ORIGINAL

In the

Supreme Court of Ohio

MEDCORP, INC.,	:	Case Nos. 2008-0584 and 2008-0630
Appellee,	:	
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-APE 04-312

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INTRODUCTION

The Court's decision in this case was straightforward: "We hold that parties filing an appeal under R.C. 119.12 must identify specific legal or factual errors in their notices of appeal, not simply restate the standard of review for such orders." *Medcorp, Inc. v. Ohio Dep't of Job & Family Servs.*, 121 Ohio St. 3d 622, 2009-Ohio-2058, ¶ 2. The Court was equally clear that this requirement is *jurisdictional,* so the defective notice that Appellee Medcorp filed in this case meant that "the trial court lacked jurisdiction to consider Medcorp's appeal." *Id.* at ¶ 21. The Court also noted that the General Assembly, not the Court, created this jurisdictional requirement, *id.* at ¶ 15, and the Court explained that its holding was so plainly required by the statute that any other result would be flatly "inconsistent with the clear intent driving the statute," *id.* at ¶ 13. Moreover, the Court has long required parties to "strictly comply with the plain meaning of R.C. 119.12," and it cited its latest example of its longstanding commitment to requiring strict compliance as a jurisdictional matter. *Id.* at ¶ 21 (citing *Hughes v. Ohio Dep't of Commerce,* 114 Ohio St. 3d 47, 52, 2007-Ohio-2877, ¶¶ 17-18). In sum, the decision was jurisdictional; it was mandated by statute; and it followed precedents both old and recent.

The Court has now asked the parties, upon Medcorp's reconsideration motion, to address "[w]hether the decision in this case should be applied prospectively only and, if so, to what cases should it be applied?" Order of August 4, 2009. For several reasons, (1) the decision should *not* be limited to prospective application, but (2) if the Court does limit it, it should exempt only those cases in which the notice was filed before a Second District decision alerted parties to the issue, and (3) in any event, the decision must be applied to Medcorp in this case, as the Court's settled practice requires, to avoid converting the Court's decision into an advisory opinion.

These three points, as further detailed below, are critical not only to resolving this case in a manner consistent with both law and equity, but also to avoid creating a new precedent at this

stage that could cause far more harm throughout the law than anything that Medcorp asserts will happen as a result of the Court's initial decision.

ARGUMENT

A. The Court's decision should be applied uniformly to all cases still pending, because a lack of jurisdiction cannot be ignored, and the case does not present "exceptional circumstances."

The Court should not exempt any litigants from its *Medcorp* decision, because all cases involving defective notices suffer a lack of jurisdiction. Allowing such cases to proceed therefore would violate a fundamental limit on the power of courts to resolve cases and controversies. For that reason, the United States Supreme Court has explained that "by definition, a jurisdictional ruling may never be made prospective only." *Budinich v. Becton Dickinson & Co.* (1988), 486 U.S. 196, 203 (quoting *Firestone Tire & Rubber Co. v. Risjord* (1981), 449 U.S. 368, 379-80). *Budinich* concerned an untimely-filed notice of appeal, and the court pointed out that timely filing was "mandatory and jurisdictional." See *Budinich,* 486 U.S. at 203. Likewise, Medcorp and other parties that filed defective notices failed to do something that was "mandatory and jurisdictional." This Court should simply hold, as has the U.S. Supreme Court, that jurisdictional rulings cannot be applied only prospectively.

Although this Court has held that decisions may have prospective-only application in "exceptional circumstances," this case does not qualify. See *DiCenzo v. A Best Prods. Co.*, 120 Ohio St. 3d 149, 2008-Ohio-5327, ¶ 28. In *DiCenzo,* the Court explained that "prospective-only application is justified only under exceptional circumstances, " *id.,* and that, as a general rule, "an Ohio court decision applies retrospectively unless a party has contract rights or vested rights under the prior decision." *Id.* at ¶ 25 (citing *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, syllabus). Thus, the starting point under *DiCenzo* is the idea that parties may have relied upon the guidance this Court gave in a "prior decision." And even then, prospective-only

application is not automatic; the Court compares the old and new decisions and asks (1) if the decision establishes a new principle of law not foreshadowed in prior decisions, (2) if retroactive application would fail to promote the rule defined in the decision, or (3) if retroactive application would cause an inequitable result. *Id.* (citing *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 106-107).

