

ORIGINAL

In the  
Supreme Court of Ohio

MEDCORP, INC.,

Appellee,

v.

OHIO DEPARTMENT OF JOB AND  
FAMILY SERVICES,

Appellant.

: Case Nos. 2008-0584 and  
: 2008-0630  
:  
: On Appeal from the  
: Franklin County  
: Court of Appeals,  
: Tenth Appellate District  
:  
: Court of Appeals Case  
: No. 07-APE 04-312  
:

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REPLY BRIEF ON SUPPLEMENTAL ISSUE  
OF APPELLANT  
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

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GEOFFREY E. WEBSTER\* (0001892)

*\*Counsel of Record*

J. RANDALL RICHARDS (0061106)

ERIC B. HERSHBERGER (0055569)

Chester, Willcox, & Saxbe L.L.P.

65 East State Street, Suite 1000

Columbus, Ohio 43215

614-221-4000

614-221-4012 fax

gewebster@cwslaw.com

Counsel for Appellee

Medcorp, Inc.

RICHARD CORDRAY (0038034)

Ohio Attorney General

BENJAMIN C. MIZER\* (0083089)

Solicitor General\*

*\*Counsel of Record*

STEPHEN P. CARNEY (0063460)

Deputy Solicitor

REBECCA L. THOMAS (0066650)

Assistant Solicitor

ARA MEKIJIAN (0068800)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

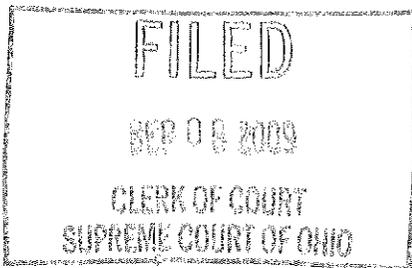
614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for Appellant

Ohio Department of Job and Family

Services



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## INTRODUCTION

The sole issue before the Court, based on its limited briefing order in light of the merits of its decision, is whether the Court's decision can or should be applied prospectively only. See Order of August 4, 2009; *Medcorp, Inc. v. Ohio Dep't of Job & Family Servs.*, 121 Ohio St. 3d 622, 2009-Ohio-2058. The Court did not ask the parties to brief further whether the Court should reconsider its ultimate holding and decision, or even its reasoning, but only whether the decision, while remaining intact, could be limited in application. In other words, the Court has already held 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," *id.* at ¶ 2, and it has already held that Appellee Medcorp's failure to do so meant that "the trial court lacked jurisdiction to consider Medcorp's appeal." *Id.* at ¶ 21.

Yet Medcorp boldly asks the Court not only to limit its decision to prospective application for *other* parties, but to reverse both its reasoning and result and to rule in Medcorp's favor in *this case*, granting victory to Medcorp rather than Appellant Ohio Department of Job and Family Services ("ODJFS"). See Medcorp Supp. Br. at 1 (urging that decision "should not apply to *any* person who filed an appeal prior to the publication of the reconsideration decision, including Medcorp."). Such a remarkable step would violate both practice and principle. This Court and others routinely apply decisions to the litigants in the case at hand, even when limiting decisions to prospective application, for to do otherwise would render the case an advisory opinion. And Medcorp asks the Court to reach this radical result by an equally objectionable expedient: allowing it to re-file, years after its fifteen-day deadline, a new notice of appeal to replace the defective one. In effect, Medcorp asks the Court to allow an end-run around its *Medcorp* decision about stating grounds by ignoring its cases requiring strict compliance with the deadline

and undercutting the well-settled principle that these requirements are statutory and *jurisdictional*.

The Court should reject Medcorp's attempt to convert the prospective-application issue into a full reconsideration and reversal for Medcorp. Equally important, the Court should not reach the point of considering any candidate for exemption from the decision, particularly not the very party to this case. Nothing in Medcorp's supplemental brief overcomes the points that ODJFS raised in its first supplemental brief. First, the decision is a jurisdictional one, leaving no room for exemptions. Second, the decision does not meet the *DiCenzo/Peerless* test, as no prior decision had ruled in the other direction, and the other factors are not met either. Third, even if the Court nevertheless exempts certain parties, it should exempt only those who filed defective notices before the Second District's *Green* decision reminded parties of this issue. Finally, no matter how the Court resolves any of these issues, it should not reverse in favor of Medcorp itself, under the guise of "prospective application." Such an unprecedented step would violate *two* jurisdictional principles at once, as it would override the lack of jurisdiction over Medcorp's appeal under R.C. 119.12, and it would render the Court's decision an advisory opinion if not applied to the parties before it.

