IN THE
SUPREME COURT OF OHIO

STATE OF OHIO EX. REL. BOARD OF THE STATE TEACHER'S RETIREMENT SYSTEM OF OHIO	:	**CASE NO.: 06-2006, 06-2172, 06-2173**
	:	
Relator-Appellee	:	**On Appeal of Right from the Hamilton County Court of Appeals, First Appellate District**
vs.	:	
JUDGE DAVID P. DAVIS	:	**Court of Appeals Case No. C-060760 Case Originated in the Court of Appeals**
Respondent-Appellant	:	

MERIT BRIEF OF RELATOR-APPELLEE STATE OF OHIO EX REL. BOARD OF THE STATE TEACHERS RETIREMENT SYSTEM OF OHIO

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FILED
JAN 26 2007
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SUPREME COURT OF OHIO

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STATEMENT OF THE FACTS AND OF THE CASE

A. Overview

Relator/appellee Board of the State Teachers Retirement System of Ohio ("STRS") is the plaintiff in the underlying proceedings, captioned *Board of the State Teachers Retirement Systems of Ohio v. Medco Health Solutions, Inc. et al.*, Hamilton County Common Pleas Court Case No. A0309929. The defendants are Medco Health Solutions, Inc. and affiliated companies (collectively "Medco") and Medco's parent, Merck & Co., Inc. ("Merck"), the appellees and cross-appellants in STRS's since-dismissed protective appeal. The case is pending before respondent-appellant, Hamilton County Common Pleas Judge David Davis.

Judge Davis presided over a four-week trial during November and December 2005, in which the jury found Medco liable for breach of fiduciary duty and constructive fraud, and found Merck jointly liable. (Supp. 14-34). But the jury failed to reach a verdict on, and therefore did not answer, the ensuing punitive damages interrogatory. (*Id.*) The jury also failed to answer a second interrogatory asking whether Medco is liable for breaching a contract regarding rebates ("the rebates claim"). (*Id.*) For more than a year, Judge Davis has refused to declare a mistrial and to proceed with a retrial on that which the jury failed to decide. Instead, he has entered an order stating that STRS waived a "new trial" by failing to file a new trial motion within 14 days of the jury's discharge. (Supp. 136-137). Judge Davis has refused to proceed with a retrial despite explicit, longstanding Supreme Court authority holding that, when a jury fails to answer

interrogatories such as occurred in this case, the trial has not been completed and ***must*** be retried, regardless whether either party has filed a new trial motion.[1]

B. The Initial Proceedings Before Judge Davis

STRS originally filed its complaint on December 22, 2003. The liability issues revolve around the relationship between STRS on the one hand, and Medco and Merck on the other, arising from contracts entered into between STRS and Medco in 1993, 1996, and 1999. Under these contracts, Medco undertook to act as a pharmacy benefit manager for STRS. The gist of STRS's allegations was that Medco breached contracts regarding both rebates and dispensing fees, committed fraud, and breached its fiduciary duties to STRS, unlawfully acting to benefit itself and Merck.

On December 19, 2005, after four weeks of trial and many days of deliberations, the jury returned verdicts in favor of STRS on its claims for breach of fiduciary duties and constructive fraud, and awarded STRS $7,815,000 in compensatory damages. (Supp. 14-34). The jury found that Merck was jointly liable. (*Id.*) The jury could not reach agreement, however, and thus failed to answer interrogatories on, the hung jury issues, i.e., the rebates claim[2] and punitive damages.[3] (*Id.*) Judge Davis declared the jury hung as to these issues and discharged it. (Supp. 46, 48).

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[1] *Aetna Casualty & Surety Co. v. Niemiec* (1961), 172 Ohio St. 53, 173 N.E.2d 118.

[2] The jury found in Medco's favor on the separate breach of contract claim regarding dispensing fees and in Merck's favor on a tortious interference claim. (Supp. 28).

[3] The jury took up the question of punitive damages upon finding Medco liable for constructive fraud and breach of fiduciary duties. (Supp. 22, 20).

