in the proceedings [appealing the agency Order to the Court of Common Pleas], the **stated grounds must be specific enough that the trial court and opposing party can identify the objections and proceed accordingly, much in the same way that the assignments of error and issues for review are presented in the courts of appeals and propositions of law are asserted in this court.**

Medcorp failed to designate precise errors in its notice of appeal; instead, it simply reiterated the statutory standard of review that the order was not in accordance with law and [was] not supported by reliable, probative, and substantial evidence.” This statement does not strictly comply with the plain meaning of R.C. 119.12,

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<sup>2</sup>On May 15, 2009 Medcorp filed a “Motion of Appellee Medcorp, Inc., For Reconsideration”. This motion for reconsideration is pending before the Ohio Supreme Court.

and thus the trial court lacked jurisdiction to consider Medcorp's appeal. See *Hughes v. Ohio Dept. of Commerce* 14 Ohio St. 3d 4, 2007-Ohio-2877, ¶ 17-18. [Emphasis Added]

*Id* at ¶¶ 20-21.

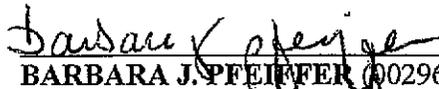
Similar to the notice of appeal in *Medcorp*, the Notice of Appeal in the instant case fails to designate precise errors in its notice of appeal. Because Appellant failed to strictly comply with the plain meaning of R.C. 119.12, this Court lacks jurisdiction to hear the appeal.

### III. CONCLUSION

For the reason that Appellant failed to properly perfect his appeal in accordance with R.C. 119.12 by failing to set forth the grounds of his appeal in the Notice of Appeal, this Court lacks jurisdiction. Therefore, Appellee respectfully requests that this Court dismiss this appeal.

Respectfully submitted,

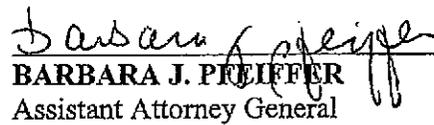
RICHARD CORDRAY  
Ohio Attorney General

  
BARBARA J. PFEIFER (0029609)

Assistant Attorney General  
Health and Human Services Section  
30 East Broad Street, 26<sup>th</sup> Floor  
Columbus, Ohio 43215-3400  
Telephone: (614) 466-8600  
Facsimile: (614) 466-6090

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Appellee's Motion to Dismiss Appeal for Lack of Jurisdiction has been sent to by regular U.S. Mail, postage prepaid, to Eric Plinke and Nicole M. Loucks, Dinsmore & Shohl, LLP, 191 West Nationwide Blvd., Suite 300, Columbus, Ohio 43215, counsel for Larry Little, M.D. this 18<sup>th</sup> day of May, 2009.

  
\_\_\_\_\_  
**BARBARA J. PFEIFFER**  
Assistant Attorney General

BEFORE THE STATE MEDICAL BOARD OF OHIO

LARRY LITTLE, M.D.  
175 E. Deshler Avenue  
Columbus, Ohio 43206,

Appellant,

vs.

STATE MEDICAL BOARD OF OHIO  
30 East Broad Street, 3<sup>rd</sup> Floor  
Columbus, Ohio 43215

Appellee.

09 CVF 1 416

Case No. \_\_\_\_\_

Judge \_\_\_\_\_

Classification F

APPEAL FROM THE ENTRY  
OF ORDER OF DECEMBER 10, 2008  
AND MAILED JANUARY 7, 2009

FILED  
COMMON PLEAS COURT  
FRANKLIN CO., OHIO  
2009 JAN -9 PM 4:35  
CLERK OF COURTS

APPELLANT'S NOTICE OF APPEAL

Appellant, Larry Little, M.D., by and through counsel, and pursuant to Ohio Revised Code Section 119.12, hereby gives notice of his appeal of the Entry of Order of the Appellee, State Medical Board of Ohio ("Board"), which stayed the permanent revocation of his license to practice medicine and placed Appellant's medical license on indefinite suspension in the State of Ohio. The Entry of Order is dated December 10, 2008, and was mailed and effective on January 7, 2009. The basis of the Appellant's Appeal is that the Board's Entry of Order is not supported by substantial, probative, and reliable evidence nor is it in accordance with law. A copy of the Board's Entry of Order is attached as Exhibit A.