## ARGUMENT

**A. Allowing a re-opened appeal period or any other exemption would require the Court to reverse the well-settled principle that the requirements for administrative appeals are *jurisdictional*.**

Medcorp's requested relief cannot be granted without, in effect, overruling the long-held principle that the General Assembly's requirements for administrative appeals are jurisdictional, leaving no room for exemptions of any kind, whether claimed as "equitable" or under any other theory. That is why 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. *Budinich* involved a late notice of appeal, just as *Medcorp* involves a defective notice of appeal. The *Budinich* rule, notably, is not simply a prudential application of case law regarding prospective-only application; rather, it is an inescapable application of the separate body of law that led to the jurisdictional ruling in the first place. Thus, because this Court has long held that the procedural requirements for administrative appeals are jurisdictional, it has already precluded the possibility of prospective-only application. In other words, granting exceptions going forward cannot be squared with this Court's refusal to deviate from strict compliance in the first place. See *Medcorp*, 2009-Ohio-2058, ¶ 21; *Hughes v. Ohio Dep't of Commerce*, 114 Ohio St. 3d 47, 52, 2007-Ohio-2877, ¶¶ 17-18; *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").

That is, if the Court holds now that exemptions are allowed *despite* a lack of jurisdiction, that new holding could rightly be cited as calling into question the decades of settled law requiring strict compliance, re-opening *Hughes*, *Holmes*, and more. Those who continue to ignore procedural requirements, even after the Court has addressed and affirmed those precise requirements, will be newly eligible to urge equitable exceptions, even if most or all are rejected on the merits. But lower courts will no longer be able to reject such requests on the simple principle that the rules are jurisdictional. That is so because no logical principle can distinguish between overlooking jurisdictional flaws under a "prospective-only" approach and overlooking such flaws in substantive decisions to begin with.

*Medcorp*'s own argument illustrates the link between allowing an exception now and allowing exceptions in general, and that linkage shows that any exceptions would be inconsistent with the Court's entire body of law on jurisdiction over administrative appeals, and not just the

application in *Medcorp* itself. Medcorp insists that the procedural rule here is “the *functional* equivalent of a rule of the Supreme Court adopted pursuant” to the Court’s own rulemaking power under Article IV, and it asserts that this means that “the Court could enact specific rules” that would override R.C. 119.12’s requirements, such that the Court “could declare the provision of R.C. 119.12 at issue thereby void.” Medcorp Supp. Br. at 5 (emphasis in original). In other words, Medcorp says that because the Court could have trumped the statute with a rule earlier, the Court can and should override the statute now.

But this Court has contrasted its broad power over its own procedural rules, including the power to forgive violations, with its inability to forgive violations of statutory rules for administrative appeals, because the General Assembly’s power to create such appeals includes the power to “set forth the conditions for the exercise of judicial authority.” *State ex rel. Arcadia Acres v. Ohio Dep’t of Job & Family Servs.*, 2009-Ohio-4176, ¶ 12. And even if the Court could override the General Assembly’s requirements by rulemaking, the Court has not done so here. Thus, Medcorp’s request to overlook a jurisdictional flaw, even if adopted in the “prospective-only” context, cannot be granted without violating the Court’s broader principle that statutory, jurisdictional rules cannot be waived.

The Court’s recent unanimous opinion in *Arcadia Acres* is a textbook example of the fundamental distinction that Medcorp asks the Court to overlook. In *Arcadia Acres*, the appellant filed a defective notice of appeal with this Court, and the Court left no doubt that the appellant “violated the rule.” *Id.* at ¶ 11. The issue was “whether that violation is jurisdictional: if it is jurisdictional, the appeal must be dismissed; if not, the appeal may proceed.” *Id.* The Court held that the violation was not jurisdictional, and it explained that “[of] critical importance is the fact that the defect in the present case does not involve an administrative appeal:

administrative appeals are authorized by statutes that set forth the conditions for the exercise of judicial authority, and those conditions call for strict compliance.” *Id.* at ¶ 12.

Medcorp’s defiance of settled case law is illustrated by the mechanism Medcorp suggests for fixing its flawed notice. It asks the Court to re-open the statutorily mandated period for filing a notice to allow it and all other affected parties to file amended notices of appeal. See Medcorp. Supp. Br. at 1, 11. Such relief is contrary not only to statute, and to the Court’s particular holding about the sanctity of that deadline, but also to the entire body of R.C. 119.12 law. See *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). After all, *any* of the flaws found fatal in prior cases could have been fixed by a do-over.

