

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)

Respondent-Appellant)

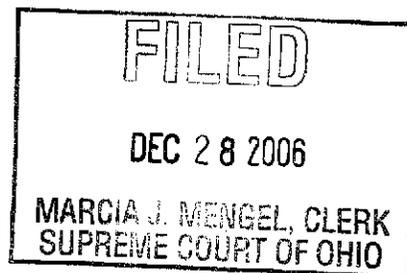
MEDCO HEALTH SOLUTIONS INC.,)
ET AL.,)

Defendants-Appellants)

CASE NO. 06-2006, 06-2172, 06-2173

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

Court of Appeals
Case No. C-060760



MERITS BRIEF OF DEFENDANTS-APPELLANTS

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STATEMENT OF FACTS

A. Factual Background

These consolidated appeals involve the question of whether the Court of Appeals erred in issuing a Preemptory Writ of Procedendo to control trial court procedure and to overrule a portion of a final judgment entry that was entered by the trial judge, the Honorable David P. Davis, on September 5, 2006. The underlying civil action was filed in 2003 by Plaintiff Board of the State Teachers Retirement System (“STRS”) against Medco Health Solutions, Inc., and other related Medco companies (together referred to as “Medco” or the “Medco Defendants”), along with Medco’s parent company, Merck & Co., Inc (“Merck”). *See Board of State Teachers Retirement System v. Medco Health Solutions, Inc.*, Hamilton County Court of Common Pleas Case No. A-0309929.

Medco is a pharmaceutical benefit management company (“PBM”). As the name indicates, PBMs manage the pharmacy benefit portion of the health care coverage provided by public and private employers, retirement systems, unions, and managed care organizations. PBMs operate mail order pharmacies and contract with networks of retail pharmacies to dispense the drugs that they purchase from pharmaceutical manufacturers. PBMs also create formularies, or lists of preferred drugs, that clients may elect to adopt for their members. By utilizing the buying power of all its clients, PBMs are able to achieve pricing concessions from manufacturers in the form of rebates and discounts. Depending on the pricing terms of any given contract with a client, these savings can be passed on by sharing some or all of the rebates or lowering the prices charged for drugs or other fees. The pricing concessions, however, are also a profit source for PBMs. Thus, the nature and types of rebates and discounts that will be shared with the clients is a matter set forth in the written agreements entered into between the PBM and its client.

One of the largest PBMs in the United States, Medco enjoys healthy contractual relationships with some of the most sophisticated purchasers of healthcare in the United States — one-third of the Fortune 500 companies, many large unions, and many large retirement plans, including STRS. Medco’s relationship with the State of Ohio began in 1981 and continues through today with four separate state retirement plans: SERS, PERS, Police & Fire, and Highway Patrol. STRS was a client until 2001, and the instant case involves Medco’s compliance with the pricing terms of three written contracts that governed their contractual relationship from 1993 through 2001. With respect to all three contracts, STRS negotiated with the benefit of PBM industry experts and well-respected legal counsel. Indeed, STRS notably did not allege that Medco fraudulently induced STRS to enter into any of the agreements in question. Rather, they are seeking to recover the alleged benefit of the agreements by suggesting that Medco should have provided STRS with more financial advantages than were actually provided. In particular, STRS alleged, among other claims, the three (3) primary claims for damages in the Complaint:

- (1) Breach of Contract Claim #1: that Medco received and retained certain “market share” rebates from drug manufacturers that STRS alleges should have been paid to the client under the terms of the contract;
- (2) Breach of Contract #2: that Medco charged a \$8.30 dispensing fee that was not authorized by the contract; and
- (3) Breach of Fiduciary Duty/Constructive Fraud: that Medco breach an alleged fiduciary duty by allegedly marking up the price of generic drugs at mail order.

Plaintiff also alleged an alter ego claim against Merck, which is the parent company of the Medco Defendants.¹

¹ Plaintiff alleged other claims against the Defendants, such as tortious interference with contract, but they were either dismissed or decided in Defendant’s favor at trial.

In the trial court proceedings below, the Medco Defendants and Merck argued that they were entitled to prevail on Plaintiff's claims as a matter of law because they were not supported by the plain language of the written agreements with STRS. In general, the interpretation of written contracts presents a question of law for the Court. Indeed, under Ohio law, a claim for breach of fiduciary duty ordinarily does not arise as a matter of law where, as here, there is written agreement that controls the terms and conditions of the business relationship. *See Blon v. Bank One* (1988), 35 Ohio St.3d 98, 101. There is a threshold legal question, therefore, about whether the Medco Defendants are a "fiduciary" under Ohio law and whether they can be held liable for breach of fiduciary duty and/or constructive fraud as a matter of law.