STATE MEDICAL BOARD  
OF OHIO  
2009 JAN -9 P 4:10

STATE MEDICAL BOARD  
OF OHIO  
2009 JAN 20 P 12:37

Respectfully submitted,

DINSMORE & SHOHL, LLP



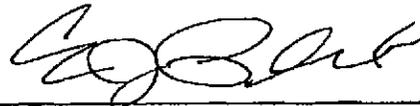
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Eric J. Plinke (0059463)  
Nicole M. Loucks (0076912)  
191 W. Nationwide Boulevard, Suite 300  
Columbus, Ohio 43215- 8120  
Phone: (614) 221-8448  
Facsimile: (614) 277-7334  
E-Mail: eplinke@bdbl.com  
nloucks@bdbl.com  
*Attorneys for Appellant Larry Little, M.D.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of January, 2009, the foregoing Notice of Appeal was filed via hand delivery with the State Medical Board of Ohio, was filed via hand delivery with the Court of Common Pleas of Franklin County, Ohio, and that a copy was served via ordinary U.S. mail, postage prepaid, upon the following:

Barbara J. Pfeiffer, Esq.  
Assistant Attorney Generals  
Ohio Attorney General's Office  
Health and Human Services  
30 East Broad Street, 26<sup>th</sup> Floor  
Columbus, Ohio 43215



---

Eric J. Plinke

STATE MEDICAL BOARD  
OF OHIO  
2009 JAN 20 P 12:31

# APPENDIX B



## MEMORANDUM IN SUPPORT

### I. INTRODUCTION AND FACTS

Appellant Mark A. DiLucaino (DiLuciano) appealed an Adjudication Order issued against him by the Ohio Real Estate Commission in case 2007-1169. Exhibit 1. In his Notice of Appeal, DiLuciano states his grounds as “the Adjudication Order is not supported by reliable, probative, and substantial evidence, and was not issued in accordance with law”. Exhibit 2.

DiLuciano timely filed his Notice of Appeal, however, he failed to set forth the grounds of his appeal. More specifically, appellant failed entirely to identify specific legal or factual errors in his Notice of Appeal and instead, simply stated the standard of review of the Common Pleas Court in a Revised Code Chapter 119 appeal.

Because DiLuciano failed to identify specific legal or factual errors in his Notice of Appeal as required by R.C. Section 119.12, this Court lacks jurisdiction and this appeal should be dismissed.

### II. ARGUMENT

#### **Filing A Notice of Appeal That Does Not Set Forth The Grounds Of The Party’s Appeal Is Insufficient To Meet The Requirements Of R.C. 119.12 And Deprives A Common Pleas Court Of Jurisdiction.**

Article IV, Section 4(b) of the Ohio Constitution provides the constitutional basis for jurisdiction and review by Courts of Common Pleas of decisions rendered by administrative agencies:

The courts of common pleas and divisions thereof have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as *may be provided by law*. [Emphasis added].

Pursuant to this constitutional mandate, the Ohio General Assembly enacted the Administrative Procedures Act, R.C. Chapter 119, which specifies the procedures for appealing administrative orders to courts of common pleas. An appeal from a decision of the Board is subject to these provisions. R.C. 119.12 states in pertinent part:

\*\*\*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. Unless otherwise provided by law relating to a particular agency, such 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.\*\*\* (Emphasis added).

This statute sets forth the mandatory requirements for filing a notice of appeal from the agency's adjudication order. The notice of appeal shall set forth two items: 1) the order appealed from and 2) the grounds of the party's appeal. Since the right of appeal is conferred by statute, and there is no common law or inherent right to appeal, there must be strict compliance with the mandatory requirements of the statute before an appeal can be taken. See *Lindblom v. Board of Tax Appeals* (1949), 151 Ohio St. 250.

The Ohio Supreme Court held that the failure of a party to comply with statutory mandates for perfecting an appeal deprives the court of jurisdiction to hear the appeal. In *Zier v. Bureau of Unemployment Compensation* (1949), 151 Ohio St. 123, the first paragraph of the syllabus states:

An appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute. The exercise of the right conferred is conditioned upon compliance with the accompanying mandatory requirements.

In the opinion, the Court held:

We are in accord with the view that the procedures directed by the above provisions relative to parties and proofs of service of notice

do not constitute conditions precedent to jurisdiction, but 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.* (Emphasis added).

*Id.* at 127.

The Court also reasoned that:

No one would contend that a notice of appeal need not be filed within the time fixed by statute. Compliance with a requirement that a notice of appeal shall be filed within the time specified, in order to invoke jurisdiction, is no more essential than that *the notice be filed at the place designated and that it be such in content as the statute requires.* (Emphasis added).

*Id.* at 125.

More recently, the Ohio Supreme Court held that to satisfy the “grounds of the party’s appeal” requirement in R.C. 119.12, parties appealing under that statute must identify specific legal or factual errors in their notices of appeal; they may not simply restate the standard of review”. *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*, Slip Opinion No 2009-Ohio-2058 @ ¶ 20.<sup>1</sup> The Notice of Appeal filed with the Court of Common Pleas in *Medcorp* contained the following language: “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 \* \* \*. The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence.” *Id.* at ¶ 5.

