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RESPONSIVE LAW AND ARGUMENT

I. Introduction

The Brief of the Department of Job & Family Services (“DJFS”) at first blush might appear sound and seem on a foundation other than sand, but it is not and seeks to lead this Court into inappropriate and punitive application of the Decision at issue. Foremost to Appellee Medcorp is the application to it of this Court’s May 7th Decision (hereafter the “Decision”) in this matter, from that flows the appropriate manner of application of the Decision to the citizens of Ohio and the members of the Bar affected by it, both prospectively and retroactively.

II. Medcorp’s Notice of Appeal and DJFS’ Claim of Prior Notice

A review of the history of this action reveals the unsound basis for the DJFS’ position. First, *the notice of appeal in this matter was filed on April 27, 2006*. It was filed in Franklin County as required by R.C. §5111.06(C), not in any county within the Second District Court of Appeals jurisdiction. The DJFS position is that counsel for Medcorp was somehow and because of the Second District’s decisions on notice of the “defects” in the filed notice of appeal and thus Medcorp cannot claim equity in the application of the Decision. There are two opinions of the Second District referenced by DJFS, neither a reported decision, *David Day Ministries v. State of Ohio ex rel Jim Petro, Attorney General* (2d Dist.), 2007 Ohio App. Lexis 3198, 2007-Ohio-3454 (“*David Day*”), and *Louis A. Green, P.S. v. St. Bd. of Registration* (2d Dist.), 2006 Ohio App. Lexis 1485 (“*Green*”). The *David Day* decision was issued July 6, 2007, more than a year after the Medcorp notice of appeal was filed, so Medcorp could hardly be on notice from that decision. The *Green* decision was issued March 31, 2006. Is that the problem for Medcorp that DJFS seems to feel it is? No, for the reasons following it is not appropriate to apply *Green* to Medcorp’s notice of appeal.

The *Green* decision, first, was law for the Second District not the Tenth District. Second, in the *Green* decision the Court notes the position of the state Board, “**The Board argues that the necessary grounds for appeal are those set out in R.C. 119.12, which are that the Board’s order is not ‘supported by reliable, probative, and substantial evidence and is (not) in accordance with law.’**” *Green* Decision at ¶ 12 (emphasis added). Interesting and telling that until the opportunistic position of the state in this matter it was clearly state agencies and their counsel’s position that the Medcorp notice of appeal constituted *the* “necessary grounds” to be stated in a notice of appeal to vest jurisdiction in the reviewing court.

Then there is the fact that in the Tenth District the Medcorp notice of appeal was, until May 7, 2009, in compliance with the binding interpretation of the provision of R.C. §119.12 at issue. The Tenth District in this matter found the notice of appeal acceptable and also did so prior to this matter’s appellate decision in *Derakhshan v. State Med. Bd. of Ohio* (10th Dist.), 2007-Ohio-5802. DJFS ignores the *Derakhshan* case completely in its brief, neither discussing it or explaining why it was not certified as in conflict with *Green* and *David Day*, nor addressing the holding of the Tenth District, the greatest level of experience with administrative appeals of any of the District Courts of Appeal in Ohio. If the issue was of such paramount concern to the state, and it is always so disadvantaged as to not be able to figure out what an appeal is about, why not raise it at the first opportunity in *Derakhshan* (and for that matter not raise it in this action until long after all merit briefs were filed in the reviewing common pleas court)?

III. Consideration of the Equities

Consideration of the cases cited by DJFS aptly illustrates the application of the principles of equity that are core to the questions presented by the Court in granting reconsideration. DJFS references the case of *George v. Ericson* (Conn, 1999), 250 Conn. 312, 736A. 2d 889, that a

decision is to apply to the parties involved in the case (a retroactive application). What DJF'S fails to note is the Connecticut Supreme Court notes that to be the "general rule." *Id* at 326. That Court goes on to note (in footnote 12) the counter holding of non-retroactive application. The determination of which way to go is based upon considerations of when the issue was raised (in the referenced footnote case the issue was raised *sua sponte* by the Court) and general, fundamental principles of fairness. The Supreme Court of Connecticut notes that the "basic purpose of a trial is the determination of truth." *Id*, citations omitted. The Connecticut Supreme Court went on to consider the application of the equities to the parties in the *George v. Ericson* case and determined the best equity was to remand the matter for a new trial. Thus, the decision was given retroactive application to the parties in that decision in order to accord equity and to permit a determination on the merits with application of the newly adopted standard of law applied in a manner fair to all parties. *Id* at 327-332.