B. The Trial Court's First Judgment Entry, Dated February 22, 2006.

On December 19, 2005, following a four-week trial, a Hamilton County jury returned a verdict in favor of Defendants on Plaintiff's Breach of Contract claim #2, but in favor of STRS on Plaintiff's claims for breach of fiduciary duty and constructive fraud, awarding a combined total of \$7,815,000 in compensatory damages on the two claims. (*See* Supplement to Briefs ("Supp."), pp. 5, 14-34).² The jury announced, however, that it was deadlocked on Plaintiff's breach of contract claim #1 regarding rebates and on Plaintiff's claim for punitive damages (the "Hung Jury Issues"). *Id.* The jury was then discharged by the trial court judge. (Supp. pg. 48).

On January 3, 2006, Medco and Merck submitted a timely motion for judgment notwithstanding the verdict on the two Hung Jury Issues under Civ. R. 50(B). (Supp. pp. 65-70).

² The Supplement to the Briefs was filed by Judge Davis in Case No. 06-2006 on November 17, 2006. The Supplement contains all of the orders, pleadings and exhibits that are relevant to the three appeals that have been consolidated by the Ohio Supreme Court (06-2006, 06-2172 and 06-2173). Accordingly, a second supplement is not necessary and has not been filed by Medco and Merck in any of the appeals.

As set forth therein, Civ. R. 50(B) established a 14-day deadline for any party who moves for judgment notwithstanding the verdict *or* for a new trial with respect to any claims upon which “a verdict was not returned.” *Id.* STRS did not file any motion within 14 days of the discharge of the jury, as required by Civ. R. 50(B). Rather, on January 19, 2006, over two weeks after the 14-day deadline had expired, STRS submitted proposed judgment entries that included a request that the trial court schedule a new trial on the Hung Jury Issues for the first time. (Supp. pp. 53-64). Medco and Merck promptly objected to this request for a new trial under Civ. R. 50(B) and Civ. R. 6(B), arguing that any request for a new trial must have been filed within fourteen (14) days of the discharge of the jury and therefore had been waived as a matter of law. (Supp. 73-76, 90-92, 101, 299-309).

During a hearing scheduled to address the pending motions, the trial court orally advised the parties on the record that he agreed with Medco’s legal position that STRS had waived the right to a new trial on the Hung Jury Issues under Civ. R. 50(B). (Supp. 104). The trial court did not directly address the waiver issue, however, in his final judgment entry, dated February 22, 2006, which only stated that a final judgment had been entered in the amount of \$7,815,000, and certified that there was no just reason for delay under Civ. R. 54(B). (Supp. 106). On March 2, 2006, Medco filed a notice of appeal from the final judgment entry to the First District Court of Appeals. (Supp. 111-113). After STRS moved to dismiss the appeal for lack of a final, appealable order (Supp. 310-313), the Court of Appeals granted the motion, issuing an entry of dismissal, dated April 6, 2006, that found that Medco’s notice of appeal was “not taken from a final appealable order.” (Supp. 128).

Medco and Merck then filed timely notices of appeal from this dismissal order with the Ohio Supreme Court. (*See Board of the State Teachers Retirement System of Ohio*, Supreme Court

Case No. 06-0997, Case No. 06-1002). During the pendency of the Supreme Court appeal, however, Medco filed a motion in the Court of Common Pleas that requested that the trial court issue a new final judgment entry that removed the Rule 54(b) language, entered judgment on all claims, including the Hung Jury Issues, and decided the three pending post-trial motions filed by STRS for a judgment notwithstanding the verdict or, in the alternative, for a new trial on the Hung Jury issues. (Supp. 346-356). Following another hearing in which the trial court indicated that it would issue a new judgment entry, Medco and Merck then filed applications to voluntarily dismiss the Supreme Court appeals on August 21, 2006. (See Case No. 06-1002, dated August 21, 2006.) Two days later, on August 23, 2006, this Court issued its own journal entry, which did not take note of the voluntary withdrawal and which dismissed the appeal “as not involving any substantial constitutional question.” (Case No. 06-1002, Entry, dated 8/23/2006).

C. The Trial Court’s Final Judgment Entry of September 5, 2006

On September 5, 2006, the trial court entered an order and amended final judgment entry that again entered a final judgment in Plaintiff’s favor in the amount of \$7,185,000:

“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 SO ORDERED AND ADJUDGED that Plaintiff, Board of the State Teacher 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.”

(Supp. 136). Moreover, as requested, the final judgment entry removed the certifying language of Civ. R. 54(b) and resolved all of the remaining motions and claims (including the two Hung Jury Issues) by denying Plaintiff’s Motion for a New Trial on the Hung Jury Issues and by denying

Plaintiff's Motion for Judgment Notwithstanding The Verdict and for New Trial with respect to the claims that had been decided by the jury in Defendants' favor:

“Plaintiff's Motion for a New Trial or, in the Alternative 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 New Trial Pursuant to Rule 59 is hereby **DENIED**.”