The language in the instant Notice of Appeal is nearly identical in terms of content to the appeal filed in *Medcorp*, in that it simply states the standard of review to be used by the Court of Common Pleas and fails to set forth the grounds of the appeal. The relevant language set forth in

---

<sup>1</sup> Medcorp filed a motion for reconsideration on May 15, 2009.

DiLuciano's Notice of Appeal is as follows: "The grounds for the appeal are that the Adjudication Order is not supported by reliable, probative, or substantial evidence, and was not issued in accordance with law." The Notice of Appeal in the instant case is completely devoid of any specific legal or factual errors. (See Exhibit 2).

The Ohio Supreme Court in *Medcorp* also stated that:

*While an extensive explanation of the alleged errors is not required at that point in the proceedings [appealing the agency Order to the Court of Common Pleas], the stated grounds must be specific enough that the trial court and opposing party can identify the objections and proceed accordingly, much in the same way that the assignments of error and issues for review are presented in the courts of appeals and propositions of law are asserted in this court.*

Medcorp failed to designate precise errors in its notice of appeal; instead, it simply reiterated the statutory standard of review that the order was not in accordance with law and [was] not supported by reliable, probative, and substantial evidence." This statement does not strictly comply with the plain meaning of R.C. 119.12, and thus the trial court lacked jurisdiction to consider Medcorp's appeal. See *Hughes v. Ohio Dept. of Commerce* 14 Ohio St. 3d 4, 2007-Ohio-2877, ¶ 17-18. [Emphasis Added]

*Id* at ¶¶ 20-21.

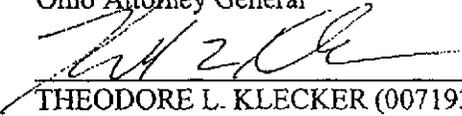
Similar to the notice of appeal in *Medcorp*, the Notice of Appeal in the instant case fails to designate precise errors in its notice of appeal. Because DiLuciano failed to strictly comply with the plain meaning of R.C. 119.12, this Court lacks jurisdiction to hear the appeal.

### III. CONCLUSION

For the reason that DiLuciano failed to properly perfect his appeal in accordance with R.C. 119.12 by failing to set forth the grounds of his appeal in the Notice of Appeal, this Court lacks jurisdiction. Therefore, Appellee respectfully requests that this Court dismiss this appeal.

Respectfully submitted,

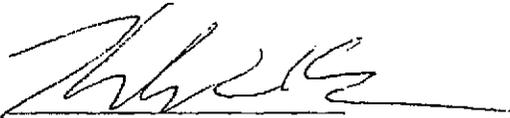
RICHARD CORDRAY  
Ohio Attorney General



THEODORE L. KLECKER (0071931)  
Assistant Attorney General  
Executive Agencies  
30 East Broad Street, 26<sup>th</sup> Floor  
Columbus, Ohio 43215-3428  
(614) 466-2980  
(614) 728-9470 facsimile  
ted.klecker@ohioattorneygeneral.gov

### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing motion to dismiss has been forwarded via regular U.S. Mail, this 28<sup>th</sup> day of May, 2009, to attorney for appellant Mark A. DiLuciano, Michael R. Szolosi Jr., at: 2695 Andover Road, Upper Arlington, Ohio 43221-3203.



THEODORE L. KLECKER  
Assistant Attorney General

# APPENDIX C

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

FINAL APPEALABLE ORDER

Bryant Health Care Center, Inc.,

:

Appellant,

:

CASE NO. 06CVF10-14496

-vs-

:

JUDGE DAVID W. FAIS

Ohio Department of Job and  
Family Services,

:

Appellee.

:

TERMINATION NO. _____
BY _____

**DECISION AND ENTRY SUSTAINING  
MOTION TO DISMISS**

Rendered this 31<sup>ST</sup> day of May, 2009.

FAIS, JUDGE

FILED  
CLERK OF COURTS  
2009 JUN -1 PM 1:25  
FRANKLIN COUNTY, OHIO

The Court held in abeyance ruling on the Appellee's pending Motion to Dismiss until the Supreme Court resolved the issue of sufficiency of Notice of Appeal presented in *MedCorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 118 Ohio St. 3d 1432; 2008 Ohio 2595; 887 N.E.2d 1202; certification for consideration on June 4, 2008. See *Order Placing Case on Inactive Status Pending Ruling by Ohio Supreme Court*, filed December 1, 2008.

The Supreme Court recently issued its ruling in *MedCorp, Inc. v. Ohio Dept. of Job & Family Servs.*, Slip Opinion No. 2009-Ohio-2058 issued May 7, 2009. The ruling in that case is dispositive to the instant matter. The notice of appeal in the instant filing does not meet the requirements of R.C. 119.12, as interpreted by the Supreme Court in *MedCorp*.

Based on the foregoing, this Court the Court hereby SUSTAINS Appellee's Motion to Dismiss.