On the same day, at the request of defendants' counsel ostensibly because it was Christmas time, the parties and the trial court agreed that the normal time limits for post-trial matters should be extended to 45 days. (Supp. 46). On January 5, 2006, STRS submitted proposed entries to defendants' counsel. (Supp. 53). On January 19, 2006, STRS filed its proposed entries, one of which would have declared a mistrial and set a retrial for the hung jury issues. (*Id*).

For their part, defendants objected to STRS's entry and proposed their own. Defendants also moved for a JNOV on the hung jury issues, asserting that the evidence was insufficient to support either punitive damages or breach of contract on rebates, regardless of the jury's failure to reach a verdict. (Supp. 65).

On February 22, 2006, oral argument took place on defendants' JNOV motion, as well as the form of the post-trial entry. Judge Davis stated that defendants' JNOV motion on the hung jury issues would be denied, but that he would adopt the form of entry proposed by defendants. (Supp. 102). Also, Judge Davis orally ruled that STRS had waived retrial on the hung jury issues, but at that time he issued no journal entry memorializing that ruling. (Supp. 104). The same day, Judge Davis issued what was labeled a "Final Judgment Entry" (the "February 22nd Entry"). It noted the joint and several award of $7,815,000, and stated, "Pursuant to Ohio Civil Rule 54(B), this Court expressly determines that there is no just reason for delay." (Supp. 106).

On February 23, 2006, STRS filed a motion to submit supplemental arguments, pointing out that there had been "no Entry circulated or filed relating to Defendants' suggestion of waiver [of retrial]" and laying out the reasons why there could have been no such waiver.

On March 1, 2006, Judge Davis issued a second entry (the "March 1st Entry"), entitled "Entry Overruling [Defendants'] Motion for Judgment on Claims on Which a Verdict Was Not Returned." (Supp. 107). That is, the one and only instance when defendants moved for judgment to be entered in their favor on the hung jury issues was their motion for a JNOV on these issues. (Supp. 65). But Judge Davis's March 1st Entry rejected that request (Supp. 107) and that entry has never been revoked or vacated.

On March 2, 2006, defendants filed notices of appeal from the February 22nd Entry. (Supp. 111). And, although no entry had been filed stating that STRS had waived retrial of the hung jury issues or entering judgment for defendants on the hung jury issues, STRS filed with the court of common pleas (a) a protective notice of appeal and cross-appeal from the March 1st Entry, and (b) a protective motion for a new trial on the hung jury issues or, in the alternative, for relief from any judgment thereon.

C. The Proceedings Before The Court of Appeals And This Court in *STRS I*

Pursuant to Rule 15 of the Ohio Rules of Appellate Procedure and Rule 4 of the Local Rules for the First Appellate District, STRS asked the court of appeals to dismiss Medco's first appeal in this case on the ground there was no final, appealable order in that the requirements of R.C. § 2505.02 and Rule 54(B) had not been met. Because the hung jury issues remained pending and unresolved, STRS's position at that time was that the trial court could not enter even a partial judgment that would be appealable under R.C. § 2505.02 or Rule 54(B) and that, therefore, the court of appeals lacked jurisdiction over any purported appeal from the February 22nd Entry.

In opposing dismissal of Medco's first appeal, Medco argued that STRS waived the hung jury issues and that, therefore, there was nothing more to be done in the trial

court. On April 6, 2006, the court of appeals dismissed not only Medco's first appeal (C-060197), but also Merck's first appeal (C-060196) and the separate protective appeal/cross-appeal that STRS had filed (C-060229), collectively referred to here as "*STRS I.*" (Supp. 128). Then, in what Medco styled as a "motion for clarification" of the dismissals, Medco asked the court of appeals to rule that it did not intend its dismissal to mean that it was rejecting Medco's "waiver" argument. (Supp. 129). Medco said it had "every confidence" that the court of appeals did not mean to reject its "waiver" argument in dismissing the appeals. (*Id.*). The court of appeals overruled that motion as "not well taken." (Supp. 133).

