

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. BOARD OF THE)
STATE TEACHERS RETIREMENT)
SYSTEM OF OHIO,)

Relators-Appellees,)

v.)

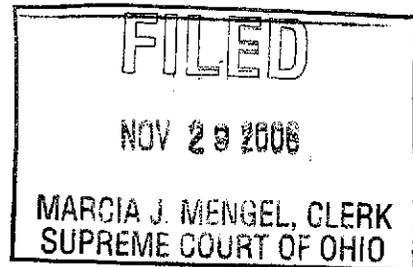
HONORABLE DAVID P. DAVIS)
JUDGE, COURT OF COMMON PLEAS)
HAMILTON COUNTY, OHIO, et al.)

Respondent-Appellants)

CASE NO. 06-2173

On Appeal from the Hamilton County
Court of Appeals, First Appellate District

Court of Appeals Case No. C-060760



MOTION FOR CONSOLIDATION OF APPEALS

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Trial Attorney for Merck & Co., Inc.

MOTION

NOW COME Defendants-Appellants Medco Health Solutions, Inc., Merck-Medco Managed Care, LLC, Paid Prescriptions, LLC, Medco Health Solutions of Columbus North, ltd., Medco Health Solutions of Columbus West, Ltd., Medco Health Solutions of Fairfield, LLC, Inc., Merck-Medco Rx Services of Florida No. 2, L.C., Merck-Medco Rx Services of Florida, L.C., Medco Health Services of Las Vegas, Inc., Medco Health Solutions of Texas, LLC (the "Medco Defendants"), and Merck & Co. ("Merck"), and hereby move to consolidate, in whole or in part, the instant appeal with the appeals filed in Supreme Court Case Nos. 06-2006, 06-2169, 06-2170, 06-2171, 06-2172. All of the above-referenced appeals arise from the same underlying case that was filed by the Board of the State Teachers Retirement System of Ohio ("STRS") against the Medco Defendants and Merck and involve many of the same legal issues. Consolidation of the appeals, in whole or in part, will ensure that the Court addresses all of the issues presented by all of the parties at one time and does not reach inconsistent results.

A memorandum in support of this Motion is attached hereto for the Court's reference. A similar motion for consolidation also has been filed in each of the other appeals.

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MEMORANDUM

The above-referenced appeals all arise from a final judgment entry, dated September 5, 2006, that was entered by the Honorable David P. Davis of the Hamilton County Court of Common Pleas in the civil action, *Board of State Teacher Retirement System of Ohio v. Medco Health Solutions, et al.*, Hamilton County Court of Common Pleas No. A0309929.¹ The final judgment entry of September 5, 2006, was issued by Judge Davis following the filing of several post-trial motions and a six-week jury trial held in December 2005. On its face, the trial court's judgment entry of September 5, 2006, is a final, appealable order because it resolved all of the parties' claims and all of the pending post-trial motions, including the question of whether to grant a new trial on the two claims where the jury failed to reach a verdict (the "Hung Jury Claims"). In his final judgment entry, Judge Davis concluded that the plaintiff had waived the right to another trial on the two Hung Jury Claims because it failed to file a timely post-trial motion within fourteen (14) days of the discharge of the jury, as required by Civ. R. 50(B) and Civ. R. 6(B). *Id.* This ruling, however, was only one part of the final judgment entry, which resolved and entered final judgment on all claims in the case. *Id.*

Notwithstanding the completeness and finality of the trial court's order and final judgment entry, the First District Court of Appeals has refused to hear the merits of the three (3) appeals (Hamilton App. No. C-60759, App. No. C-60786, and App. No. C-60787) that were filed by Plaintiff Board of the State Teachers Retirement Association ("STRS"), Merck & Co., Inc. ("Merck"), and Medco Health Solutions, Inc. and the other Medco Defendants (together referred to as "Medco") from the trial court's final judgment entry. On October 12, 2006, the Court of

¹ A copy of the trial court's final judgment entry, dated September 5, 2006, is attached hereto as Exhibit "A." A copy of the six (6) orders that are the subject of the Supreme Court appeals and that were entered by the Court of Appeals on October 12, 2006, are attached as Exhibit "B".