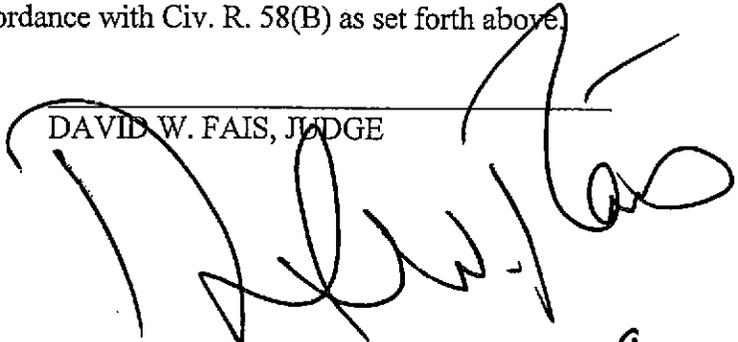
Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

**(B) Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

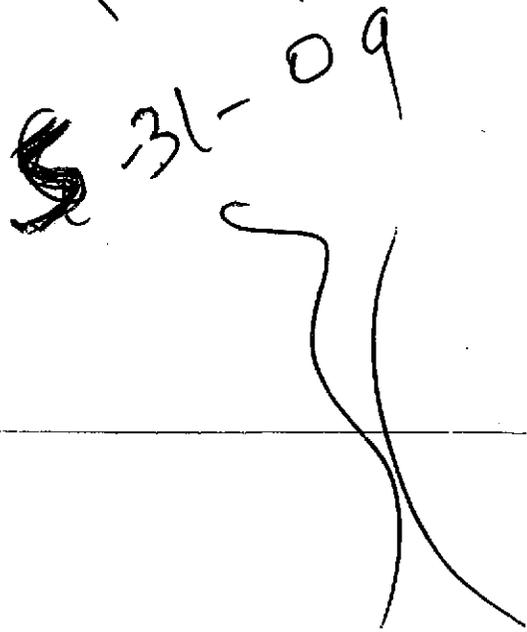
**The Court finds that there is no just reason for delay. This is a final appealable order.**

The Clerk is instructed to serve the parties in accordance with Civ. R. 58(B) as set forth above.

\_\_\_\_\_  
DAVID W. FAIS, JUDGE



\$ 31-09



COPIES TO:

Geoffrey E. Webster, Esq.  
J. Randall Richards, Esq.  
Two Miranova Place, Suite 310  
Columbus, OH 43215  
Attorneys for Appellant

Rebecca L. Thomas, Esq.  
Assistant Attorney General  
30 East Broad Street, 26<sup>th</sup> Floor  
Columbus, OH 43215-3428  
Attorney for Appellee

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

BRYANT HEALTH CARE  
CENTER, INC.,

APPELLANT,

VS.

OHIO DEPARTMENT OF JOB  
AND FAMILY SERVICES,

APPELLEE.

CASE NO. 06CV-14496

JUDGE FAIS

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO  
2008 OCT 10 AM 10:08  
CLERK OF COURTS

DECISION AND ENTRY

ENTERED THIS 13 DAY OF OCT, 2008.

FAIS, J.

The Court will hold in abeyance ruling on the Appellee's Motion to Dismiss until the Supreme Court resolves the issue of sufficiency of Notice of Appeal presented in *MedCorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 118 Ohio St. 3d 1432; 2008 Ohio 2595; 887 N.E.2d 1202; certification for consideration on June 4, 2008.

David W. Fais, Judge

Appearances:

Geoffrey E. Webster  
J. Randall Richards  
Two Miranova Place, Suite 310  
Columbus, OH 43215

Attorneys for Appellant

Rebecca L. Thomas  
Assistant Attorney General  
30 East Broad Street  
26<sup>th</sup> Floor  
Columbus, OH 43215-3428

Attorney for Appellee

10-8-08

# APPENDIX D

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO  
GENERAL DIVISION

FILED  
COMMON PLEAS COURT  
FRANKLIN CO., OHIO  
2009 AUG - 3 PM 1:33  
CLERK OF COURTS

GERALD WILLIAM LANE, D.O. :  
APPELLANT, : CASE NO. 09CVF 03 4247  
vs. : JUDGE HOGAN  
STATE MEDICAL BOARD :  
OF OHIO :  
APPELLEE. :

TERMINATION NO. 10  
BY *[Signature]* 7-30-09

DECISION AND ENTRY

Rendered this 3<sup>rd</sup> day of ~~July~~ *Aug* 2009

HOGAN, J.

This matter is before this Court pursuant to the R.C. 119.12 appeal of the appellant Gerald Lane, D.O. from a March 12, 2009 Order of the State Medical Board of Ohio ("Board"). In its March 12, 2009 Order, the Board permanently revoked the appellant's license to practice osteopathic medicine and surgery in the state of Ohio.