(See Order and Final Judgment Entry, dated September 5, 2006) (Appendix A); (Supp. 136-137).

Notwithstanding the completeness and finality of the September 5th final judgment entry, the First District Court of Appeals again refused to hear any of the appeals on the merits. Three notices of appeal were filed by STRS (C-0060759), Medco (C-060787), and Merck (C-060786) from the trial court's final judgment entry, dated September 5, 2006. STRS characterized their notice of appeal, however, as a “protective” notice of appeal and, on September 8, 2006, filed a motion to dismiss the appeal, along with a “petition for extraordinary relief” that sought to overrule the trial court's “waiver” ruling and compel a new trial on the Hung Jury Issues without deciding any of Medco's potential assignments of error. (Supp. 245). The petition for extraordinary relief was filed on September 8, 2006, as an original action against the trial court judge, the Honorable David P. Davis, as Respondent, and against Medco and Merck, as Defendants. (Supp. 2). Judge Davis, Medco, and Merck then filed motions to dismiss the petition on September 26, 2006, and September 28, 2006, respectively. (Supp. 265-271, 281-383). Although they were named as “Defendants” in the original petition, both Medco and Merck also filed motions to intervene as a protective measure to ensure that they could be fully heard on the merits of the petition. (Supp. 272-280). STRS opposed the motions to dismiss, but did not oppose the motions to intervene. (Supp. 384-398).

On October 12, 2006, the Court of Appeals issued six (6) separate judgment entries that granted STRS's petition for extraordinary relief and dismissed all pending appeals:

- (1) Entry Overruling Motion to Dismiss Petition and Granting Preemptory Writ of Procedendo (No. C-060760);
- (2) Entry Overruling Motion to Intervene by Medco (No. C-060760);
- (3) Entry Overruling Motion to Intervene by Merck & Co., Inc. (No. C-060760);
- (4) Entry of Dismissal (Appeal No. C-060759)
- (5) Entry of Dismissal (Appeal No. C-060786)
- (6) Entry of Dismissal (Appeal No. C-060787)

(Supp. 399-401). A copy of the six (6) orders are included as Appendix B to this Brief.

On October 25, 2006, Judge Davis filed a notice of appeal from the entry granting the preemptory writ. (Supp. 402). Medco and Merck have filed their own timely notices of appeal from the preemptory writ in Supreme Court Case No. 2006-2006, along with timely notices of appeal from the denials of the motions to intervene in Case Nos. 06-2172 and 06-2713. Moreover, both Medco and Merck have filed notices of appeal from the three judgment entries that dismissed Appeals Nos. C-060759, C-060786, and C-060787. (*See Board of State Teachers Retirement System v. Medco Health Solutions, et al.*, Case Nos. 06-2169, 06-2170, and 06-2171). The first set of appeals are appeals of right, and the second set of appeals are discretionary. On December 19, 2006, this Court issued an Order consolidating the appeals in Nos. 06-2006, 06-2172, and 06-2173, and directing that the "parties shall combine the briefing of Case Nos. 06-2006, 06-2172, and 06-2173, and file one brief for each permitted under S. Ct. Prac. R. VI." (*See Entry*, dated December 19, 2006). Moreover, in a separate entry dated December 19, 2006, the Court consolidated the discretionary appeals filed in Case Nos. 06-2169, 06-2170, and 06-2171, and, *sua sponte*, ordered that they should be held in abeyance pending the outcome of the instant appeals.

LAW AND ARGUMENT

I. Proposition of Law #1: A Writ of Procedendo Should Not Be Used To Control The Procedure Of An Inferior Court Or To Overturn The Trial Court's Substantive Ruling On A Disputed Legal Issue.

As previously discussed, it is undisputed that the Court of Appeals issued a writ of procedendo in this case because it disagreed with the trial court's substantive ruling that STRS had "waived" the right to another trial on the Hung Jury Issues under Civ. R. 6(B) and Civ. R. 50(B). While Medco and Merck strongly believe that the trial court did not err in determining that a waiver had occurred under Civ. R. 50(B) and Civ. R. 6(B),³ the legal question before this Court is not whether the Court of Appeals was correct in determining that the trial court erred in concluding that the right to a second trial had been waived. Rather, the question is whether the Court of Appeals erred in using the extraordinary writ of procedendo to reverse the trial court's holding on this procedural issue and thereby sustain STRS's assignment of error through an extraordinary writ, rather than through the normal process of appellate review.