In sum, the jurisdictional nature of the ruling leaves no room for exemptions from the decision, and any such allowance would mark a departure not only from the *Medcorp* decision, but from the entire body of law holding such requirements to be jurisdictional.

**B. The Court’s decision does not even trigger the *Peerless/DiCenzo* test because no “prior decision” created reliance to begin with, and the decision does not meet the *DiCenzo* factors anyway.**

Even if Medcorp could clear the jurisdictional hurdle, it faces another problem: Its argument is based upon the three-prong test that the Court applied in *DiCenzo v. A Best Prods. Co.*, 120 Ohio St. 3d 149, 2008-Ohio-5327. But *DiCenzo* re-affirmed the requirement that “a prior decision” must have created the reliance interest or “vested right” to begin with. *Id.* at ¶ 25 (citing *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, syllabus). Here, no such “prior decision” exists.

The *DiCenzo* syllabus reiterates the *Peerless* doctrine: “An Ohio court decision applies retrospectively unless a party has contract rights or vested rights under the *prior decision*.”

*DiCenzo*, syllabus ¶ 1 (citing *Peerless* as “followed”) (emphasis added). Thus, a party does not reach the three-prong *DiCenzo* test (in the second syllabus point) unless a prior decision created vested rights. Even then, the party must show that the three factors add up to a situation in which the reliance interests in the “rights under the prior decision” justify an exception to retrospective application.

In *DiCenzo*, no one disputed that prior law had once gone the other way. The old privity doctrine had not allowed product-liability tort cases against either manufacturers or sellers; a plaintiff could pursue only a contract-based breach of warranty claim against the retailer with which she was directly in privity. The question was whether the Court’s decisions slowly expanding liability against *manufacturers*, which chipped away at the privity doctrine in that context, had “foreshadowed” the decision that abolished the privity barrier and established liability against *sellers* in Ohio, *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317. *DiCenzo*, 2008-Ohio-5327, ¶¶ 29-30 (citing *Temple*). In asking whether such liability had been an “issue of first impression in *Temple v. Wean*,” *DiCenzo* at ¶ 29, the concept of “first impression” meant not an absence of law in the field, but rather whether *Temple*’s indisputable abrogation of privity against sellers had been “foreshadowed” by decisions of this Court that had “gradually relaxed the long-held legal requirement of privity” against manufacturers, *id.* at ¶ 35. The privity bar would have protected the *Temple* defendants from the *Temple* plaintiff, as that plaintiff was an injured worker who was not in privity with any of the several sellers and re-sellers she sued.

Here, in stark contrast, no prior decision of this Court ever held that the “grounds” requirement of R.C. 119.12 was satisfied by reciting the standard of review, so Medcorp does not reach the *DiCenzo* prongs, let alone satisfy them. Thus, Medcorp’s argument about whether

prior cases “foreshadowed” the *Medcorp* decision is irrelevant, because foreshadowing comes into play only when the issue is whether the Court foreshadowed its *overruling of prior doctrine*, not whether the Court foreshadowed resolution of an issue it had never directly addressed at all. Nor should the Court accept *Medcorp*’s implicit invitation to treat what it claims as “accepted practice” as the equivalent of a decision of this Court. To do so would dramatically expand the scope of *DiCenzo*, and it would further require the Court to analyze and resolve the validity of such “practice” claims.

Even if the Court applies the *DiCenzo* test (and it should not), application of that test does not overcome ODJFS’s initial showing of why *Medcorp* fails on all three prongs. See ODJFS Supp. Br. at 2-5. Most important, *Medcorp*’s claim of equity, which essentially restates its claim that “no one saw this coming,” is unavailing. Not only did the Court’s cases all point in this direction, along with the statute itself, but also, as explained below, the Second District’s *Green* decision broadcast the importance of this issue, so at most that decision should mark the outer limit of any purported reliance upon a mere absence of law. See ODJFS Supp. Br. at 6-9.

In addition, *Medcorp*’s complaint about quick enforcement—that “the state’s use of the decision has been swift,” *Medcorp*. Supp. Br. at 7—is unavailing. State agencies notified courts of this issue immediately because parties and lawyers are required to identify flaws in subject-matter jurisdiction; the State has also agreed that such cases should be stayed until this Court addresses the pending motion. Courts, too, are obliged to address such jurisdictional flaws *sua sponte*, so the fact that courts have done their duty is not a valid criticism. See *id.* (citing , e.g., *Volkman v. State Medical Bd.*, Case No. 08CVF18288, Decision and Entry, July 22, 2009, attached as Appendix E to *Medcorp* Supp. Br., at 3 (raising issue *sua sponte*)).