The Board issued a Notice of Opportunity for Hearing to the appellant on December 12, 2007. See State's Exhibit 4. The December 12, 2007 Notice alleged that from August 2001 to July 2002, in the routine course of his practice, the appellant engaged in inappropriate sexual contact with Patients 1 through 3. See State's Exhibit 4.

The December 12, 2007 Notice alleged the following:

From in or about August 2001 to in or about July 2002, in the routine course of your osteopathic medical practice, you treated Patients 1 through 3 identified on the attached Patient Key. The Patient Key is confidential and shall be withheld from public disclosure.

(a) On or about August 23, 2001, Patient 1 presented to your osteopathic medical

office with complaints including ear pain. During your examination of her, you asked Patient 1 if she was experiencing pain in her neck or shoulders. Although Patient 1 denied such pain, you checked her neck and shoulder area and, after claiming to notice muscle tension, you told Patient 1 that you would give her a massage. You instructed Patient 1 to place her hands behind her back, to cup her hands together, and to sit back and rest her head against your chest. As you massaged Patient 1, she noticed that you were rubbing your penis against her hands, and that you had developed an erection. At one point, Patient 1 tried to sit away from you, but you told her to lean back and to relax her head on your chest. You continued to rub your penis against Patient 1's hands. After about ten or fifteen minutes, you started to shake, and then finished the massage. After giving the massage to Patient 1, she noted that you appeared to be flush.

- (b) On or about July 15, 2002, Patient 2 presented to your osteopathic medical office with complaints including diarrhea, stomach cramps and low back pain. After explaining her symptoms to you, you examined her for her pain complaint by pressing in the area of her lower back while she was lying down on the examination table. At some point during your examination of Patient 2, after claiming to note muscle tension in her neck, you proceeded to massage Patient 2. You positioned Patient 2 so that she sat at the edge of the examination table with her hands behind her back, palms up. As you massaged Patient 2, she could feel you pressing your genitals into her hands. When Patient 2 moved away from you, you pulled her back into your body, continued to massage her, this time massaging her underneath her clothing, including in her chest area, and she continued to feel your genitalia on her hands.
- (c) On or about July 15, 2002, Patient 3 presented to your osteopathic medical office with complaints including possible ear infection. During your examination of Patient 3, you felt her shoulders, told her that her shoulders felt tight, and told her that you were going to loosen them. You instructed her to sit on the exam table with her hands behind her back and to place one hand on top of the other, palms out. You began to rub her shoulders beneath the collar of her shirt, and put your hands under her bra straps to rub her shoulders. You pushed your genitalia against the palm of Patient 3's hand, and she noticed you had an erection. When Patient 3 moved forward, you moved her back and continued to press your penis in her hand. At one point while moving your penis on Patient 3's hand you began to shake, and Patient 3 moved away, told you she had to leave, then jumped off the table and moved to a chair in the exam room.

The Notice went on to inform appellant that:

Your acts, conduct, and/or omissions as alleged in paragraph (1) above, individually and/or collectively, constitute "[a] departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established," as that clause is used in Section 4731.22(B)(6), Ohio Revised Code.

Further, your acts, conduct, and/or omissions as alleged in paragraph (I) above, individually and/or collectively, constitute “[v]iolation of any provision of a code of ethics of the American medical association, the American osteopathic association, the American podiatric medical association, or any other national professional organizations that the board specifies by rule,” as that clause is used in Section 4731.22(B)(18), Ohio Revised Code, to wit: Section 15 of the Code of Ethics of the American Osteopathic Association.

See State’s Exhibit 4.

Subsequently, the Board issued another Notice of Opportunity for Hearing which is dated September 10, 2008. The 2008 Notice alleged that from in or about 2004, in the routine course of his practice, the appellant engaged in inappropriate sexual contact with Patient 4. See State’s Exhibit 17. The September 10, 2008 Notice alleged the following:

On December 12, 2007, the Board issued a Notice of Opportunity for Hearing alleging that in your course of treatment of Patients 1 through 3, you rubbed your genitals against these patients. That Notice of Opportunity for Hearing is currently pending for hearing.

Further, in or about 2004, in the routine course of your osteopathic practice, you treated Patient 4, who is identified in the attached Patient Key. (The Patient Key is confidential and shall be withheld from public disclosure). Patient 4 presented to your osteopathic medical office with complaints including headache and stomach ache. During two office consultations with you, you instructed Patient 4 to sit at the edge of the exam table and asked her to put both her hands behind her back and cup them together. You stood behind her to administer treatment. During your treatment of Patient 4 on these two occasions while she was positioned in this manner, she felt you rub your penis against her hands.

See State’s Exhibit 17.