On August 23, 2006, this Court declined jurisdiction to hear *STRS I.* (Supp. 134).

D. The Latest Proceedings Before Judge Davis

Following the dismissals in *STRS I*, defendants filed a motion asking Judge Davis to journalize an entry explicitly holding that, under Civil Rule 50(B), STRS waived retrial of the hung jury issues by not filing a motion for new trial within 14 days of the jury's discharge. (Supp. 140). On August 21, 2006, Judge Davis heard arguments on defendants' motion, as well as on STRS's protective motion for a new trial or relief from judgment and STRS's motion for JNOV or new trial on the claims that the jury had decided against STRS (i.e., breach of contract regarding dispensing fees and tortious interference). (Supp. 191).

At the conclusion of the August 21st hearing, Judge Davis indicated that he intended to grant defendants' motion to journalize an entry explicitly finding STRS waived retrial of the hung jury issues, deny STRS's protective motion for a new trial or relief from judgment, and deny STRS's motion for JNOV or new trial on the claims that

the jury had decided against STRS. (Supp. 229-231). Judge Davis again refused to sign STRS's proposed entry declaring a mistrial as to the hung jury issues. (*Id.*).

Defendants thereafter submitted a proposed "Order and Final Judgment Entry" reflecting Judge Davis's rulings. (Supp. 233-235). STRS objected to it on grounds that (1) the entry did not specify under which procedure authorized by which Civil Rule (e.g., a JNOV under Rule 50, a summary judgment under Rule 56, etc.) the trial court purported to enter judgment against STRS on the hung jury issues; (2) the law does not permit entry of judgment against STRS on the hung jury issues but rather requires the trial court to declare a mistrial and order a retrial; (3) the Civil Rules do not supersede the substantive law, which requires a retrial with or without a new trial motion; (4) defendants had not filed any motion under the Civil Rules that would authorize the trial court to enter judgment against STRS under these circumstances; and (5) the entry did not state any grounds for denying STRS relief from judgment for good cause shown. (Supp. 237). Judge Davis journalized defendants' proposed entry on September 5, 2006 (the "September 5th Entry"). (Supp. 136-137).

E. The Latest Proceedings Before The Court of Appeals

STRS believed that, despite the title of Judge Davis's September 5th Entry (i.e., "Order and Final Judgment Entry"), it was no more appealable than the "Final Judgment Entry" involved in *STRS I* (the February 22nd Entry). Therefore, STRS simultaneously filed the following out of an abundance of caution:

- a protective notice of appeal from the September 5th Entry, in which STRS made clear its belief that the September 5th Entry is not, and cannot be, appealable;
- a motion to dismiss STRS's protective appeal on the ground that the September 5th Entry is not appealable; and

- an original action for a writ of procedendo or mandamus in the event the court of appeals concluded that there has been no final, appealable order.

The court of appeals ultimately concluded there was no final, appealable order and granted the writ of procedendo, ordering Judge Davis to "proceed with retrial of those claims or causes of action upon which the jury could not reach a verdict." The court of appeals also dismissed STRS's protective appeal and defendants' cross-appeals and denied defendants' motions to intervene. Judge Davis and defendants filed notices of appeal, claiming to do so "as of right."

LEGAL ARGUMENT

Appellee's Substitute Proposition Of Law In Response To Judge Davis's First, Second, And Third Propositions Of Law, And In Response To Defendants' First, Second, And Third Propositions Of Law: A writ of procedendo is the appropriate mechanism for commanding a trial judge to proceed to judgment when that is the only thing the judge has discretion to do and when there is no adequate appellate remedy for compelling the judge to proceed.

STRS has tried, respectfully, for more than a year to persuade Judge Davis to do what STRS believes should have been done automatically after a hung jury in December 2005 – declare a mistrial and schedule a retrial of each claim/issue on which the jury failed to reach a verdict. STRS simultaneously filed a protective notice of appeal from Judge Davis's latest entry dated September 5, 2006, a motion to dismiss that protective appeal, and a petition for a writ of procedendo or mandamus. The court of appeals simultaneously dismissed STRS's protective appeal and defendants' cross-appeals as taken from a non-appealable order and granted the writ of procedendo. Judge Davis appeals from the granting of the writ of procedendo.

