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MEMORANDUM

Amicus Curiae The Ohio Academy of Nursing Homes, Inc. (the “Academy”), respectfully submits this memorandum on reconsideration pursuant to the order for briefing issued by the Court on August 4, 2009. The Court has directed the parties to answer two questions. These questions are:

1. Whether the decision in this case should be applied prospectively only, and, if so;
2. To what cases should it be applied?

The Academy appreciates the Court giving the Academy and the parties an opportunity to answer these pertinent and important questions and thanks the Court for giving this matter an additional look on reconsideration.

The answer to question number one is “yes.” The answer to question number two is that the Court’s decision should be applied only to those cases where notices of appeal are filed subsequent to the announcement by the Court of its decision on reconsideration. The Academy’s reasons for these responses follow. The result that will be obtained by following the Academy’s suggestion will be both just and supported by authority. In addition, the result will do honor to the Court’s decision which, of course, the Academy recognizes and accepts as binding authority in Ohio.

A. Retroactive Application

The Academy respectfully suggests to the Court that under no circumstances should the Court’s decision be applied retroactively. The decision in *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, syllabus, teaches that a decision from a court of supreme jurisdiction overruling another decision or practice determines not that the prior decision or practice was wrong but, rather, that the challenged principle was never the law; therefore a retroactive

application of the case at bar could, in effect, leave cases that have been fully and finally adjudicated subject to the risk of being overturned on the ground that there never was subject matter jurisdiction, regardless of the passage of time. Such a result would leave physicians, truck drivers, nursing homes and day care centers, just to name a few, together with all other parties who have ever appealed an agency decision and prevailed, in severe jeopardy.

This may seem like an alarmist position, but it is not. Right now the effects of the decision can be seen as state agencies seek to dismiss appeals brought by aggrieved parties who have appealed administrative decisions and, in addition, courts with pending appeals are issuing *sua sponte* dismissals. These actions are catching unwary appellants by surprise.

No less at risk are the members of the bar and their insurance carriers who will likely be required to answer malpractice claims. The theory will be that attorneys, who had no notion of the procedural change brought about by the Court's decision, should have known that the notices of appeal they filed were defective. This is the exact position that counsel for Medcorp now finds itself in. Ohio attorneys have followed an established and unchanged – until now – custom and practice for more than 65 years. A retroactive application of this decision will, unwittingly and needlessly, expose these attorneys, who reasonably and rationally relied upon this custom and practice, to a multitude of malpractice claims, as Medcorp discusses more fully in its merit brief.

B. Prospective Application

The Court's decision should be applied prospectively only to matters filed after the announcement by the Court of its decision on rehearing. Fortunately, the Court in its wisdom has provided that the *Peerless* Doctrine should not be blindly applied. *DiCenzo v. A-Best Prods. Co., Inc.* (2008), 120 Ohio St.3d 149, 152. 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 *DiCenzo v. A-Best Prods. Co., Inc.*, *supra*, this Court adopted the United States Supreme Court decision in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, holding that 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.” *Id.* at 156. This decision is consistent with the Court’s prior decisions applying the *Sunburst* Doctrine, first recognized by the United States Supreme Court in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358. Under 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, also, *Hoover v. Franklin Cty. Bd. Of Commrs.* (1985), 19 Ohio St. 3d 1, 9. This Court previously applied the *Sunburst* Doctrine in *OMCO v. Lindley* (1987), 29 Ohio St.3d 1, where it held its decision in a Board of Tax Appeals case would receive prospective only application to transactions occurring subsequent to the date of the issuance of the decision, and in *Minister Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St. 3d 459, 2008-Ohio-1259, where it declined to retroactively apply a decision establishing the method for implementing interest rates exceeding the statutory maximum on a book account pursuant to R.C. §1343.03(A). The Court in *Minister Farmers* 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.

Likewise, the *DiCenzo* decision, authored by Justice Stratton and concurred in by Justices O’Conner, O’Donnell, Lanzinger and Cupp, determined that the Court’s 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. In that decision, the Court reaffirmed the *Sunburst* 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.

As in *DiCenzo*, the present case meets the three considerations set forth in *Chevron Oil* and falls squarely within the equitable principles of the *Sunburst* Doctrine. The decision clearly qualifies as one of first impression which was not foreshadowed, and a retroactive application of this case will have widespread ramifications, cause tremendous injustice, and retard the operation of R.C. §119.12, considering its history, purpose, and effect. An untold number of administrative appeals currently are pending before the courts of this state, and many hundreds, and maybe thousands, more which have been decided since the General Assembly adopted the “grounds of the party’s appeal” language in 1943. Many of these appeals, and more likely than not the majority of them, used the statutory language plainly set forth in R.C. §119.12, without more, to obtain subject matter jurisdiction. The purpose of the decision’s new rule – to put parties and courts on notice of the specific grounds for appeal – simply is not promoted by applying it to these past and pending cases.

The prospective only application suggested here gives the state the result it desires, i.e., administrative appellants from this point forward are now required to state grounds “specific enough that the trial court and opposing party can identify the objections and proceed accordingly” (*Medcorp* at 627), and yet the Court avoids “creating shock waves throughout the

many sectors of Ohio's economy" relying, innocently, on the previous custom and practice. Accord, *DiCenzo, supra* at 153, and *Minister Farmers Coop. Exchange Co., Inc. v. Meyer* at 465.