It is well-established that a "[p]rocedendo is a high prerogative writ of an extraordinary nature" that "does not lie where * * * there is no clear legal right to such relief." *State ex rel. Ratliff v. Marshall* (1972), 30 Ohio St.2d 101, 102. As this Court has repeatedly emphasized, a "writ of procedendo is merely an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. It does not in any case attempt to control the inferior court as to what that judgment should be." *State ex rel. Utey v. Abruzzo* (1985), 17 Ohio St.3d 203, *Id.* at 204. Thus, "[i]t is well-settled that the writ of procedendo will not issue for the purpose of

³ In any case where "a verdict was not returned" on any issue, Civ. R. 50(B) provides that any post-judgment motion for judgment notwithstanding the verdict or for a new trial must be filed within fourteen (14) days "after the jury was discharged." Under Civ. R. 6(B), this 14-day deadline may not be extended by the trial court.

controlling or interfering with ordinary court procedure.” *Id.* Moreover, it cannot be used to request “immediate review” of an alleged procedural error nor “control how the inferior court rules” on a procedural issue. *See State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St.3d 104, 106, 110, 1994-Ohio-385 (following *Utley* to hold that a writ of procedendo should not seek a “superior court’s review of procedure” in the trial court and should never attempt “to control how the inferior court rules” on a procedural issue).

In this regard, the recent appellate decision in *State of Ohio ex rel. Safety National Casualty Corp. v. Cook*, 2006-Ohio-3066, ¶ 13-17, 2006 WL 1667712, *2 (Ohio App. 6 Dist. June 12, 2006), provides a good example of how these principles should be applied in this case. In that case, the Relator sought a writ of procedendo to compel the trial court to enforce an arbitration clause, arguing that it had an “absolute” right to arbitration. *Id.*, 2006-Ohio-3066, ¶ 13. The trial court ruled, however, that “Relator had waived its right to arbitrate” and denied the motion. *Id.* Relator then sought judicial review of this decision via a writ of procedendo, but the Court of Appeals refused to grant this extraordinary relief. In denying the petition, the court purposefully refused to address the merits of the Relator’s argument that the right to arbitrate had not been waived. *Id.* This issue is “not germane,” the court of appeals reasoned, because “the writ is not intended to instruct the lower court as to what its judgment should be.” *Id.* at ¶ 10, 13. The trial judge had “not refused to rule” on the arbitration request; the court explained, so a writ of procedendo would not issue. *Id.* at ¶ 13. Any error that may have been committed in ruling on the arbitration issue, the court held, must be reviewed by appeal, not by a writ of procedendo. *Id.*

Here, the same principles equally apply. As in the above-referenced case law, the Court of Appeals wrongfully used a writ of procedendo in order to review the merits of the trial court’s

ruling on the procedural issue of whether STRS waived the right to another trial. This is clearly improper. Judge Davis did not refuse to rule on the Hung Jury Issues. Rather, he directly addressed and conclusively resolved the Hung Jury Issues by finding that STRS had waived any right to another trial as a matter of law. While the Court of Appeals may disagree with this legal ruling, it cannot use a writ of procedendo to review an alleged procedural error nor control how the trial court resolves this legal issue on the merits. The trial court determined that the Plaintiff had waived the right to another trial and any error that may have been committed can only be overturned through a direct appeal, not a writ of procedendo. Accordingly, the Court should reverse the writ of procedendo that was wrongly issued in this case.

II. Proposition of Law #2: An Extraordinary Writ of Procedendo Should Not Be Granted If An Adequate Remedy Is Available Through The Normal Appellate Process.

It is well-established that an extraordinary writ should not 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 (denying writs of prohibition and procedendo directed at judge in common pleas court); *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 to 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”). In this regard, this Court has held that “the availability of an appeal as of right” and the “availability of an appeal by leave of court” constitute “an adequate remedy and will prevent the issuance of extraordinary relief.” *State ex rel. LTV Steel Co. v. Gwin* (1992), 64 Ohio St.3d 245, 248. Thus, the Court has refused to issue of writ of mandamus or procedendo if an adequate remedy exists by way of an appeal. *State ex rel. Reynolds v. Bassinger, Judge* (2003), 99 Ohio St.3d 303, 2003-Ohio-3631, ¶ 8; *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”).

In this case, STRS clearly was using a petition for a writ of procedendo as a substitute for a direct appeal. STRS was asking the Court of Appeals to conduct immediate appellate review of whether the trial court erred in finding that it waived the right to another trial on the Hung Jury Issues. The Court of Appeals only can review the merits of this procedural issue, however, via a direct appeal, not an extraordinary writ. This distinction between a direct appeal and an extraordinary writ matters because it directly impacts how any appeal might be resolved in this case. In any direct appeal, the Court of Appeals would not only be deciding STRS’s assignment of error, it would also be deciding *Merck’s* and *Medco’s* assignments of error, which may render STRS’s assignments of error moot if the Court of Appeals determined that Medco and Merck were entitled to judgment as a matter of law. Accordingly, for this additional reason, the Court of Appeals clearly erred in issuing a writ of procedendo in this case.