The central fallacy in Judge Davis's brief is that the court of appeals had no business considering at such an early stage of the appeal whether STRS waived retrial of

the rebates claim and the punitive damages issue. In the trial judge's view, the court of appeals should have addressed the waiver issue via STRS's protective appeal, not a writ of procedendo. This argument disregards the fact that the trial judge failed to enter an appealable order. We note that Judge Davis's brief never directly addresses whether the specific entry he issued constitutes an appealable order in form and content. See Section B(1), *infra*. Rather, the brief merely adverts to the appealability issue in the abstract. The court of appeals correctly recognized that Judge Davis's failure to have issued an entry that constitutes a final, appealable order left it without appellate jurisdiction and left STRS without any adequate appellate remedy for compelling a retrial, opening the door to the writ of procedendo.

Moreover, arguing, as Judge Davis seems to do, that the court of appeals should have allowed full appellate briefing on an issue it deemed clear hardly constitutes a ground for reversal. It is not as if the waiver issue was difficult for the court of appeals to decide. This was, after all, the second time the waiver issue had been raised with this court of appeals, *STRS I* being the first.

It also was not a difficult issue to decide because the law is clear. The notion espoused by defendants and inexplicably embraced by Judge Davis – i.e., that Civil Rule 50(B) required STRS to file a new trial motion within 14 days of the jury's discharge in order to secure a retrial – is wholly without any legal or logical foundation. Judge Davis's brief mentions no support for that argument; defendants plead with this Court not to address the waiver issue, just as they did in *STRS I*. Defendants' Brief, p. 8; Defendants' Memorandum in Support of Jurisdiction in *STRS I*, p. 6 ("[I]t is critical to be clear that the issue presented to this Court is *not* whether the trial court was right or

wrong in holding that STRS waived its right to a new trial on the Hung Claims"; emphasis original). Long before defendants first made that argument in this case, this Court had made it abundantly clear that a retrial is mandatory where there is a hung jury, whether or not a new trial motion was filed.[4]

It is therefore mystifying why Judge Davis believes a full-blown appeal would be necessary. Why should a court of appeals dignify – with full appellate briefing, oral argument, deliberations, etc. – what it considers a meritless threshold argument on which its appellate jurisdiction hinges? Why should the court of appeals in this case have waited until the parties drafted formal, full-length briefs, when no less than seven motions and memoranda filed with that court amply illuminated the crucial issues and convinced it that it lacked jurisdiction and that the requirements for a writ of procedendo were met? Defendants had no argument to make in favor of waiver other than their tortured reading of Rule 50(B). This argument was fully laid out in Judge Davis's, Medco's, and Merck's filings in connection with the writ action, STRS's protective appeal, and, for that matter, *STRS I* – and it was refuted by STRS in filings with the court of appeals. (Supp. 143-144, 170-174, 237, 245-263, 268, 285-288, 292-296, 299-300, 303-305, 314-324, 339-342, 348-350).

The instant appeal involves a writ of procedendo against a common pleas judge presiding over an action. Although a writ of mandamus would also be appropriate when a common pleas judge refuses to proceed with an action or unduly delays doing so, this is

[4] See Section A, *infra*.

precisely "the ill a writ of procedendo is designed to remedy."[5] In this case, the court of appeals opted to utilize a writ of procedendo, which is uniquely a tool of judicial superintendence. A writ of "procedendo ad judicium" is a remedy by which a court of superior jurisdiction may direct a court of inferior jurisdiction to proceed to judgment in a case pending before it.[6] To obtain a writ of procedendo, the relator must demonstrate that it possesses a clear legal right to the relief requested, that there exists no adequate remedy in the ordinary course of law, and that the court below possesses a clear legal duty to proceed to judgment.[7] The court of appeals correctly concluded that STRS satisfied all of these requirements.