Here, no party relied on any earlier decision of this Court allowing less-than-strict compliance with the grounds requirement, for there were no such decisions. To the contrary, the Court's decisions consistently applied a strict compliance standard to all other aspects of R.C. 119.12's requirements for notices of appeal, on everything from the time limits to the need to file a copy with the common pleas court and not just the agency. *Nibert v. Ohio Dep't of Rehab. & Corr.*, 84 Ohio St. 3d 100, 102, 1998-Ohio-506 (holding that party failed to invoke courts' jurisdiction when it filed notice with agency but did not file copy with common pleas court within fifteen days); *Holmes v. Union Gospel Press* (1980), 64 Ohio St. 2d 187, 188 ("where a statute confers a right of appeal, . . . strict adherence to the statutory conditions is essential for the enjoyment of the right to appeal"). Just two years ago, the Court required strict compliance with a rule that many critics considered the apex of hypertechnicality: the requirement that the *original* notice must be filed with the agency, and a *copy* with the common pleas court, with the result that parties who swapped the dual filings had their cases dismissed. *Hughes,* 2007-Ohio-2877, ¶¶ 17-18. Thus, no one had a reasonable reason to rely on, or hope for, anything less than a rule of strict compliance; these previous case all "foreshadowed" this result. *DiCenzo,* 2008-Ohio-5327, ¶ 25.

Moreover, to the extent that anyone argues that the "grounds" requirement is different from the other aspects of R.C. 119.12 that the Court has enforced, reliance on such an attempted

distinction would have been unreasonable for three reasons. First, as the Court held, the statute alone is plain, and compelled this result. *Medcorp,* 2009-Ohio-2058, ¶ 13. Second, the Court had long enforced analogous provisions in other statutes that required parties to "set forth . . . the errors therein complained of" or otherwise specify errors. See, e.g., *Zier v. Bur. of Unemployment. Comp.* (1949), 151 Ohio St. 123 (dismissing unemployment compensation appeal for failure to state errors in notice of appeal). Finally, although only this Court's decisions are determinative for purpose of parties' reliance, parties should have been warned of the need for compliance after an appeals court dismissed a case for failure to state grounds in an appeal under R.C. 119.12. *Green v. State Bd. of Registration* (2d Dist.), 2006 Ohio App. Lexis 1485, 2006-Ohio-1581, ¶¶ 14, 20 (rejecting notice stating that party "is adversely affected" by agency order, and also noting the insufficiency of reciting the statutory standard of review).

Thus, *DiCenzo*'s focus on reliance interests, foreshadowing, and expectation cuts in favor of uniform application, not a prospective-only limitation, and the other two *DiCenzo* factors likewise favor uniform application. Only uniform application of the Court's decision would promote the rule stated therein—that courts cannot hear cases in which a party's defective notice failed to invoke the common pleas court's jurisdiction over the attempted appeal. And uniform application will not cause inequity, because, as explained above, it is not inequitable to require strict compliance when the Court has been doing so for decades.

Notably, when the Court has previously required strict compliance with the jurisdictional requirements of R.C. 119.12, it did not exempt any then-pending cases from its decisions. The best example is *Hughes,* not only because it was recent, but because the Court there required strict compliance of both private parties *and the State*. *Hughes*, 2007-Ohio-2877, ¶¶ 12-15, 18. The Court held not only that private parties needed properly to file their original notices with the

relevant agency, and copies with the common pleas court; but also, the Court held that State agencies must properly certify orders under R.C. 119.09, and insufficient orders were invalid and void. The Court did not exempt pending cases from either rule; the State and private parties alike faced uniform application.