In proceedings below, STRS argued that an appeal was not an adequate remedy because the trial court’s order of September 5, 2006, was not final and appealable. This is not true. The trial court’s order is final and appealable because it resolved all of the pending claims and motions, including the Hung Jury Issues. As this Court has held, an order is final and appealable under R.C. 2505.02 if it disposes of all claims and “leaves nothing” for future determination by the trial court. *State ex rel. Downs v. Panioto* (2006), 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911; *Hamilton Cty. Bd. Of Mental Retardation v. Professional Guild of Ohio* (1989), 46 Ohio St.3d 147, 154. As one appellate court recently explained, “the primary function of a final order, for purposes of appeal, is the termination of a case or controversy that the parties have submitted to the trial court for resolution.” *Burns v. Morgan* (2006), 165 Ohio App.3d 694, 2006-Ohio-1213. Here, the trial

court's Final Judgment Entry, dated September 5, 2006, terminated the case by resolving all pending motions and claims, including the Hung Jury Issues. While STRS believes that the trial court should have granted a new trial of the Hung Jury Issues before entering final judgment, the undisputed fact is that the trial court rejected this contention and entered a final judgment that resolved the Hung Jury Issues and left nothing for further determination. Thus, while STRS has the right to appeal this "waiver" ruling on the merits, it cannot seek "immediate review" of this issue via a writ of procedendo.

In proceedings below, STRS also argued that the September 5th judgment entry was not "final" because it did not expressly enter judgment in Defendant's favor on the Hung Jury Issues, but only denied STRS's motion for a new trial. This argument is based upon a distinction without a difference.⁴ R.C. 2505.02(B)(1) provides that an "order is a final order that may be reviewed, affirmed, modified, or reversed, *with or without retrial*" if, *inter alia*, it is an "order that affects a substantial right in an action that *in effect* determines the action and prevents a judgment" in favor of one of the parties. *Id.* (emphasis added). Here, the trial court denied STRS's motion for a new trial on the Hung Jury Issues based upon the finding that it had been "waived" under Civ. R. 50(B). This order effectively determined the action and prevented a judgment in the Plaintiff's favor on the Hung Jury Issues. While Plaintiff may disagree with the trial court's waiver ruling on the merits, this argument does not mean that the September 5th order was not "final," given that it clearly and unambiguously prevented STRS from obtaining a judgment in its favor on the two Hung Jury

⁴ This Court has recognized that a final appealable order must be determined based upon the practical effect of the order on the case, not upon procedural irregularities. *See Barksdale v. Van's Auto Sales* (1988), 38 Ohio St.3d 127, 128; *Maritime Manufactures, Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 260 (holding that an appeal from an order denying a motion for new trial can be construed as an appeal on the merits).

Issues. Thus, the alleged error was just one of the assignments of error that the parties would have the right to present in any appeal taken from the trial court's final judgment entry.

III. Proposition of Law #3: A Writ of Procedendo Should Not Be Used To Deprive Any Party Of The Right To Timely Appellate Review.

The writ of procedendo also should be reversed because it wrongfully operated to deprive Medco and Merck of *their* right to timely appellate review of the trial court's final judgment entry. Under Appellate Rule 12(A), a court of appeals has a mandatory duty to hear and decide *all* assignments of error and cross-assignments of error that may be raised by any party to the appeal. In particular, the Rule provides, in relevant part, as follows:

- (1) On an undismissed appeal from a trial court, a court of appeals *shall* do all of the following:
 - (a) review and affirm, modify, or reverse the judgment or final order appealed;
 - (b) determine the appeal on its merits on the assignments of error set forth in the briefs under App. R. 16, the record on appeal under App. R. 9, and, unless waived, the oral argument under App. R. 21;
 - (c) unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.

Id.

In this case, the Court of Appeals effectively circumvented the mandatory requirements of App. R. 12 by selectively reviewing the merits of only one portion of the trial court's final order — whether the trial court erred in determining that STRS waived the right to a new trial on the Hung Jury Issues. In this regard, the issue presented to this Court is *not* whether the Court of Appeals was right or wrong in holding that STRS did not waive the right to a new trial on the Hung Jury Issues. Rather, the issue is whether the Court of Appeals should be permitted to use an extraordinary writ to sustain only one assignment of error or be required to review the entire judgment entry and to

decide *all* of the assignments of error (not just STRS's assignment of error) before ordering a new trial. If, as previously discussed, the Court of Appeals sustains Medco's and Merck's assignments of error and concludes that they cannot be held liable for breach of fiduciary duty and constructive fraud as a matter of law, then there is either no need for another trial, or any new trial would be greatly limited in scope. Indeed, if Medco also prevails on their assignment of error that it is entitled to judgment in its favor on Breach of Contract Claim #1, then there would be no need for another trial altogether. In that case, STRS's assignment of error on the Hung Jury ruling would be rendered moot.⁵