Nor should the Court consider, as an equitable claim, Medcorp's warning that lawyers will be "horribly exposed to a multitude of malpractice claims," Medcorp Supp. Br. at 10, because that speculative issue is not before the Court. The issue is speculative for at least two reasons. First, a malpractice plaintiff will have to show that a lawyer failed to "conform to the standard required by law," *Envtl. Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St. 3d 209, 2008-Ohio-3833, ¶ 13, and if Medcorp is right in its claim that its practice was reasonable at the time, its counsel and others will not run afoul of that standard. Second, a malpractice plaintiff will have to show that the jurisdictional flaw caused it to lose a winnable case, *id.*, which would typically involve, under the "case-within-a-case doctrine," a showing that its appeal would have been successful on the merits, *id.* at ¶ 16. Given the deferential standard of review in administrative actions, and the reality that most agency actions are affirmed on the merits, it is doubtful that many counsel would face viable claims, even in the situation that Medcorp describes as "a virtually uncontestable malpractice claim." Medcorp Supp. Br. at 10.

Equally important, adding malpractice concerns to the *DiCenzo* analysis would unduly complicate all cases addressing prospective-only application, not just this case. True malpractice claims are complicated enough, with the "case-within-a-case," and that is when evidence related to malpractice and causation is actually introduced. If the Court were to consider, as part of *DiCenzo*'s equity prong, whether prospective or retrospective application might lead to malpractice claims for some counsel in cases not before the Court, it would have to weigh speculation upon speculation about all these issues. The Court should rule only on the narrow issue presented, and it should leave such collateral issues to be raised elsewhere, if at all.

Finally, Medcorp's claims about *closed* cases, as opposed to pending ones, are misplaced, because final judgments are just that—final. ODJFS Supp. Br. at 5; ODFJS Mem. Opp.

Medcorp's Mot. for Reconsideration at 6-7. ODJFS repeats that it does not object to a clarification that the decision cannot be used to unsettle closed cases, including in any of the ways that Medcorp describes.

**C. The Second District's *Green* decision should mark the outer limit, if any, for purported reliance upon non-enforcement.**

As ODJFS explained in its first supplemental brief (at 6-9), any claim of reasonable reliance upon an absence of law, or non-enforcement of the "grounds" rule, cannot have been maintained after the Second District Court of Appeals dismissed a case with a defective notice in *Green v. State Bd. of Registration* (2d Dist.), 2006 Ohio App. Lexis 1485, 2006-Ohio-1581. Medcorp insists that the first warning came not in *Green* but in the Second District's later decision in *David May Ministries v. State ex rel. Petro* (2d Dist.), 2007 Ohio App. Lexis 3198, 2007-Ohio-3454. But, as ODJFS's earlier brief showed, *Green* not only dismissed a case based on a defective notice, but it also specifically said that reciting the standard of review would not be enough. ODJFS Supp. Br. at 6-7.

Although the defective notice in *Green* did not actually recite the standard of review, as Medcorp and the appellant in *David May* did, that distinction should not matter here. Once *Green* opined that the boilerplate would not be enough, and no other court had held otherwise, that was enough—even if the language was dicta—to nullify any reasonable reliance on any prior perception of non-enforcement. In any event, Medcorp's focus on *David May* rather than *Green* should at most shift the line in the sand to the *David May* decision. But that does not justify Medcorp's request to delay enforcement beyond this Court's *Medcorp* decision until the Court rules on this pending motion and until publication in the Ohio State Bar Association's reporter. Medcorp Supp. Br. at 10.

Most important, any alleged uncertainty during the period between *Green* and this Court's decision does not justify non-compliance, as Medcorp and any other party could have complied with *Green*'s warning, at no cost, with minimal effort. The Court recently made this point in *Arcadia Acres*. In that case, a party claimed, as Medcorp does here, that it was the victim of an unforeseen change in law. Specifically, the party first tried to raise certain claims by seeking declaratory judgment, but after this Court held in another case that mandamus was the sole vehicle for such claims, the party sought to file a new mandamus case. *Arcadia Acres*, 2009-Ohio-4176, at ¶ 17. The issue before the Court was whether res judicata precluded the second case, because the mandamus claims *could have* been brought in the first case. *Id.* The party argued that such claim preclusion carried "an element of unfairness," because, the party said, it was not sure what procedure to follow, and it had filed its complaint before this Court settled the matter: "confusion clouded the proper cause of action to plead as a vehicle." *Id.* at ¶ 16. In rejecting that appeal to "unfairness" and "confusion," the Court noted that "nothing prevented the nursing homes from adopting the cautious approach of pleading two alternative causes of action." *Id.* at ¶ 17. Here, too, stating grounds beyond the boilerplate was the "cautious approach" after *Green*, and could easily have been followed.