The *George v. Ericson, supra*, decision contains sound discussion about the application of decisions of a court based upon the principle of *stare decisis* beginning at page 318. The Connecticut Supreme Court notes:

Stare decisis is justified because it allows for . . . predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources, and it promotes judicial efficiency. It is the most important application of a theory of decision making consistency in our legal culture and it is an obvious manifestation of the notion that decision making consistency itself has normative value.

* * *

A court, when once convinced that it is in error, is not compelled to follow precedent.

* * *

The court must weigh [the] benefits [of *stare decisis*] against its burdens in deciding whether to overturn a precedent it thinks is unjust If law is to have a current relevance, courts must have and exhort the capacity to change a rule of law when reason so requires.

George v. Ericson at 318-319 (extensive citations omitted).

While not strictly a matter of *stare decisis*, the Decision did change the long term accepted standard and custom of administrative law practice; applying the standard of when was an issue raised and the general principle of fairness utilized in *George v. Ericson* to this matter yields a conclusion the Court should apply the decision in a non-retroactive fashion and not to the parties of this appeal. DJFS never made claim below and does not now that it had no idea what the appeal was about, suffered any disadvantage arising out of the content of the notice of appeal and never raised the issue until so late in the reviewing common pleas court that that court never even ruled on the motion to dismiss.

If truth is desired and a decision on the merits the governing standards of the law in Ohio the course is clear: the Decision is prospective only as to the parties to this action and all others. If Ohio wishes to set a standard of opportunistic gamesmanship and avoidance of the consequences of merit decisions by convincing the second appellate review of a means to avoid the merit decision this Court may simply announce the Decision stands. It would be a sad day for Ohio jurisprudence were the latter course chosen.

The Supreme Court of Montana similarly holds with the Supreme Court of Connecticut and states, in the case from that Court cited by DJFS:

Indeed, we have held that *stare decisis* does not require us to follow a manifestly wrong decision; we now believe that the analysis of the inherently dangerous activity exception contained in the *Bechtel* line of cases is manifestly wrong.

Beckman v. Butte-Silver Bow County (Mont, 2000), 299 Mont. 389, 1 p. 3d 348, 352 (citations omitted).

This Court has noted:

Benjamin N. Cardozo said it in The Paradoxes of Legal Science (1928) 29-30: what has once been settled by a precedent will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed. Above all is this true when honest men have shaped their conduct upon the faith of the pronouncement.

Gallimore v. Children's Hospital Med. Ctr. (1993), 67 Ohio St.3d 244, 257 (C. J. Moyer dissent).

In the *Gallimore* decision, this Court determined to overrule a one-year old decision as no longer good law. Of course and as the State notes, the equities of the matter presented in the *Gallimore* case required its application to the parties in the matter. Justice Wright's dissent also noted the value of consistency and predictability. See, *Gallimore* at 259. In particular, Justice Wright states in his dissenting opinion:

When we decide a case without even a bow toward precedent, we tell people that they cannot rely on our decisions because we may change our minds at any time and without warning. Not only does this prevent people from rationally planning their lives, but it seriously erodes the integrity of this Court and the authority of our decisions.

Id.

The Medcorp appeal of the adjudication order is not a matter where there is any claim of unfairness to DJFS. DJFS has never claimed any lack of clarity or understanding or other bases to support the overturning of the long-standing precedent of custom and practice by the Bar of the State of Ohio, supported by decisions of all but one court of appeals and then not until 64 years into the administrative law practice created by the adoption of R. C. Ch. 119.