Appeals issued three (3) orders that dismissed the appeals for lack of a final, appealable order. A copy of the orders is attached hereto as Exhibit B. Moreover, on October 12, 2006, the Court of Appeals took the extraordinary step of granting a writ of procedendo in an original action filed by STRS (App. No. C-60760) to compel a new trial on the Hung Jury Claims. *Id.* By so doing, the Court of Appeals effectively sustained only one assignment of error relating to only one portion of the trial court's final judgment entry (*i.e.*, the ruling of a waiver of a new trial on the Hung Jury Claims). Under App. R. 12, however, it was the Court of Appeals' mandatory duty to review the *entire* judgment entry and hear and decide *all* of the assignments of error that may be briefed by the parties in the appeals. Thus, Medco and Merck have filed notices of appeals from the Court of Appeals' dismissal orders and from the Court of Appeals' writ of procedendo with this Court.

Because the Court of Appeals issued six (6) separate judgment entries with respect to this matter, there are now six (6) appeals that have been filed with this Court. The proceedings in the Ohio Supreme Court were initiated on October 25, 2006, when Judge Davis filed a notice of appeal from the Court of Appeals' entry of October 12, 2006, granting the writ of procedendo. (*See State of Ohio ex rel. Board of the State Teachers Retirement System of Ohio v. Hon. David P. Davis, Judge*, Case No. 06-2006). This first appeal was designated as an appeal of right under S. Ct. R. II because it was taken from a case that originated in the Court of Appeals and invoked the appellate jurisdiction of the Ohio Supreme Court. Meanwhile, on November 27, 2006, Medco and Merck filed their own timely notice of appeal from the writ of procedendo in Case No. 06-2006, along with two (2) separate notices of appeal from the Court of Appeals' orders, dated October 12, 2006, denying motions to intervene that were filed by Medco and Merck, as a protective measure, to ensure that they could be heard on the merits of the petition in the original action. (*See Supreme*

Court Case Nos. 06-2172, 06-2173). All of these appeals were designated as appeals of right because they also were taken from an action originating in the Court of Appeals. *Id.*

Finally, on November 27, 2006, Medco and Merck also filed notices of appeal from the three (3) judgment entries, dated October 12, 2006, that dismissed the three appeals (Nos. C-060759, C-060786, and C-060787) that were taken from the trial court's final judgment entry. (*See Board of the State Teachers Retirement System of Ohio v. Medco Health Solutions, Inc.*, Case No. 06-2169, 06-2170, and 06-2171). This second set of Supreme Court appeals are discretionary under S.Ct. R. II, but they are directly related to the appeals taken from the orders issued in the original action, because they all challenge whether the Court of Appeals should have been required to hear the merits of the entire judgment entry issued on September 5, 2006, rather than reversing only one portion of the order (i.e. the trial court's waiver ruling) via an extraordinary writ of procedendo. Accordingly, Merck and Medco are hereby moving to consolidate all six of the appeals at this time.

DISCUSSION

A. The Court Should Consolidate The Appeals Taken From The Orders Issued In The Original Action (Nos. 06-2006, 06-2172, and 06-2173) With The Appeals Taken From The Court of Appeals' Dismissal Orders (Nos. 06-2169, 06-2170, and 06-2171).

This Court has the inherent authority to control its own docket and to consolidate related appeals, in whole or in part, to ensure that proper, efficient and fair administration of justice. In general, this Court has consolidated related appeals where, as here, they arise from the same subject matter or the same underlying civil action. *See, e.g. State of Ohio v. Hutton* (2003), 100 Ohio St.3d 176, 181, 2003-Ohio-5607 (consolidating two appeals, No. 2000-0816 and 2000-1540 arising from the same underlying criminal action), *State ex rel. R.T.G., Inc. v. State of Ohio* (2002), 98 Ohio St.3d 1, 5, 2002-Ohio-6716, ¶ 25 (consolidating appeals in Case No. 2001-0748 and 2001-0976

arising from the same underlying action). Moreover, it has consolidated appeals if they involve common issues of law or fact. By so doing, the Supreme Court can provide for the fair, complete, and efficient administration of justice by ensuring that it hears from all parties on the related issues at the same time and renders consistent rulings with respect to common questions of law or fact.

In this case, the six (6) appeals taken from the Court of Appeals' six (6) journal entries, dated October 12, 2006, should be consolidated because they involve the same underlying case and the same underlying subject matter. Although the first set of appeals arise from a petition that originated in the court of appeals, this original action was filed in order to challenge a portion of the trial court's final judgment entry of September 5, 2006, relating to the waiver of a new trial. Thus, the original action was decided on the same day by the same panel of the Court of Appeals as the three (3) appeals that were filed from the trial court's final judgment entry. The outcome of the first set of appeals, therefore, will have a direct and immediate effect on the second set of appeals, and vice versa. Moreover, both sets of appeals will have a direct and immediate effect on the same underlying action and whether an appeal of the September 5th judgment entry should have taken place at this time, instead of a writ of procedendo or a new trial. All six (6) of the appeals therefore should be consolidated because they will have a direct and immediate impact on the same underlying action and should be decided together in a unified and consistent manner.