Thus, the Court should, at most, allow pre-*Green* cases to be exempt from the *Medcorp* decision. However, the better approach is to allow no exceptions at all to this jurisdictional ruling.

**D. Medcorp's request to convert its defeat into victory, at the expense of both jurisdictional principles at stake, should be rejected.**

Finally, Medcorp's request to escape its own loss, and to deprive ODJFS of its victory, should be firmly rejected, even if the Court somehow clears the hurdles above and relieves other parties of the effect of its decision.

As ODJFS's earlier supplemental brief explained, this Court and others routinely apply decisions to the parties before them, even when applying a "prospective-only" approach. ODJFS Supp. Br. at 10-11 (citing, e.g., *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)). That practice is primarily justified by the necessity of maintaining jurisdiction to announce the decision as a holding: If a decision is not applied to the parties before the Court, it would be an advisory opinion or mere dictum. See ODJFS Supp. Br. at 10-11 (citing, e.g., *Molitor v. Kaneland Community Unit Dist.* (Ill. 1959), 18 Ill. 2d 11, 28, 163 N.E.2d 89, 97).

Therefore, granting Medcorp relief from its own loss would violate *two* jurisdictional principles: It would contravene the rule that R.C. 119.12's requirements are jurisdictional, as explained in Part A above, and it would also render the Court's decision an advisory one. Medcorp cites no case, nor is ODJFS aware of one, in which this Court or any other court overrode these twin jurisdictional principles to grant relief to a party that failed to invoke jurisdiction at square one.

Medcorp appeals to equity, for its own case, claiming that it should not lose the value of its victories below. But it is ODJFS, not Medcorp, that would lose the favorable decision in *this* Court if Medcorp receives the unprecedented relief it requests. Indeed, courts often cite, as another reason for the well-settled practice of applying decisions to the subject litigants, the concern that doing otherwise would unfairly deprive the winning party of the benefit of its efforts in litigating an issue, and that such deprivation, in turn, would serve 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*, above.

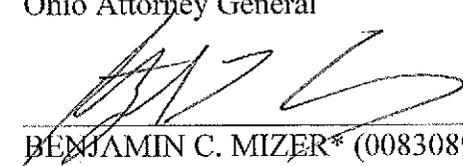
Consequently, the decision here must apply to Medcorp itself, regardless of any exemptions that the Court might carve out for other pending cases.

### 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.

Respectfully submitted,

RICHARD CORDRAY (0038034)  
Ohio Attorney General



BENJAMIN C. MIZER\* (0083089)  
Solicitor General\*

*\*Counsel of Record*

STEPHEN P. CARNEY (0063460)  
Deputy Solicitor

REBECCA L. THOMAS (0066650)  
Assistant Solicitor

ARA MEKHJIAN (0068800)  
Assistant Attorney General

30 East Broad Street, 17th Floor  
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

[benjamin.mizer@ohioattorneygeneral.gov](mailto:benjamin.mizer@ohioattorneygeneral.gov)

Counsel for Appellant  
Ohio Department of Job and Family  
Services

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief on Supplemental Issue of Appellant Ohio Department of Job and Family Services was served by U.S. mail this 8th day of September, 2009 upon the following counsel:

Geoffrey E. Webster  
J. Randall Richards  
Chester, Willcox, & Saxbe L.L.P.  
65 East State Street, Suite 1000  
Columbus, Ohio 43215

Counsel for Appellee  
Medcorp, Inc.

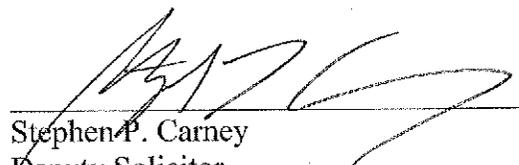
A courtesy copy of the foregoing was also served upon the following counsel for amicus curiae by U.S. mail this 8th day of September, 2009:

Andy Douglas  
Crabbe, Brown & James LLP  
500 South Front Street  
Suite 1200  
Columbus, Ohio 43215

Counsel for *Amicus Curiae*  
Ohio Academy of Nursing Homes

David A. Raber  
J. Richard Lumpe  
Lumpe & Raber  
37 W. Broad Street  
Suite 730  
Columbus, Ohio 43215

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



Stephen P. Carney  
Deputy Solicitor