At pages eight and nine of DJFS' brief there is a, frankly, confusing discussion of the potential to create a "problem of courts that flip-flop over time." How a decision of the Supreme Court of Ohio having application in all 88 counties would create a problem of courts "flip-flopping" is not addressed by DJFS. Where the real problem of flip-flop exists is in the new

question of when is a notice of appeal specific enough to pass the new and undefined muster of adequacy of the statement of grounds. Woe to the attorney who unwisely accepts the last day request for legal services to appeal an administrative decision, for the failure to state an issue may be a waiver of the issue and that attorney's insurer will receive the call at some point down the road. At least until the Bar simply adopts a standard of it is better to not accept an engagement to represent one in an administrative appeal than risk exposure to claims (that is if insurers do not require declination of services in such a matter as a condition of coverage to an administrative practice attorney or firm).

Medcorp proposes a uniform standard that from and after the pronouncement of the reconsideration decision all notices of appeal must meet the standard announced in the Court's May 7 Decision. In its discussion of "flip-flopping" courts, DJFS references the case of *Playmate School and Child Care Center v. Ohio Dept. of Job and Family Services* (5th Dist.), 2005-Ohio-5937, which determines to change its prior course because:

. . . This court found pleadings must be liberally construed in order to do substantial justice, and cases should be decided on their merits.

Id at ¶9.

The *Gallimore, supra*, decision, as well as the DJFS referenced decision of *Coleman v. Sandoz Pharmaceuticals, Corp.* (1996), 74 Ohio St.3d 492, are both classic examples of the application of the principles of equity called for in determining when a decision has prospective only, non-retroactive, or retroactive application. *Coleman* determined a certified question from a federal district court and applied the *Gallimore* decision retroactively. That decision was made because it was "just and feasible." *Id* at 494. The dissent (written by Justice Cooke and concurred by Chief Justice Moyer and Justice Wright) noted ". . . this court has the authority to make its rulings prospective only." *Id* (citations omitted).

DJFS' citation to *CNG Development Co. v. Limbach* (1992), 63 Ohio St.3d 28, reveals an interesting holding. In that matter, the filing of a notice of appeal from a Board of Tax Appeals noted a requirement to “. . . attach the commissioner's order to the notice of appeal, which discloses the substance of the appeal.”¹ *Id* at 31 (citations omitted). Further, in that decision, the Court applied its equitable power to avoid harm, noting:

We expect that unwary tax payers may have relied on the commissioner's failure to raise this question before now. We do not desire to harm unsuspecting tax payers who have so relied. Accordingly, under our broad authority to limit the applications of our decisions . . . , we declare that this decision shall operate prospectively only.

Id at 33 (citation omitted).

IV. Prospective only Application is Not an Advisory Opinion

DJFS suggests that to apply the Decision prospectively only would make it an advisory opinion. That is incorrect. An advisory opinion is “to simply answer a hypothetical question merely for the sake of answering it” *Ahmad v. AK Steel Corp.* (2008), 119 Ohio St.3d 1210 (Justice O'Connor concurring opinion). The decision of this Court in *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468, is illustrative of what an advisory opinion is and how this matter is not. When the question of a statutory interpretation arose which did not apply to the parties, the Court stated it would “. . . refrain from giving opinions on abstract propositions and * * avoid the imposition by judgment of premature declarations or advise upon potential controversies.” *Id* at 485, citing *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14.

There is nothing abstract or hypothetical about the matter pending before this Court. There is a real controversy between litigants whose interests are obviously adverse; and thus, no advisory opinion results from whatever course is determined by this Court, in the exercise of its

¹ In this matter Medcorp attached a copy of the adjudication order from which the appeal was taken and incorporated it by reference into the notice of appeal.

powers. See, e.g., *State ex rel Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 524-525.

It is the absence of a “case or controversy” which yields an advisory opinion. See, e.g., *Muskraat v. U. S.* (1911), 219 U. S. 346, 359, 31 S. Ct. 250, 254, 255. The *Muskraat* decision notes the decision of the United States Supreme Court in *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L.Ed. 176, that the United States Supreme Court has determined:

Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state, or Federal, and the decision necessarily rests upon the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not

Id at 359.