Consolidation also should occur because the appeals involve common issues of law. Here, one of the common legal questions presented by both sets of appeals is whether the Court of Appeals erred in concluding that the Trial Court's Final Judgment Entry of September 5, 2006, was not a final, appealable order under R.C. 2505.02. If, as Medco and Merck contend, the Trial Court's order of September 5, 2006, is a final and appealable order, then it is clear that the Court of Appeals erred in dismissing the three appeals that were filed in App. No. 60759, 60786, and 60787.

Moreover, it means that the Court of Appeals erred in issuing a writ of procedendo, which cannot be granted “where an adequate remedy in the ordinary course of law is available.” *State ex rel. CNG Financial Corp. v. Nadel* (2006), 111 Ohio St.3d 149, 151, 2006-Ohio-5344; *see also State ex rel. Miley v. Parrot, Judge* (1996), 77 Ohio St.3d 64, 65 (“In order to be entitled to a writ of procedendo, a relator must establish a clear legal right to require the court to proceed, a clear legal duty on the part of the court to proceed, and the lack of an adequate remedy in the ordinary course of law”); *State ex rel. Lewis v. Moser, Judge* (1995), 72 Ohio St.3d 25, 27 (“extraordinary relief is not to be used as a substitute for appeal”).

Because the two sets of appeals are so directly inter-related and so inter-dependent with each other, consolidation would ensure that any ruling that may be entered in the appeals of right will not be inconsistent with any ruling that may be entered in the discretionary appeals *or* with allowing the underlying dismissal orders to stand. If, for example, the Supreme Court concludes that the Court of Appeals erred in issuing a writ of procedendo, then it should vacate the Court of Appeals’ dismissal orders because it would be inconsistent with such a ruling to allow the three (3) dismissal orders to stand. By accepting jurisdiction of the discretionary appeals, therefore, and consolidating such appeals with the appeals taken from the petition that originated in the Court of Appeals, the Supreme Court can ensure that it enters a definitive ruling that brings fair, complete and consistent resolution to the disputed legal issues in this case.

The fact that the Court orders consolidation of related appeals does not mean that they must necessarily be consolidated for briefing. Although the Court may elect to establish a consolidated briefing schedule in this case, it is not required. In this case, it may be acceptable to allow the briefing to occur in the first set of appeals before any briefing occurs in the second set of appeals. As the appeals in Case Nos. 06-2006, 06-2172, 06-2173, were filed as a matter of right, the record

already has been transmitted to the Supreme Court and, unless the briefing schedule is extended or modified by this Court, Medco's merits briefs will now be due on or before December 19, 2006, which is 45 days after the filing of the original record. Judge Davis has already filed his merits brief in Case No. 06-2006. Thus, absent an order to delay briefing in the first set of appeals or to expedite briefing in the second set of appeals, all of the merits briefs in Case Nos. 06-2006, 06-2172, and 06-2173, will likely be filed before the merits briefs are filed in Case Nos. 06-2169, 06-2170, and 06-2171. Nevertheless, it still makes sense to consolidate the six (6) appeals, so that the entire matter may be heard and decided at one time and in a consistent manner.

B. In The Alternative, The Court Should Consolidate Supreme Court Case Nos. 06-2006, 06-2172, and 06-2173, Which Are The Appeals Of Right Taken From The Action Originating In The Court of Appeals.

To the extent that the Court is not inclined to consolidate the first set of appeals with the second set of appeals, it should, at a minimum, consolidate the three (3) appeals of right (No. 06-2006, 06-2172, and 06-2173), which were taken from the same action (App. No. 060760) that originated in the Court of Appeals. Although Judge Davis has already filed his merits brief in Case No. 06-2006, it would be more efficient and expeditious to allow Medco and Merck to file one, consolidated merits brief with respect to the three (3) related appeals at the same time. The issues all relate to the same underlying petition for writ of procedendo and should be briefed, heard and decided at the same time. Accordingly, the Court should, at a minimum, order the immediate consolidation of Case Nos. 06-2006, 06-2172, and 06-2173.

C. The Court Should Also, At A Minimum, Consolidate Supreme Court Case Nos. 06-2169, 06-2170, and 06-2171, Which Are The Discretionary Appeals Taken From The Three Dismissal Orders.

Finally, the Court also should, at a minimum, order an immediate consolidation of the appeals taken from the Court's three dismissal orders (Case Nos. 06-2169, 06-2170, and 06-2171).