Finally, although the Court's decision should be applied uniformly to all *pending* cases, as well as future ones, that does not mean that long-closed cases with final judgments will be re-opened for those judgments to be vacated. As ODJFS explained more fully in its opposition to Medcorp's original reconsideration motion, it is well-settled that a final judgment entry precludes parties from litigating the question of the court's subject-matter jurisdiction. See ODFJS Memorandum Opposing Medcorp's Motion For Reconsideration at 6-7; see also Restatement 2d of Judgments §12 (1982); *Travelers Indemnity Co. v. Bailey* (2009), 129 S. Ct. 2195, 2206 (stating general rule that res judicata bars a party who had the opportunity to litigate the issue of jurisdiction—even if he did not do so—from collaterally attacking the judgment later; citing Restatement for recognized exceptions). Although this issue should be beyond dispute, the Court could easily dispel any such concerns, if Medcorp or its amicus raises this concern again, by clarifying that its decision cannot be used to re-open old cases or otherwise disturb final judgments. ODJFS does not at all object to restating that settled rule.

In sum, the rule here is a jurisdictional one, based on a statutory mandate, and no circumstances here justify *any* exceptions to applying the Court's decision uniformly to pending and future cases.

B. If the Court decides to apply the decision only prospectively, the decision should apply to any case in which the notice of appeal was filed after the Second District's decision in *Green* reminded parties that a failure to state grounds is a jurisdictional defect in R.C. 119.12 cases.

For the reasons stated in Part A, the Court should not limit its decision at all. If the Court does alter *Medcorp*'s application, however, the *only* plausible line to be drawn would be one that exempts those parties who filed their defective notices before the Second District Court of Appeals issued its decision in *Green v. State Bd. of Registration* (2d Dist.), 2006 Ohio App. Lexis 1485, 2006-Ohio-1581, ¶¶ 14, 20 (rejecting notice stating that party "is adversely affected" by agency order). As explained above, the Court's *DiCenzo* factors are all rooted in the idea that it is unfair for a party to suffer for relying upon an earlier decision of this Court. Medcorp here asks the Court to take that "reliance" idea a step further, asking the Court to bless reliance not upon any affirmative reassurance from this Court, but on a perceived atmosphere of non-enforcement and an absence of guidance. That is, Medcorp says that "it was well-settled practice" to state only the boilerplate standard of review in notices, and that courts had not previously enforced the grounds requirement or dismissed cases for failure to state grounds. See Medcorp Recon. Motion at 8. But even granting, for argument's sake, that such "non-enforcement" in lower courts trumps the statutory language and this Court's enforcement of similar provisions, any such reliance surely lost its claim to reasonableness when the Second District decided *Green*.

In *Green,* the Second District enforced the "grounds" rule in a decision that essentially foreshadowed this Court's decision here. The *Green* court explained that reciting the standard of review language in R.C. 119.12 would not be sufficient to state grounds and thus invoke a court's jurisdiction over an attempted appeal.

> The standards of review that R.C. 119.12 imposes are not themselves grounds for appeal, but only the findings on which the court may affirm, reverse, vacate, or

> modify the agency's order. To state or set forth grounds means to recite some basis in law or fact for a claim. Black's Law Dictionary, Seventh Ed. To satisfy the grounds requirement in R.C. 119.12, an appellant's notice of appeal must therefore set forth facts sufficient on their face to show how the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. Otherwise, the agency is not put on notice of the claim or claims against which it must defend.

Green, 2006-Ohio-1581, ¶ 13. The *Green* court held that the notice before it was defective, and it dismissed that party's case. Thus, at that point, the only reported appellate case directly on-point was a clear warning to parties—and especially to their counsel—that the grounds requirement was a real one.

Notably, because the rule here is a procedural one that is easy to follow, the presence of even one warning is enough. Thus, even parties disagreeing with the Second District's decision could have and should have played it safe. That contrasts sharply with uncertainty over a substantive rule of law, such as one involving contract law and transaction planning, in which costs and benefits run in both directions. For example, a party structuring a transaction might be unsure whether to follow the rule in one appellate district or a rule in another, if the stricter compliance approach costs more or creates operational difficulties, and so on. But after *Green,* any party in any other district of the State could have simply met *Green's* "higher" standard, even if the party's local courts had not addressed the issue, and that safe approach would not have cost it anything as a legal or financial matter. Surely the attorney time in writing the grounds would be minimal or even zero, as the grounds would have to be worked out soon for the briefing anyway.