In this matter, there is no legitimate argument that a prospective-only determination regarding the application of this Court’s Decision would be an advisory-only opinion. The “honest and actual antagonistic” position is certainly present.

V. Prior Judgments are Subject to Attack

DJFS argues at page 5 of its Brief the multitude of prior judgments are “safe” and DJFS will be pleased to “restate the settled rule” that such cannot happen. When one consults the cited sources of DJFS’ “settled rule” one finds anything but repose and calm. Consider first the United States Supreme Court case cited by DJFS, *Travelers Indemnity Co. v. Bailey* (2009), 129 S.Ct. 2195, 174 L.Ed. 2d 99. The actual holding is that where “respondents or those in privity with them... were given a fair chance to challenge...” they cannot in a separate action challenge subject matter jurisdiction of the contested order issued by a bankruptcy court. *Id*, at 2206. However when one actually reads the Supreme Court’s opinion one quickly sees footnote 6, noting the general rule regarding a parties collateral attack bar “...is not absolute...” and citing a

number of cases in which even a party to an action gone to judgment may collaterally attack the judgment.

The *Bailey* case is clearly where DJFS got the reference to the citation on page 5 of its Brief to the Restatement (Second) of Judgments § 12 (1980). Reading that Section gives one a much different assurance of the solidity of the “rule” regarding attacks on subject matter basis a prior judgment than the DJFS asserts. Consider the actual syllabus of the cited section:

When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:

(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or

(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or

(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

Bold in original.

The Restatement breaks its discussion into several topics and under subsection d the issue of “*subject matter jurisdiction not expressly determined*” is discussed. The issue is separated into the question having actually been addressed or only having been implicitly addressed. In this latter concern the Restatement states:

In contrast, when the issue of subject matter jurisdiction has been only implicitly resolved through a judgment on the merits, and then is raised through an attack on the judgment, it signifies that the adversary system failed to bring forward a highly relevant issue in the original proceeding. If the belated contention about lack of jurisdiction could be rejected out of

hand on its merits, the question of its being *res judicata* would not have much practical significance. It is when the belated contention about subject matter jurisdiction indeed has some substantial merit, rather, that the application of the rules of *res judicata* has real effect and hence poses a genuine dilemma. The question is whether to permit, in the interest of securing conformity to the rules of jurisdiction, the revival of a question that attentive counsel should have raised in the first instance. The situation is therefore not simply one of relitigation; to the contrary, it partakes of some aspects of a challenge to subject matter jurisdiction following a default judgment. See Comment *e*.

The interests primarily at stake in resolving this question are governmental and societal, not those of the parties. By hypothesis the parties had earlier opportunity to litigate the question of jurisdiction and thereby to protect their interest in the observance of the rules governing competency. They also had their day on the merits, even if before a body whose authority is now in doubt. To allow one of them to raise the question of subject matter jurisdiction after judgment is in the effect to make him a public agent for enforcing the rules of jurisdiction. But the public interest, though substantial, also has its protectors in other litigants on other occasions, who will have opportunity and incentive to object to the excess of authority if it is repeated.

The question therefore is whether the public interest in observance of the particular jurisdictional rule is sufficiently strong to permit a possibly superfluous vindication of the rule by a litigant who is undeserving of the accompanying benefit that will redound to him. The public interest is of that strength only if the tribunal's excess of authority was plain or has seriously disturbed the distribution of governmental powers or has infringed a fundamental constitutional protection.

So it is not much of a rule upon which to risk the entire history of administrative appeal judgments and this Court should not be enticed into such insubstantial a position as that put forth by DJFS. It is DJFS who is undeserving of a judgment in its favor in this matter.