A. For More Than A Year, And Without Any Valid Legal Justification, Judge Davis Has Delayed Declaring A Mistrial On The Hung Jury Issues And Setting A Retrial, Despite His Clear Legal Duty To Do So. STRS Clearly Is Entitled To A Retrial On The Hung Jury Issues And No Waiver Of That Right Has Occurred.

As noted above, defendants plead with this Court not to address the waiver issue, just as they did in *STRS I*. They evidently recognize that their waiver argument is groundless and would prefer to use it as they have for more than a year – not as a plausible basis for disposing of the hung jury issues but as a means to delay the inevitable retrial of these issues. The waiver issue must be addressed, if for no other reason than the fact that it was central to the writ of procedendo now under review.

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[5] *State ex rel. Dehler v. Sutula* (1995), 74 Ohio St.3d 33, 35, 656 N.E.2d 332, 333; *Ohio Appellate Practice* (Baldwin, 2005 ed.), § 10.49-.50 (writ appropriate when trial court refuses to proceed to judgment).

[6] *State of Ohio ex rel. Edward W. v. Ferris* (1956), 102 Ohio App. 412, 140 N.E.2d 901.

[7] *State ex rel. Brown v. Shoemaker* (1988), 38 Ohio St.3d 344, 528 N.E.2d 188; *State ex rel. Cochran v. Quillin* (1969), 20 Ohio St.2d 6, 251 N.E.2d 607.

There was absolutely no basis in law or fact for Judge Davis to avoid declaring a mistrial on the hung jury issues or for him to hold that STRS waived its right to a retrial of these issues. In *Aetna Casualty & Surety Co. v. Niemiec* (1961), 172 Ohio St. 53, 173 N.E.2d 118, this Court held: "The function of a jury is to decide the questions of fact. Until this has been accomplished the trial has not been completed and the case ***must be retried***."[8] In response to the argument in that case that a motion for new trial was not timely filed following a hung jury – the very same argument that defendants raised in *STRS I* and below – this Court stated: "One difficulty with this contention is that, ***with or without a motion for a new trial***, a new trial was necessary since the first trial never was completed."[9] Pursuant to Rule 49(B), the jury must answer properly submitted interrogatories, or the case must be retried.[10] Despite this Court's mandate that the case be retried "with or without a motion for a new trial," Judge Davis in effect concluded that there could be no retrial unless STRS filed a new trial motion within 14 days of the jury's discharge.

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[8] *Aetna Casualty & Surety Co. v. Niemiec*, 172 Ohio St. at 55 (emphasis added).

[9] *Id.* at 56 (emphasis added).

[10] *Id.*; *Dyer v. Kaszubski* (1st App. Dist., Hamilton Cty., Dec. 14, 1988), 1988 WL 133003; *Clopton v. Saint Ann's Hospital* (10th App. Dist., Franklin Cty., Jan. 18, 1977), 1977 WL 199849; *Siemer v. Patton* (10th App. Dist., Franklin Cty., Dec. 20, 1983), 1983 WL 3829; *Morris v. Stone* (1972), 33 Ohio App.2d 101, 108, 292 N.E.2d 891, 896; R.C. § 2315.06 ("When the jury is discharged during a trial or after a cause is submitted, such may at once be tried again, or on a future day, as the court directs."). Judge Davis's suggestion under his third proposition of law that the unanswered interrogatories were somehow inconsistent with those previously answered is baffling, particularly because Judge Davis rejected any notion of inconsistency when the verdict was presented. The jury did not answer the interrogatories in question. STRS fails to grasp how unanswered interrogatories could possibly conflict with answered interrogatories, much less why the brief's expressed concern about that is a reason to deprive STRS of its right to a retrial at which those interrogatories can be answered.