It is likely that STRS will rely heavily on *Aetna Casualty Co. & Surety Co. v. Niemiec* (1961), 172 Ohio St. 53, to argue that the trial court had a mandatory duty to schedule a new trial on the Hung Jury Issues, regardless of any alleged waiver. Although this issue is not "germane" to this appeal, the fact is that *Niemiec* actually supports Appellants' position. In *Niemiec*, the Supreme Court and the Court of Appeals were reviewing a hung jury issue via a direct appeal from the trial court's order to *grant* a new trial *on the merits*. They did not dismiss the appeal for lack of a final, appealable order or issue an extraordinary writ. Thus, the case only provides support for Appellants' position that the Court of Appeals should not have issue a writ of procedendo, but should have resolved the waiver issue through a direct appeal. Indeed, even with respect to the merits of the waiver issue, *Niemiec* is clearly distinguishable because it was decided in 1961 before the adoption of Rule 50(B). Thus, *Niemiec* was not deciding the same procedural issue that was

⁵ For this reason, it is clear that Medco and Merck should have the right to participate and to be heard on the merits of this petition in both the Court of the Appeals and the Supreme Court. Although Medco and Merck were not the "Respondents," they were named as Defendants and were clearly indispensable parties to the petition because they were parties in the underlying trial court proceedings with rights that would be directly affected by the Court of Appeals' ruling. *State ex rel. Watkins v. Eighth District Court of Appeals* (1998), 82 Ohio St.3d 532, 534.

decided by the trial court under Civ. R. 50(B), which establishes jurisdictional deadlines for the filing of post-trial motions where, as here, “a verdict was not returned” for any party. Thus, for this additional reason, *Niemiec* is not applicable here.

Even if the 1961 decision in *Niemiec* were applicable to this case, the fact remains that the decision does not justify the issuance of an extraordinary writ of procedendo. STRS certainly has the right to challenge the portion of the trial court’s order that ruled that it had waived the right to another trial on the Hung Jury Issues via a direct appeal. STRS, however, is not the only party that believes that the trial court erred in how it resolved the Plaintiff’s claims. Medco and Merck also believe that the trial court committed reversible error by failing to enter judgment in Defendants’ favor and by failing to vacate the \$7.8 million jury verdict that was entered in this case. There may be no need for another trial. Under the appellate rules, Medco and Merck have the right to seek appellate review of this final judgment entry and should not be blocked by a Court of Appeals that prefers to sustain only one assignment of error with respect to only one portion of the trial court’s order. Accordingly, the Court should reverse the writ of procedendo and require that the Court of Appeals review all assignments of error and resolve all of the disputed issues via a direct appeal.

IV. Proposition of Law #4: Any Party To A Civil Action That May Be Directly Affected By A Petition for Writ of Procedendo Is A Necessary And Indispensable Party Who With The Right To Participate And To Be Heard On The Merits Of The Petition.

These consolidated appeals also involve appeals (Nos. 06-2172 and 06-2173) filed by Medco and Merck from the Court of Appeals’ orders of October 12, 2006, overruling Medco and Merck’s motions to intervene in the underlying original action. (Supp. 399, 400). As previously discussed, the STRS petition for extraordinary relief was filed on September 8, 2006, as an original action (C-060760) against the trial court judge, the Honorable David P. Davis, as Respondent, and against Medco and Merck, “as Defendants.” (Supp. 2). While a review of the petition confirms

that Merck and Medco Defendants were named as parties in the original petition, Medco and Merck elected, as protective measure, to file timely motions to intervene (which accompanied their motions to dismiss) in order to ensure that they could be fully heard on the merits of the STRS petition. (Supp. 272-280). The motions were timely filed on September 28, 2006, just 20 days after the filing of the original petition and were accompanied by motions to dismiss that were filed on the same day. (*Id.*) STRS opposed the motions to dismiss, but did not oppose the motions to intervene. (Supp. 384-398).

Indeed, given the immediate and direct effect that the STRS petition had on Medco and Merck's rights and interests in this case, it is clear that Medco and Merck were necessary and indispensable parties who had a right under Civ. R. 19 and 24 to participate and to be heard on the merits of the petition. The STRS petition sought to control the trial court's procedures in a civil action in which Medco and Merck were named as Defendants. It improperly sought to circumvent the normal appellate process and unfairly block the rights of Medco and Merck to prosecute their own appeals from the trial court's final judgment entry of September 5, 2006. This Court has long recognized that any party to a pending civil proceeding that may be affected by the issuance of extraordinary writ has a right to participate (and to intervene if necessary) in the petition. *State ex rel. Watkins v. Eighth District Court of Appeals* (1998), 82 Ohio St.3d 532, 534 (granting Cleveland Clinic's motion to intervene in original action for writ of procedendo to compel court of appeals to stay the Clinic's appeal of \$14 million judgment); *see also State ex rel. SuperAmerica Group v. Licking Cty. Bd. Of Elections* (1997), 80 Ohio St.3d 182, 685 N.E.2d 507, 509.