VI. Prospective Only Application has Long Standing Supportive Precedent

DJFS refers this Court to the Michigan Supreme Court's decision of *Wayne v. Hathcock* (2004), 471 Mich. 445, 684 N.W.2d 765. There the Michigan Supreme Court determined to apply the overruling of a long-established precedent which governed and defined eminent domain under the state's constitution with retroactive effect to all pending cases in which a challenge to the prior decision had been raised and preserved. *Id* at 788. Footnote 98 to that court's opinion notes that in the State of Michigan, the Supreme Court has the power to issue a decision of complete prospective application if it overrules clear and uncontradicted case law. It is respectfully submitted that given (1) the established fact that notices of appeal have for many, many years been filed that state exactly what Medcorp stated in its notice of appeal and (2) that method of taking an appeal was clearly established and not contradicted by any court² until the *David Day* decision in the Second District Court of Appeals, this Court is fully within its power to, and should in the exercise of its discretionary powers of equity, apply the decision to prospective-only matters.

The question raised in *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210 is- is the effect of the decision upon a vested right or a contractual right in determining prospective or retrospective application of the Decision? *An accrued cause of action is a vested right*. As so aptly and succinctly noted by the Eighth District Court of Appeals:

“Of particular note in the case at bar is the “vested rights” exception to retroactive application. The Ohio Supreme Court has recognized, in a host of cases, that an accrued cause of action is a substantive vested right. See *Gregory v. Flowers* (1972), 32 Ohio St.2d 48, 290 N.E.2d 181 [61 O.O.2d 295]; *Cook v. Matvejs* (1978), 56 Ohio St.2d 234, 383 N.E.2d 601 [10 O.O.3d 384]; *Baird v. Loeffler* (1982), 69 Ohio St.2d 533, 433 N.E.2d 194 [23 O.O.3d 458]; *Adams v. Sherk* (1983), 4 Ohio St.3d 37, 446 N.E.2d 165.

² Save where *no* reason was stated. See, e.g. *In re Wheeler* (8th Dist.), 2007-Ohio-3919 (where there was further no opposition to a motion to dismiss the appeal (*Id* at ¶ 4).

We particularly note the unambiguous statement found in *Baird, supra*, 69 Ohio St.2d at 535, 433 N.E.2d 194:

‘Although statutes of limitations are remedial in nature and may generally be classified as procedural legislation, a retroactive application which ‘operates to destroy an accrued substantive right’ conflicts with Section 28, Article II of the Ohio Constitution. *Gregory v. Flowers* (1972), 32 Ohio St.2d 48, 290 N.E.2d 181 [61 O.O.2d 295], paragraphs one and three of the syllabus. *Gregory* provides a means to save from constitutional infirmity a statute of limitation which is applicable to actions accrued before its enactment: ‘ * * * [o]n the theory that a right to sue once existing becomes a vested right, and cannot be taken away altogether, it does not conclusively follow that the time within which the right may be asserted and maintained may not be limited to a shorter period than that which prevailed at the time the right arose, provided such limitation still leaves the claimant a *reasonable time* within which to enforce the right.’ (Emphasis deleted in part.) *Id.*, at page 54, 290 N.E.2d 181, citing *Smith v. New York Central Rd. Co.* (1930), 122 Ohio St. 45, 48, 170 N.E. 637.’”

Weeton v. Satayathum, M.D. (8th Dist., 1984), 21 Ohio App. 3d 82, 84.

The right to appeal conferred by R.C. §§119.12 and 5111.06(C) is as much a vested right as the legislatively adopted statutes of limitations discussed in the cases above. Medcorp’s rights vested *prior* to the re-interpretation of the section of R. C. 119.12 at issue and to retroactively take those rights away by judicial decision cannot stand muster. See, *Wendell v. Ameritrust Company, N.A.* (1994), 69 Ohio St. 3d 74 (Chief Justice Moyer’s opinion affirmed the non-retroactive application of the judicial declaration of the unconstitutionality of a statute). Medcorp exercised its right of appeal in the form and manner accepted by the Tenth District Court of Appeals under the then prevailing construction and interpretation of the applicable provisions of R. C. §119.12 and has a vested right in the exercise of that right to obtain a merit decision.

The Decision should have prospective only application and not prevent Medcorp and DJFS from a decision on the merits in this matter.