Thus, the line in the sand, if any, should be to enforce the rule for all cases in which the notice of appeal was filed after *Green* was decided, on March 31, 2006. The decision was posted

to this Court's website the same day, and it was presumably available within a day or two through commonly used online legal-research tools.[1]

In addition, not only is the *Green* line supported by the reasoning above, but that line is an easily workable one, whereas any other approach would lead courts and parties down a labyrinthine path with no clear end in sight. In this regard, ODJFS stresses that the precedent the Court sets here, if it accedes to Medcorp's request, will not only resolve pending cases on this grounds issue, but will also, like *DiCenzo,* set the standard for how to approach prospective-only application in all eligible cases. That is, if the Court opens the door to having more than one relevant timepoint, or different rules for different appellate districts, then parties in other cases will not only seek prospective-only application, but will also urge the Court to further subdivide such application into different categories. For that reason, the concerns detailed below should be considered not only as problems in this case, but they should also serve as an example of the type of problems that could recur if the Court adopts a practice of *partial* prospective application.

For example, if the Court takes a geographic approach and says that *Green* put parties on notice in the Second District, but not necessarily in other appellate districts, then it would have to assess what the "reasonable litigant" would have expected in every separate district. For example, the Eighth District rejected a notice of appeal, for lack of grounds, in a case in which the party's notice gave only the date of the order, without even the boilerplate standard of review. *In re Wheeler* (8th Dist.), 2007-Ohio-3919, ¶¶ 12, 15. So a district-specific view would require the Court, or lower courts, to assess whether that gave parties "fair warning"—was a

[1] While the *Green* date should govern any pending cases, it should not apply to Medcorp's own case, because, as explained below in Part C, the Court's settled practice—even where a prospective-only approach exempts *all* pending cases—is to apply a rule of law to the parties in the case announcing the rule. Nevertheless, ODJFS notes that Medcorp filed its defective notice on April 27, 2006, about a month after *Green* was decided.

dismissal for lack of a grounds statement enough, or could a party reasonably conclude that a boilerplate line, although saying nothing about the individual case, was still enough under *In re Wheeler*? Further, if reliance is measured not just by this Court's decisions, but also by the appeals courts' decisions, some party will go the next step and insist on looking at the practice of the common pleas court in *its county,* even in unreported cases not online, as the local bar often knows of cases showing the local court's approach.

Then there is the problem of courts that flip-flop over time, adding a chronological dimension to the geographic one, so that cases *within* a district are governed by one rule from date 1 to 2, then another from date 2 to 3, and so on. That is no idle speculation, for that exact scenario occurred in the Fifth District with the original/copy issue that the Court resolved in *Hughes*. In four different cases in under two years, the Fifth District required proper filing, then allowed reversed filing, then reverted to proper filing, then again went back to reversed filing. See, e.g., *Evans v. Dep't of Insur.* (5th Dist.), 2005-Ohio-3921, 2005 Ohio App. Lexis 3603, ¶¶ 20-26 (third case, rejecting second case from a month earlier and reverting to 2004 decision requiring proper filing); *Playmate School and Child Care Center v. Ohio Dep't of Job & Family Servs.* (5th Dist.), 2005-Ohio-5937, 2005 Ohio App. Lexis 5353 (fourth case, four months after *Evans,* reverting to second case and allowing reversed filing). Thus, a partial-prospective approach in that case, if tied to the guidance offered by that appeals court, would have led to several different slices on the timeline. While no such multiple flips have occurred on the statement-of-grounds issue, this is an example of the problems that could arise if the Court endorses the practice of applying rulings prospectively based on timing and geography.

For all these reasons, the Court should, at most, allow pre-*Green* cases to be exempt from the *Medcorp* decision, as any other breakdowns are both unjustified and unworkable, not only in

this case, but in any future case in which a party seeks to limit a decision's application to some partial-prospective standard. And again, the better approach is to allow no exceptions at all to this jurisdictional ruling.

C. Even if the Court exempts some or all pending cases, the *Medcorp* decision must apply to Medcorp itself in this case, as that is settled practice and is necessary to avoid issuing an advisory opinion.