The appeals were filed on the same day (November 27, 2006) and are supported by the same combined memorandum in support of jurisdiction. *Id.* All three (3) appeals in fact involve the same legal issue: whether the trial court's final judgment entry of September 5, 2006, is a final, appealable order under Ohio law. It would clearly be more efficient and proper, therefore, to consolidate the three (3) appeals for purpose of any further briefing and oral argument in the case. Accordingly, the Court should, at minimum, order the consolidation of Case Nos. 06-2169, 06-2170 and 06-2171, forthwith.

CONCLUSION

For these reasons, the Court should order the consolidation, in whole or in part, of the appeals filed in Supreme Court Case Nos. 06-2006, 06-2169, 06-2170, 06-2171, 06-2172, 06-2173.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2006, a true and correct copy of the foregoing **MOTION FOR CONSOLIDATION OF APPEALS** was served upon the below-listed counsel of record via first-class U.S. mail, postage prepaid, at the following addresses:

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Ronald S. Kopp

*Attorneys for Respondent-Appellant
Hon. David P. Davis, Judge*

ENTERED
SEP 05 2006

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**



**BOARD OF THE STATE
TEACHERS RETIREMENT
SYSTEM OF OHIO,**

: **CASE NO.: A0309929**

: **(Judge David Davis)**

Plaintiff,

:

-vs-

: **ORDER AND FINAL JUDGMENT ENTRY**

**MEDCO HEALTH SOLUTIONS,
INC., et al.,**

:

:

Defendants.

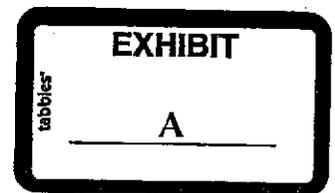
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This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiff, Board of the State Teachers Retirement System of Ohio, recover of the Defendants, Medco Health Solutions, Inc., Merck-Medco Managed Care, L.L.C., Paid Prescriptions, L.L.C., Medco Health Solutions of Columbus, North, Ltd., Medco Health Solutions of Columbus West, Ltd., Medco Health Solutions of Fairfield, L.L.C., Merck-Medco Rx Services of Florida No. 2, L.C., Merck-Medco Rx Services of Florida, L.C., Medco Health Services of Las Vegas, Inc. and Medco Health Solutions of Texas L.L.C. (collectively "Medco") and Merck & Company, Inc., jointly and severally, the sum of \$7,815,000, and the costs of this action.

Plaintiff's Motion to Submit Supplement Argument for Consideration by the Court and Argument is hereby **DENIED**.

Plaintiff's Motion for a New Trial or, in the Alternative for Relief from Judgment and a New Trial, on the Hung Jury Issues is hereby **DENIED**. The Court holds that Plaintiff has



waived its right to a new trial for failure to file a timely motion pursuant to Ohio Rules of Civil Procedure 50(B) and 6(B).

Plaintiff's Motion for Judgment Notwithstanding the Verdict Pursuant to Rule 50(B) and Motion for a New Trial Pursuant to Rule 59 is hereby **DENIED**.

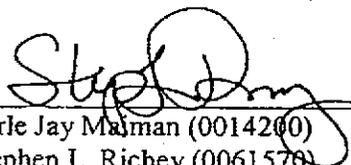
Medco's Motion to Journalize the Court's Ruling on Rule 50(B) Waiver and to Amend its Final Judgment Entry Proposed Order and Entry Attached, in which Merck & Co., Inc. has joined, is hereby **GRANTED**.

SO ORDERED.



Judge David Davis 9-5-09

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On Behalf of All Defendants

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO EX REL. BOARD
OF THE STATE TEACHERS
RETIREMENT SYSTEM OF OHIO

CASE NO. C-060760

Relator,

vs.

ENTRY OVERRULING MOTION TO
DISMISS PETITION AND GRANTING
PEREMPTORY WRIT OF PROCEDENDO

JUDGE DAVID P. DAVIS, Court of
Common Pleas, Hamilton County, Ohio

Respondent.

This cause came on to be considered upon the motion of the respondent to dismiss the petition and upon the response thereto. This cause also came on for consideration of the petition for extraordinary relief and the motion for a peremptory writ or alternative writ of procedendo or mandamus.

The Court, upon consideration of the motion to dismiss, finds that it is not well taken and is overruled.

The Court further finds that the motion for a peremptory writ of procedendo is well taken and is granted. The trial court shall proceed with retrial of those claims or causes of action upon which the jury could not reach a verdict.

To The Clerk:

Enter upon the Journal of the Court on OCT 12 2006 per order of the Court.