Thus, the Court is urged to limit its decision to a prospective only application and to apply that decision only to those appeals arising after the publication of the decision upon reconsideration, with an exception.

C. Medcorp and Other Pending Appeals

A problem arises at this point, however, with the application of the decision to Medcorp, the party now before the Court, and to all other pending cases in like situations. The equities of this case dictate that Medcorp, and other litigants with currently pending cases, receive the same benefit as other parties benefiting from a prospective application. Under the newly proposed application, Medcorp, as the party to this appeal, is in a no-win position. If the decision is applied retroactively, Medcorp, and all similarly situated appellants, loose. If the decision is applied prospectively only, Medcorp, and all similarly situated appellants, also loose. It is, in essence, championing a solution – as the *appellee* no less – that could bring about an adverse result for its efforts to do honor to the Court's decision. Therefore, the exception to prospective only application referenced above arises as to this and all other pending cases; that is, those cases where the notice of appeal was filed prior to this Court's decision herein and the case is somewhere in the system awaiting a final disposition by this Court, a court of appeals, or a trial court.

Realizing this, it is respectfully suggested to the Court that the decision be applied prospectively only to those cases where notices of appeal are filed subsequent to the announcement by the Court of its decision on reconsideration and, with respect to Medcorp and other similarly situated appellants, that the Court remand this case to the lower court with

instructions to permit amendment of all pending notices of appeal within a reasonable time, i.e., 30 days, thus allowing the matter to be resolved on the merits. A court has considerable discretion in attempting to fashion a fair and just remedy. *Winchell v. Burch* (1996), 116 Ohio App.3d 555, 561. It has the power to fashion any remedy necessary and appropriate to do justice in a particular case. *Carter-Jones Lumber Co. v. Dixie Distrib. Co.* (C.A.6, 1999), 166 F.3d 840, 846. Such discretion includes the authority to remand an administrative appeal to the court of common pleas with instruction that it permit the adverse party to amend its notice of appeal. See *Floyd Stamps Rambler Inc. v. The Planning and Zoning Commission of the City of Euclid* (1963), 119 Ohio App. 249. See also *Williamson v. Township Trustees of Chester Township* (1969), 18 Ohio App. 2d 188, 189, where the court, finding the notice of appeal to the common pleas court defective, *sua sponte* amended the notice to correct the error.

A remand to permit amendment in this case is consistent with the fundamental principle of judicial review in Ohio that courts should decide cases on their merits, not on minor or technical violations. *State ex rel. Wilcox v. Seidner* (1996), 76 Ohio St.3d 412, 414. “Fairness and justice are best served when a court disposes of a case on the merits. Only a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds.” *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 193. As this Court observed in *Svodboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351, “[t]he primary objective and function of our courts is to adjudicate cases on the merits by applying the substantive law whenever possible, and not to adjudicate cases with finality upon a strained construction of procedural law yielding unjust results.”

D. Non-retroactive Application

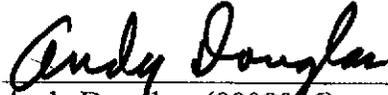
As a further alternative, the Court could apply the procedure utilized in *Chevron Oil* wherein the Court decided that a pending matter be given a “non-retroactive” application to such appeals. *Id.* at 105-106. Such an approach finds widespread support and is consistent with the use of the *Sunburst* Doctrine as a means of avoiding injustice. See *DiCenzo* at 152, *Minister Farmers* at 465, and *Hoover* at 9. See, also, *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; and *Smith v. State* (1970), 93 Idaho 795, 473 P.2d 937. “Where a decision of this Court could produce substantial inequitable results . . . there is ample basis in our cases for avoiding the ‘injustice or hardship’ by a holding of nonretroactivity.” *Chevron Oil, supra*, at 107, citing *Cipriano v. City of Houma* (1969), 395 U.S. 701. In fact, the Court could amend the notice of appeal *sua sponte* as referenced above in *Williamson, supra*, at 189.

CONCLUSION

For the foregoing reasons, the Academy respectfully urges the Court to apply the decision prospectively only and limit its application to cases where notices of appeal are filed subsequent to the announcement by the Court of its decision on reconsideration. With respect to this matter and other pending cases, the Academy urges the Court to remand this case to the lower court with instruction to permit amendment of the notice of appeal within a reasonable time, i.e., 30 days, thus allowing the matter to be resolved on the merits. In the alternative, the Court could *sua sponte*, as in *Williamson, supra*, apply the procedure utilized in *Chevron Oil*, wherein the Court decided that a pending matter be given a “non-retroactive” application to such

appeals. The Academy thanks the Court again for further consideration of this matter thereby, hopefully, avoiding what for Medcorp and its attorneys would be a disastrous result.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of this Reconsideration Memorandum 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 to counsel for Appellee, Geoffrey E. Webster, Chester, Willcox and Saxbe, 65 East State Street, Suite 1000, Columbus, Ohio, 43215 on this 24th day of August, 2009.



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