Here, STRS fully recognized that Medco and Merck had a right to participate in the merits of the petition because it named both Medco and Merck in the original petition and did not oppose

their motions to intervene. For some inexplicable reason, however, the Court of Appeals overruled Medco's and Merck's motions to intervene. (Supp. 399-401). While the Court of Appeals may have been denying the motions as unnecessary because Medco and Merck had been named as parties by STRS, it is not clear from the journal entries, which provide no reasons for the orders. To the extent that the Court of Appeals was overruling the intervention motions because the Court believed that Medco and Merck have no right to participate or to be heard in the STRS petition for extraordinary relief, then its orders were clearly erroneous as a matter of law and an abuse of discretion. *Id.*

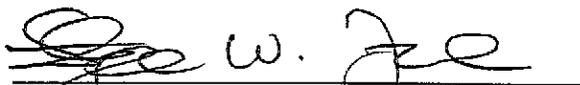
Under Civ. R. 24(A), a party has a legal right to intervene in any civil proceeding if the applicant claims an interest in the proceeding and "the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties." *Id.* Here, Medco and Merck should not be required to rely solely upon Judge Davis, as Respondent, to serve as a "representative" of Medco and Merck's interests in the STRS petition. *See Schucker v. Metcalf*, 1984 WL 5986 (Ohio App. 10 Dist. 1984) (granting motion of parties to intervene in prohibition action under Civ. R. 24(A) because "disposition of the prohibition action might practically impair their ability to protect their interest" and the judge would not adequately represent their interests). As the judge in the underlying action, Judge Davis must remain neutral and cannot advance Medco and Merck's interests. Thus, it is clear that Medco and Merck were necessary and indispensable parties that were properly named by STRS in the original petition and, if necessary, would have the mandatory right to intervene under Civ. R. 24(A). *Watkins*, 82 Ohio St.3d at 534 (holding that Ohio courts have a "duty to liberally construe Civ. R. 24 in favor of intervention").

STRS's petition for writ of procedendo was filed in order to control the trial procedure and otherwise overrule the trial court's holding re: the waiver issue. The petition wrongfully circumvented the normal appellate process and wrongfully deprived Merck and Medco of *their* appellate rights to prosecute *their* respective assignments of error from the trial court's final judgment entry. Medco and Merck had the right to be heard on the merits of the petition in both the Court of Appeals and the Supreme Court. Accordingly, the Court should reverse the Court of Appeals' orders and conclude that the Court wrongfully issued a writ of procedendo in this case.

CONCLUSION

For these reasons, this Court should reverse the writ of procedendo that was wrongfully issued by the Court of Appeals in this case.

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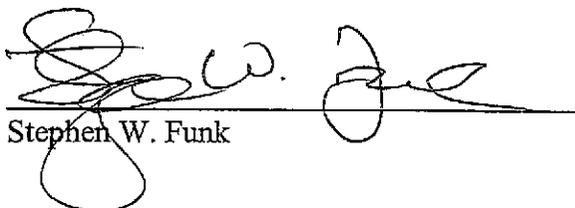
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APPENDIX

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)

Respondent-Appellant)

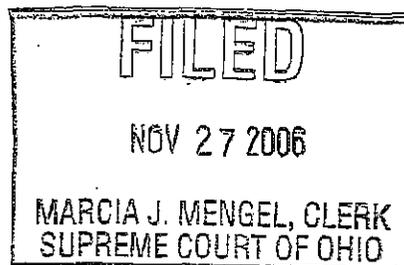
MEDCO HEALTH SOLUTIONS INC.,)
ET AL.,)

Defendants-Appellants)

CASE NO. 2006-2006

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

Court of Appeals
Case No. C-060760



NOTICE OF APPEAL OF 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, AND MERCK & CO., INC.

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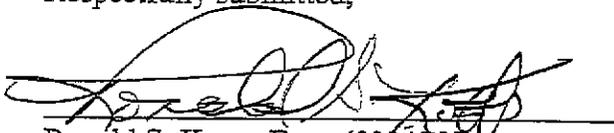
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This appeal is an appeal of right under S.Ct. R. Prac. II (1)(A)(1) because it arises from a Petition for Preemptory or Alternative Writ of Procedendo or Mandamus that was originated in the court of appeals pursuant to Section 3(B)(1)(b) of Article IV of the Ohio Constitution.

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Hon. David P. Davis, Judge
Hamilton County Court of Common Pleas



Ronald S. Kopp

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.