As in the 2007 Notice, the 2008 Notice charged the appellant with violating R.C. 4731.22(B)(6) for departing from or failing to conform to “minimal standards of care of similar practitioners under the same circumstances, whether or not actual injury to a patient

is established.” The Notices also charged the appellant with R.C. 4731.22(B)(18) for violating Section 15 of the Code of Ethics of the American Osteopathic Association.<sup>1</sup>

Following the appellant’s request for hearings in each matter, the two matters were consolidated and a hearing was held on October 6, 7, and 9, 2008. The Hearing Examiner issued a Report and Recommendation to the Board on February 12, 2009. See R. 12. The hearing examiner concluded that the appellant engaged in sexual misconduct with Patients 1 through 4 and thus, violated R.C. 4734(C) (13) (14) (15) and (20), in addition to O.A.C. 4734-8-04(A) and O.A.C. 4734-8-05(B) and (C) as stated in Counts Two through Five. The hearing examiner recommended to the Board that the appellant’s license to practice osteopathic medicine and surgery in the state of Ohio be permanently revoked. See February 12, 2009 Report and Recommendation. The appellant filed objections to the hearing examiner’s report on January 13, 2009.<sup>2</sup>

The Board issued an Order on March 12, 2009 approving and confirming the hearing examiner’s Report and Recommendation and thus, permanently revoking the appellant’s license to practice osteopathic medicine and surgery in the state of Ohio. The appellant filed this appeal on March 20, 2009.

On June 3, 2009 the appellee filed a Motion to Dismiss for Lack of Jurisdiction based on the Ohio Supreme Court’s holding in *Medcorp, Inc. v. Ohio Dept. of Job and Family Servs.*, (2009), 121 Ohio St. 3d 622, 2009-Ohio-2058. Thus, it is the position of the appellee that this Court does not have subject matter jurisdiction to adjudicate this case.

---

<sup>1</sup> Section 15 of the Code of Ethics of the American Osteopathic Association states that “[i]t is considered sexual misconduct for a physician to have sexual contact with any current patient whom the physician has interviewed and/or upon whom a medical or surgical procedure has been performed.”

<sup>2</sup> On March 9, 2009 the Board granted the appellee’s motion striking portions of the objections containing material not admitted at the hearing, patient names, material regarding confidential settlement negotiations, and material previously ordered stricken from the record by the hearing examiner pursuant to O.A.C. 4731-12-27.

## LAW AND ANALYSIS

A motion to dismiss for lack of subject matter jurisdiction challenges the authority of the particular court involved to rule on the case. *Pratts v. Hurley*, (2004), 102 Ohio St.3d 81, 83, citing *Morrison v. Steite*, (1972), 32 Ohio St.2d 86, 87. “Because subject matter jurisdiction goes to the power of the court to adjudicate the merits of the case, it can never be waived and may be challenged at any time.” *Id.*

During the time that the matter herein has been pending, the Ohio Supreme Court issued its holding in *Medcorp, Inc.*, 121 Ohio St. 3d at 622. In that case, the court held that “to satisfy the ‘grounds of the party’s appeal’ requirement in R.C. 119.12, parties appealing under that statute must identify specific legal or factual errors in their notices of appeal; they may not simply restate the standard of review.” *Id.* at 627.

The Notice of Appeal in this case provides as follows:

Now comes Appellant Charles Stocker, D.C. through the undersigned attorney and hereby appeals from an Adjudication Order of the Ohio State Chiropractic Board dated 02/27/2009 for the reasons that the order is not supported by reliable, probative, and substantial evidence and, further, is not in accordance with law.

See March 13, 2009 Notice of Appeal from an Order of the Ohio State Chiropractic Board dated 02/27/2009.

The Ohio Supreme Court reasoned in the *Medcorp* case that the appellant cannot merely restate the standard of review as its basis of appeal in its Notice of Appeal:

Medcorp failed to designate precise errors in its notice of appeal; instead, it simply reiterated the statutory standard of review, that the order was “not in accordance with law and [was] not supported by reliable, probative, and substantial evidence.” This statement does not strictly comply with the plain meaning of R.C. 119.12, and thus the trial court lacked jurisdiction to consider Medcorp’s appeal. See *Hughes v. Ohio Dept. Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, 868 N.E.2d 246, ¶ 17-18.

*Id.* at 627.

The *Medcorp* holding mandates that the appellant cannot merely reiterate the statutory standard of review, but must set forth stated grounds that “must be specific enough that the trial court and the opposing party can identify the objections...much in the same way that assignments of error and issues for review are presented in the courts of appeals and propositions of law are asserted in this court.” *Id.* at 624. Thus, in order to comply with the statutory language of R.C. 119.12, “an appealing party must state in its notice of appeal the specific legal and/or factual reasons why it is appealing.” *Id.*

The *Medcorp* court reasoned that although the statute (R.C. 119.12) does not suggest that parties must present these reasons in exacting detail, the parties are required to simply designate the explicit objection they are raising to the administrative agency’s order. *Id.* The *Medcorp* court further explained that this is similar in the way that appellants in a court of appeals must assert specific assignments of error and issues for review, and is in accordance with appellants appealing in the Ohio Supreme Court who must advance propositions of law. See App.R. 16(A)(3) and 4; see also S.Ct.Prac.R.III(1)(B)(4) and VI(2)(B)(4).