VII. Decisions Effecting Subject Matter Jurisdiction May Be Prospective Only

This Court's decision in *DiCenzo v. A-Best Prods. Co., Inc.* (2008), 120 Ohio St.3d 149, does not limit its application to non-jurisdictional rulings only (nor does any other decision of this Court). Under *DiCenzo*, this Court has the discretion to apply a decision only prospectively after weighing the three considerations set forth in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97. As *DiCenzo* noted, state courts enjoy a freedom independent of federal law to limit the retroactive operation of their interpretations of state laws. Accord, *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358, 364-366; and *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. 86. The *DiCenzo* decision provides all the guidance necessary to resolve the matter at issue here.

The Court's hands are not tied by the language in *Firestone Tire & Rubber Co. v. Risjord* (1981), 449 U.S. 368, 379-380, and *Budinich v. Becton Dickinson & Co* (1988), 146 U.S. 196, 203, DJFS cites for the proposition that a jurisdictional ruling may never be made prospective only. That language was limited by the United States Supreme Court in *Northern Pipeline v. Marathon Pipe Line*, 458 U.S. 50, 87 (1982), and has been soundly criticized by other courts. See *George v. CAMACHO*, 119 F.3d 1393, 1397 (9th Cir. 1997) ("That sentence . . . has never been applied as broadly and inflexibly as . . . its language . . . suggest[s]."). See also *Holt v. Shalala* (9th Cir. 1994), 35 F.3d 376; *Pettyjohn v. Shalala*, 23 F.3d 1572 (10th Cir. 1994); *Trinity Broadcasting Corp. v. Eller*, 835 F.2d 245 (10th Cir. 1987); and *Snyder v. Smith*, 736 F.2d 409, 414-415 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984), each of which limited the retroactive application of a jurisdictional ruling.

The Ninth Circuit first criticized the *Firestone* decision in *Holt v. Shalala*, 35 F.3d 376, finding that *Firestone* did not address a rule “which would foreclose all review in a class of cases.” *Id.* at 381. The *Firestone* ruling did not entirely foreclose appeal, but merely delayed it until a final order was entered. “It certainly did not create a rule that, if applied to a category of pending cases in the courts, would mean that the time for review had come and gone. The *Firestone* decision did not change the prevailing understanding of jurisdictional principles.” *Id.*

In *Snyder v. Smith*, 736 F.2d 409, 415, the Seventh Circuit refused to apply *Firestone*, holding that its jurisdictional ruling adopting a new time for filing appeals in arbitration cases must be applied prospectively so that its review of a group of cases would not be peremptorily foreclosed. The court held that “[u]the effect of applying the decision . . . retroactively here would be to deprive the appellant of any opportunity to present his claims to this court for review. *Id.*

In *Pettyjohn v. Shalala*, 23 F.3d 1572, 1575, the Tenth Circuit reached the same conclusion as the *Holt* court, under similar factual and legal circumstances. It went on to hold that a retroactive application of a new jurisdictional rule would frustrate the purpose of the Equal Access to Justice Act. *Id.*

Again, in *Trinity Broadcasting Corp. v. Eller*, 835 F.2d 245, the Tenth Circuit also rejected “the absolute language of *Firestone*” and declined to retroactively bar the plaintiff’s appeal in order to “avoid an unfairly harsh application” of its decision. The court found that, “when faced with more compelling fact” the Supreme Court “retreated from an absolute prohibition against prospective jurisdictional holdings” in its post-*Firestone* opinion in *Northern Pipeline v. Marathon Pipe Line*, 458 U.S. 50 (1982). The *Trinity Broadcasting* case concluded in issuing a prospective only jurisdictional ruling that “we are exercising a prudential and

constitutional measure of discretion over the retroactive impact of our new holding, so that technical barriers will not deprive appellant of its appeal.” *Trinity Broadcasting* at 248.