By: 

Presiding Judge

(Copies sent to all counsel)

EXHIBIT

B

tabbles

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BOARD OF THE STATE TEACHERS
RETIREMENT SYSTEM OF OHIO

APPEAL NO. C-060787

TRIAL NO. A-0309929

Appellee,

vs.

ENTRY OF DISMISSAL

MEDCO HEALTH SOLUTIONS,
INC., et al.

Appellants,

MERCK & CO., INC.,

Appellee.

This cause came on to be considered by the Court sua sponte upon the appeal filed herein.

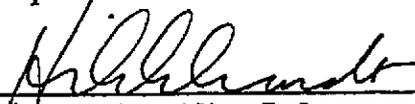
The Court finds that the appeal is not taken from a final appealable order.

WHEREFORE, it is ordered and decreed that the appeal is dismissed.

It is further ordered that a certified copy of this judgment shall constitute the mandate to the trial court pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To The Clerk:

Enter upon the Journal of the Court on OCT 12 2006 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BOARD OF THE STATE TEACHERS
RETIREMENT SYSTEM OF OHIO

APPEAL NO. C-060786

TRIAL NO. A-0309929

Appellee,

vs.

ENTRY OF DISMISSAL

MEDCO HEALTH SOLUTIONS,
INC., et al.

Appellees,

MERCK & CO., INC.,

Appellants.

This cause came on to be considered by the Court sua sponte upon the appeal filed herein.

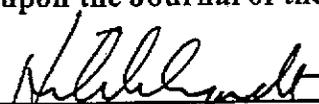
The Court finds that the appeal is not taken from a final appealable order.

WHEREFORE, it is ordered and decreed that the appeal is dismissed.

It is further ordered that a certified copy of this judgment shall constitute the mandate to the trial court pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To The Clerk:

Enter upon the Journal of the Court on OCT 12 2006 per order of the Court.

By: 

Presiding Judge

(Copies sent to all counsel)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BOARD OF THE STATE TEACHERS
RETIREMENT SYSTEM OF OHIO

APPEAL NO. C-060759

TRIAL NO. A-0309929

Appellant,

vs.

ENTRY OF DISMISSAL

MEDCO HEALTH SOLUTIONS,
INC., et al.

Appellees.

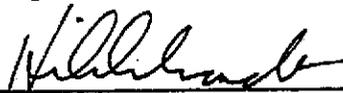
This cause came on to be considered by the Court upon the motion of the appellant filed herein for an order of this Court dismissing the appeal.

The Court, upon consideration thereof, finds that said motion is well taken and is granted. WHEREFORE, it is ordered and decreed that the appeal is dismissed.

It is further ordered that a certified copy of this judgment shall constitute the mandate to the trial court pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To The Clerk:

Enter upon the Journal of the Court on OCT 12 2006 per order of the Court.

By: 

Presiding Judge

(Copies sent to all counsel)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO EX REL. BOARD
OF THE STATE TEACHERS
RETIREMENT SYSTEM OF OHIO

CASE NO. C-060760

Relator,

vs.

ENTRY OVERRULING MOTION TO
INTERVENE BY MERCK & CO., INC.

JUDGE DAVID P. DAVIS, Court of
Common Pleas, Hamilton County, Ohio

Respondent.

This cause came on to be considered upon the motion of the Merck & Co., Inc. to intervene in this cause and for leave to file a motion to dismiss the petition for extraordinary relief.

The Court, upon consideration of the motion to intervene, finds that it is not well taken and is overruled.

To The Clerk:

Enter upon the Journal of the Court on OCT 12 2006 per order of the Court.

By: _____



Presiding Judge

(Copies sent to all counsel)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO EX REL. BOARD
OF THE STATE TEACHERS
RETIREMENT SYSTEM OF OHIO

CASE NO. C-060760

Relator,

vs.

ENTRY OVERRULING MOTION TO
INTERVENE BY MEDCO DEFENDANTS

JUDGE DAVID P. DAVIS, Court of
Common Pleas, Hamilton County, Ohio

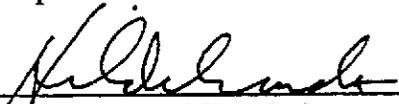
Respondent.

This cause came on to be considered upon the motion of the Medco defendants to intervene in this cause and for leave to file a motion to dismiss the petition for extraordinary relief.

The Court, upon consideration of the motion to intervene, finds that it is not well taken and is overruled.

To The Clerk:

Enter upon the Journal of the Court on OCT 12 2006 per order of the Court.

By: 

Presiding Judge

(Copies sent to all counsel)