The holding in *Medcorp* clearly states that the trial court lacked jurisdiction to consider the appeal since *Medcorp* failed to designate precise errors in its notice of appeal and simply reiterated the statutory standard of review. *Id.* In the case *sub judice*, the notice of appeal does not set forth specific factual or legal errors regarding the Board’s action to permanently revoke Dr. Stocker’s license to practice chiropractic medicine in the state of Ohio since it merely reiterates the R.C. 119.12 standard of review. This Court concludes that appellant’s notice of appeal does not comply with the language in R.C. 119.12 which mandates that the 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.'  
See R.C. 119.12.

The issue of subject matter jurisdiction cannot be waived. It is well established that the issue of subject matter jurisdiction can be raised at any stage of the proceeding. Moreover, a court may address, *sua sponte*, the issue of jurisdiction based on its inherent power to vacate void judgments and orders. See *Total Office Products v. Dept. of Adminis. Serv.*, 2006 Ohio App. LEXIS 3230. A common pleas court has power to review proceedings of administrative agencies and officers only to the extent granted by law. The provisions of R.C. 119.12 relating to time, place and the manner of filing the notice of appeal are conditions precedent to this court's subject matter jurisdiction. *Id.* at \*P11-12. R.C. 119.12 provides, in pertinent part:

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.

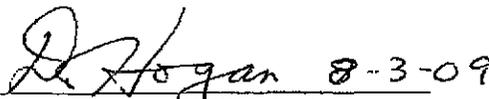
See R.C. 119.12

Accordingly, in applying the holding in *Medcorp*, this Court concludes that the appellant has failed to set forth the 'grounds of the party's appeal' in its notice of appeal and thus, this Court is without jurisdiction to adjudicate this case on its merits.

## DECISION

Upon review, on the basis of the holding in *Medcorp*, this Court does not have subject matter jurisdiction to adjudicate this matter on its merits. Accordingly, the appellee's Motion to Dismiss is hereby **GRANTED**. Furthermore, all other pending motions are hereby moot.

It is so ordered.

  
8-3-09  
JUDGE DANIEL HOGAN

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# APPENDIX E

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

PAUL H VOLKMAN,

Appellant,

-vs-

STATE MEDICAL BOARD OF OHIO

Appellee.

**FINAL APPEALABLE ORDER**

CASE NO. 08 CVF 18288

JUDGE BESSEY

TERMINATION NO. 10
BY: <i>[Signature]</i>

**DECISION AND FINAL ENTRY DISMISSING ADMINISTRATIVE  
APPEAL**

**BESSEY, JUDGE**

This matter comes before this court upon an appeal pursuant to R.C. Chapter 124 and R.C. 119.12 from a December 10, 2008, Order of the State Medical Board of Review. Appellant filed an appeal of that Order which permanently revoked his certificate to practice medicine and surgery in the State of Ohio.

On December 26, 2008, Appellant filed a Notice of Appeal. The notice of appeal, filed pursuant to R.C. 119.12, stated, "The Medical Board order is not supported by the necessary quantum of reliable, probative and substantial evidence nor is it in accordance with law." Appellant does not identify that sentence as grounds for the appeal. No further elaboration of any grounds for the appeal is set forth in Appellant's Notice of Appeal.

During the time that this case has been pending, the Ohio Supreme Court decided *Medcorp, Inc. v. Ohio Dept. of Job and Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058. In that case, the Court held that "to satisfy the 'grounds of the party's appeal' requirement in R.C. 119.12, parties appealing under that statute must identify specific legal or factual errors in their notices of appeal; they may not simply restate the standard of

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review.” *Medcorp* at ¶ 20.

The *Medcorp* Court instructed that because the notice of appeal simply reiterated the statutory standard of review (that the order was “not in accordance with law and [was] not supported by reliable, probative, and substantial evidence”), the notice of appeal did not strictly comply with R.C. 119.12 and, therefore, the trial court lacked jurisdiction to consider *Medcorp*’s appeal. *Medcorp*, at ¶ 21. referring to *Hughes v. Ohio Dept. Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, 868 N.E.2d 246, ¶ 17-18.

The *Medcorp* holding mandates that the appellant cannot merely reiterate the statutory standard of review, but must set forth stated grounds that “must be specific enough that the trial court and the opposing party can identify the objections...much in the same way that assignments of error and issues for review are presented in the courts of appeals and propositions of law are asserted in this court.” *Medcorp*, at ¶20. Thus, in order to comply with the statutory language of R.C. 119.12, “an appealing party must state in its notice of appeal the specific legal and/or factual reasons why it is appealing.” *Medcorp*, at ¶ 20.