Finally, even if the Court exempts some or even all pending cases from its decision, the Court should apply its decision to Medcorp itself. The simple fact that it was the party in this litigation means that the decision must apply to it, as a matter of principle and of the Court's settled practice.

The principle is simple, as courts around the country have explained: if a decision is not applied to the parties before it, it would be an advisory opinion or mere dictum. See, e.g., *Molitor v. Kaneland Community Unit Dist.* (Ill. 1959), 18 Ill. 2d 11, 28, 163 N.E.2d 89, 97; *Oroz v. Bd. of County Commrs.* (Wyo. 1978), 575 P.2d 1155, 1159 (citations omitted); *County of Wayne v. Hathcock* (Mich. 2004), 471 Mich. 445, 684 N.W.2d 765, 788 n.98; *Beckman v. Butte-Silver Bow County* (Mont. 2000), 1 P.3d 348, 299 Mont. 389, ¶ 45 (Gray, J., specially concurring).

In addition, several courts have explained that, if a decision is not applied to the parties before it, it unfairly deprives the winning party of the benefit of its efforts in litigating an issue, and that in turn serves as a disincentive for parties to seek to persuade courts to advance the law. See, e.g., *George v. Ericson* (Conn. 1999), 250 Conn. 312, 326, 736 A.2d 889, 898; *Molitor*, supra; *Oroz*, supra.

The practice is equally well-settled in this Court. In case after case in which the Court has declared a decision to have prospective-only application, the Court has routinely applied that decision to the litigants in the actual case. See, e.g., *Minster Farmers Cooperative Exchange Co.*

v. Meyer, 117 Ohio St. 3d 459, 2008-Ohio-1259, ¶ 30 (holding the decision applicable "*in these two cases* and for transactions occurring after the date of this decision") (emphasis added); *Cincinnati School Dist. Bd. of Educ. v. Hamilton County Bd. of Revision*, 116 Ohio St. 3d 1220, 2007-Ohio-6664, ¶ 6 (making earlier decision prospective only, "with the exception of our application of it in [that earlier case] itself") (citations omitted); *Cleveland Electric Illuminating Co. v. Lake County Bd. of Revision*, 96 Ohio St. 3d 165, 2002-Ohio-4033, ¶ 20 ("we declare that this decision shall, *with the exception of the subject litigants* and cases currently pending at the time of this decision, operate prospectively only") (emphasis added); *Gallimore v. Children's Hospital Medical Center* (1993), 67 Ohio St. 3d 244, 255 (ordering that the holding "be applied only prospectively *and, of course, to the case at bar*") (emphasis added);[2] *CNG Devel. Co. v. Limbach* (1992), 63 Ohio St. 3d 28, 32-33 (holding decision prospective only in application, but applying it to parties in that case); *OAMCO v. Lindley* (1987), 29 Ohio St. 3d 1, syllabus ("[the] decision in this case shall, *with the exception of the subject litigants*, only receive prospective application . . .") (emphasis added).

Consequently, the decision here must apply to Medcorp itself, regardless of any exemptions that the Court might carve out for other pending cases.

[2] The Court, in a later decision, decided to make *Gallimore* retroactive. See *Coleman v. Sandoz Pharm. Corp.* (1996), 74 Ohio St. 3d 492, 493. However, *Gallimore* still serves as an example of the Court—when choosing prospective-only application—making the decision applicable to the litigants in the actual case.

CONCLUSION

For the above reasons, the Court should apply its jurisdictional decision uniformly, including to pending cases. However, if the Court decides on prospective-only application, then it should apply the decision to any case in which the notice of appeal was filed after *Green* alerted parties to the issue. Finally, regardless of where the Court draws the line, its decision must be applied to *this* case.

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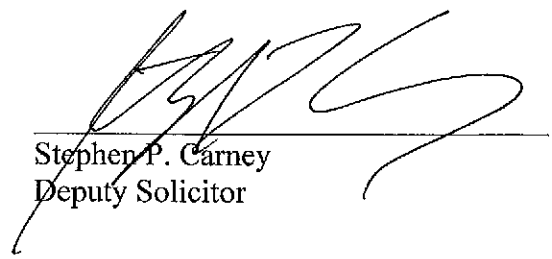

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