Finally, in *CAMACHO*, a case in which the Ninth Circuit eliminated the previously afforded seven-day extension for filing notices of appeals in the Northern Mariana Islands but applied its decision prospectively only, the court provided an extensive analysis of *Firestone* and noted “*Firestone* itself concerns a different kind of jurisdictional issue,” i.e., jurisdiction over an interlocutory order. *Id.* at 1397. In *Firestone*, a retroactive application advanced the purpose of limiting piecemeal litigation by postponing appeals until after final judgment, but there was “no question in *Firestone* of forfeiting anyone’s right to appeal permanently.” *Id.* at 1398. Likewise, the *Budinich* decision also “does not prevent finality” and “did not wipe out any rights . . . established under a former version of the rule.” *Id.* As the *CAMACHO* court observed, “no court has ever applied a change to a procedural rule in a manner that serves to forfeit a litigant’s substantive rights when the litigant had fully complied with the provisions of the rule as it existed at the time he acted.” [Emphasis in original.] *Id.* at 1399. The Ninth Circuit further noted that the Supreme Court itself explicitly refused to make its jurisdiction ruling in *Northern Pipeline v. Marathon Pipe Line*, 458 U.S. at 87, retroactive. Taking its cue from the fact that amendments to the federal rules operate prospectively, the court explained “we can conceive of no reason why a change in the construction of a rule must necessarily be ‘retroactive.’” *CAMACHO* at 1400. “Finally, we look to fundamental principles of fairness. Here, no one can seriously deny that it would be profoundly unjust to apply our holding retroactively and subject the rights of a class of litigants who were entitled to govern their conduct in accordance with our prior rule [A]pplying our changed rule retroactively would unsettle matters that have already been settled, cast into doubt the practice of relying on the court’s construction of the

federal rules, and penalize parties whose conduct faithfully conformed to our determinations.”
Id. at 1401-1404.

In each of the above-cited cases not only did the court apply its decision prospectively only, it applied the decision to the subject litigants in a manner which did not deprive them of their appeal. The same can be said for the cases cited by the state in its brief on reconsideration, contrary to the contention of the state. This Court’s decision in *OAMCO v. Lindley* (1987), 29 Ohio St.3d 1, was not used as a sword against the appellant. The Court applied its decision prospectively only but excepted the subject litigants and currently pending cases from such an application because that holding *was favorable to the subject litigants or permitted those causes to proceed with their appeals*. See also, *Minister Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St. 3d 459, 2008-Ohio-1259 (limiting a decision to the subject litigants and to transactions arising in the future so as not to create “shock waves” in the economy); *Cleveland Elec. Illuminating Co. v. Lake Cty. Bd. Of Revision*, 96 Ohio St. 3d 165, 2002-Ohio-4033 (applying a decision prospectively only, except for the subject litigants and pending cases which permitted those cases to proceed with their appeals); and *Gallimore v. Children’s Hosp. Medical Center* (1993), 67 Ohio St. 3d 244, 255 (decision reversing previous decision applied prospectively and to case at bar).

Each of these decisions was crafted so as to avoid an unfairly harsh application of the decision. The Academy respectfully urges the Court apply the same principles of fairness and justice to the case at bar.

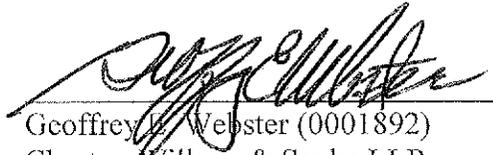
CONCLUSION

It is respectfully submitted that the standard set forth in the May 7 Decision should have prospective application. On reflection and after review of the authorities and DJFS’ brief it is the

respectful position of Medcorp that the Court, in the just and fair exercise of its powers, should apply the Decision, if unmodified, only to appeals filed from and after a reasonable notice period to the public and the Bar and to no action filed prior to that effective date of the Court's reconsideration decision's effective date, including the parties to this action.

If the Court desires oral argument Medcorp would be pleased to offer same.

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 counsel for Appellant Benjamin C. Mizer, Stephen P. Carney, Rebecca L. Thomas, and Ara Mekhjian, 30 East Broad Street, 15th Floor, Columbus, OH 43215, and counsel for *amicus curiae* J. Richard Lumpe and David Raber, Lumpe & Raber, 37 W. Broad Street, Suite 730, Columbus, Ohio 43215 and Andrew Douglas, Crabbe Brown & James LLP, 500 South Front Street, Suite 1200, Columbus, Ohio 43215 via regular U.S. mail, postage prepaid, this 8th day of September, 2009.



Geoffrey F. Webster