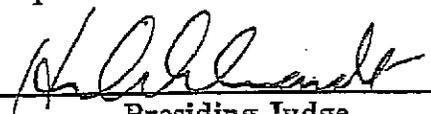
This cause came on to be considered upon the motion of the respondent to dismiss the petition and upon the response thereto. This cause also came on for consideration of the petition for extraordinary relief and the motion for a peremptory writ or alternative writ of procedendo or mandamus.

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)

IN THE SUPREME COURT OF OHIO

06-2172

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)

Respondent-Appellant)

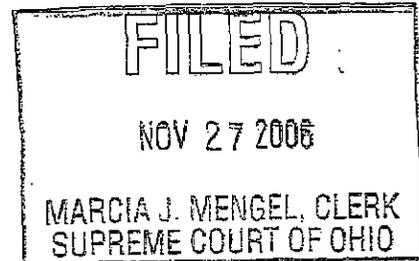
MEDCO HEALTH SOLUTIONS INC.,)
ET AL.,)

Defendants-Appellants)

CASE NO. 2006-2006

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

Court of Appeals
Case No. C-060760



NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS

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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.,
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Trial Attorney for Merck & Co., Inc.

court of appeals pursuant to Section 3(B)(1)(b) of Article IV of the Ohio Constitution. A true and correct copy of the judgment entry that is the subject of the instant appeal is attached hereto as Exhibit "A."

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2006, a true and correct copy of the foregoing **NOTICE OF APPEAL** 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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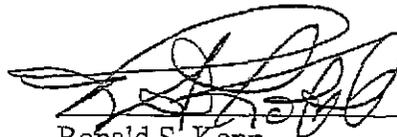
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Hon. David P. Davis, Judge
Hamilton County Court of Common Pleas



Ronald S. Kopp

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.

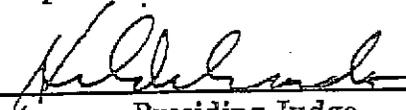
This cause came on to be considered upon the motion of the Medco defendants to intervene in this cause and for leave to file a motion to dismiss the petition for extraordinary relief.

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)

IN THE SUPREME COURT OF OHIO

06-2173

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)

Respondent-Appellant)

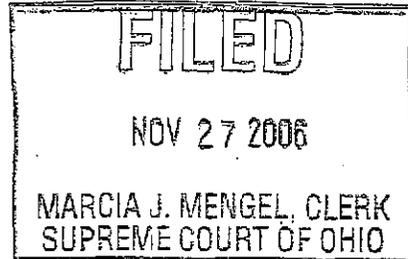
MEDCO HEALTH SOLUTIONS INC.,)
ET AL.,)

Defendants-Appellants.)

CASE NO. 2006-2006

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

Court of Appeals
Case No. C-060760



NOTICE OF APPEAL OF
DEFENDANT-APPELLANT MERCK & CO., INC.

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Hon. David P. Davis, Judge
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Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2006, a true and correct copy of the foregoing **NOTICE OF APPEAL** 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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*Attorneys for Respondent-Appellant
Hon. David P. Davis, Judge
Hamilton County Court of Common Pleas*



Ronald S. Kopp

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.

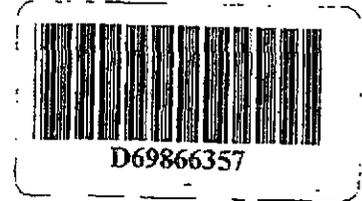
By: 

Presiding Judge

(Copies sent to all counsel)

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.

:

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**.

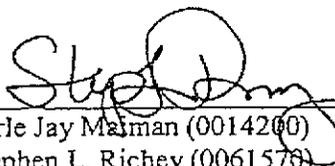
Medco's Motion to Journalize the Court's Ruling on Rule 50(B) Waiver and to Amend its Final Judgment Entry Proposed Order and Entry Attached, in which Merck & Co., Inc. has joined, is hereby **GRANTED**.

SO ORDERED.



Judge David Davis 9-5-06

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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.

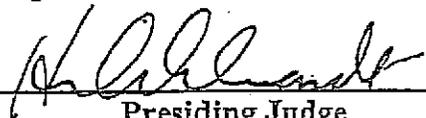
This cause came on to be considered upon the motion of the respondent to dismiss the petition and upon the response thereto. This cause also came on for consideration of the petition for extraordinary relief and the motion for a peremptory writ or alternative writ of procedendo or mandamus.

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)

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.

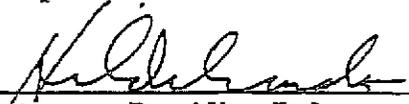
This cause came on to be considered upon the motion of the Medco defendants to intervene in this cause and for leave to file a motion to dismiss the petition for extraordinary relief.

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)

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)