*Medcorp* held that the trial court lacked jurisdiction to consider the appeal because *Medcorp* failed to designate precise errors in its notice of appeal and simply reiterated the statutory standard of review. *Medcorp*, at ¶21. In the case *sub judice*, the notice of appeal does not set forth specific factual or legal errors regarding the permanent revocation of appellant’s certificate to practice medicine and surgery in the State of Ohio. This Court concludes that appellant’s notice of appeal does not comply with R.C. 119.12 which mandates that an appellant set forth the ‘grounds of the party’s appeal.’ See R.C. 119.12. See *Id.*

The issue of subject matter jurisdiction cannot be waived and the issue may be raised at any stage of the proceeding. Moreover, a court may address, *sua sponte*, the issue of jurisdiction based on its inherent power to vacate void judgments and orders. See *Total Office Products v. Dept. of Adminis. Serv.*, 2006 Ohio App. LEXIS 3230. A common pleas court has power to review proceedings of administrative agencies and officers only to the extent granted by law. The provisions of R.C. 119.12 are conditions precedent to this court's subject matter jurisdiction. *Id.* at \*P11-12.

Upon a review of the record, this Court finds that the appellant did not comply with the R.C. 119.12 by identifying specific legal and/or factual errors in his notice of appeal. The appellant, like the appellant in *Medcorp*, did not comply with the mandates set forth in R.C. 119.12. Accordingly, this Court concludes, as a matter of law, that the appellant has failed to set forth the 'grounds of the party's appeal' in its Notice of Appeal as required by *Medcorp* and *Hughes*. Thus, this Court is without jurisdiction to adjudicate this case on its merits.

#### DECISION

Upon consideration of the certified record, the Court concludes that it does not have jurisdiction to adjudicate this appeal on its merits based on the holdings in *Medcorp* and *Hughes*. Accordingly, this appeal is hereby **DISMISSED** *sua sponte*.

It is so ordered.

  
JUDGE JOHN P. BESSEY

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# APPENDIX F

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

Emad S. Atalla, M.D., :  
Appellant, :  
vs. : Case No. 09 CV 7750  
State Medical Board of Ohio, : Judge FAIS  
Appellee. :

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CLERK OF COURTS

**SUA SPONTE ORDER PLACING CASE ON INACTIVE STATUS  
PENDING RULING BY OHIO SUPREME COURT**

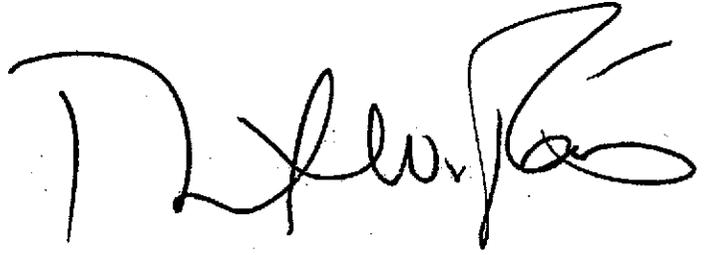
Rendered this 9<sup>th</sup> day of July, 2009.

**FAIS, J.**

On May 29, 2009, Appellee State Medical Board of Ohio ("Appellee") filed a Motion to Dismiss for Lack of Jurisdiction, therein requesting this Court to dismiss Appellant Emad S. Atalla, M.D.'s ("Appellant"), appeal for lack of subject matter jurisdiction pursuant to R.C. 12(B)(2) and R.C. Section 119.12 for failure to set forth the grounds of the appeal. Appellee asserts the Ohio Supreme Court's holding in *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*, Slip Opinion No. 2009-Ohio-2058, is controlling, where the Court found merely restating the standards of review is not sufficient to satisfy the grounds of a party's appeal in accordance with R.C. 119.12, but rather appealing parties must identify specific legal or factual errors in their notices of appeal. Appellee further notifies the Court that on May 15, 2009, Medcorp filed a Motion for Reconsideration which is currently pending before the Ohio Supreme Court. Appellee's brief in the case *sub judice* is due on or before July 31, 2009.

Based upon the foregoing, the Court, on its own motion, hereby places the instant matter on **INACTIVE STATUS**, pending a determination from the Ohio Supreme Court in the *Medcorp* case. Counsel are hereby **ORDERED** to notify this Court upon the release of a decision in *MedCorp, Inc. v. Ohio Department of Job & Family Services* regarding Medcorp's Motion for Reconsideration so that the instant case can be re-activated and proceed in accordance with that ruling.

**IT IS SO ORDERED.**



---

David W. Fais, Judge

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7-9-09