A retrial following a mistrial is not a "new trial," as that term is used in Rule 59. Black's Law Dictionary draws the correct distinction:

> *Motion for new trial*: A request that the judge set aside the judgment and order a new trial on the basis that the trial was improper or unfair due to specified prejudicial errors that occurred.
>
> *Mistrial*: An erroneous, invalid or nugatory trial. A trial of an action which cannot stand in law because of want of jurisdiction, or a wrong drawing of jurors, or disregard of some other fundamental requisite before or during trial. Trial which has been terminated prior to its normal conclusion. The judge may declare a mistrial because of some extraordinary event (e.g. death of juror, or attorney), for prejudicial error that cannot be corrected at trial, or because of a deadlocked jury.

Black's Law Dictionary, Fifth Edition, 1979, pp. 902, 914 (Supp. 125-127). A hung jury tellingly is not among the reasons for a "new trial" under Rule 59. A retrial following a hung jury is not a "new trial" in the Rule 59(A) sense, but rather a continuation of an initial trial that has not been concluded.[11] This makes perfect sense because, when a party files a new trial motion under Rule 59(A), it seeks to set aside some sort of adverse finding; but a hung jury, by definition, makes no finding at all.[12]

In arguing the waiver issue in the courts below, defendants relied entirely on Rule 50(B). Defendants did not cite a single case in support of their argument that a new trial motion is required under Rule 50(B) following a hung jury. Plaintiff's counsel have never found any, in Ohio or any other jurisdictions with similar rules. Rule 50(B) deals with JNOV motions and speaks of a new trial motion that "may be joined with this motion, or prayed for in the alternative." STRS did not seek a JNOV on the hung jury

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[11] *See Newark Shopping Ctr. v. Morris Skilken & Co.* (1964), 5 Ohio App.2d 241, 242, 214 N.E.2d 674 (retrial following hung jury is not a "new trial").

[12] See *Wederath v. Brant* (Iowa 1982), 319 N.W.2d 306, 308.

issues,[13] so there was nothing to which STRS could append a new trial motion under Rule 50(B). Even if Rule 50(B) somehow applied, it ***permits but does not require*** the joinder or bringing of a new trial motion. STRS did not "waive" its right to a retrial on the hung jury issues by failing to move for a "new trial" within 14 days of the jury's discharge.[14]

STRS clearly is entitled to a retrial on the hung jury issues and, because no waiver of that right has occurred, Judge Davis clearly has the duty to proceed with such retrial.

B. STRS Demonstrated To The Court Of Appeals That STRS Does Not Possess An Adequate Appellate Remedy For Challenging The September 5th Entry In The Ordinary Course Of Law Because An Appeal From That Entry Was Just As Subject To Dismissal As The Appeals From The Entries In *STRS I* Proved To Be.

At the conclusion of the August 21st hearing, Judge Davis granted defendants' motion to journalize an entry explicitly finding STRS waived retrial of the hung jury issues, denied STRS's protective motion for a new trial or relief from judgment, and denied STRS's motion for JNOV or new trial on the claims that the jury had decided against STRS. The September 5th Entry followed. While Judge Davis argues that the court of appeals should simply have allowed STRS's protective appeal from the

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[13] Rather, STRS sought JNOV on the claims that the jury decided against it. Judge Davis denied that JNOV motion.

[14] In addition, STRS's request that Judge Davis set the case for retrial on the hung jury issues was memorialized in a proposed entry submitted by STRS to defendants and the trial court on January 19, 2006, well within the 45-day extended period for post-trial matters. This extension was proposed by defendants' counsel Earle Maiman on the record and agreed upon by the parties and Judge Davis. Having requested and been granted this extension, defendants should have been estopped to assert a waiver in any event, given that plaintiff requested a schedule for the retrial within that extended timeframe.

September 5th Entry to proceed, that was not an option. The September 5th Entry is no more appealable than that which the court of appeals rejected as non-appealable in *STRS I*. For lack of a final order from which to appeal, STRS had no adequate appellate remedy. Consequently, the only way for the court of appeals to compel Judge Davis to carry out his duty was to proceed precisely as it did – by issuing a writ of procedendo.

1. Contrary to Judge Davis's contention, the September 5th Entry did not determine the action or prevent a judgment. It was not appealable.

Defendants' contention that they have been "wrongfully deprived . . . of *their* appellate rights" (Defendants' Brief, p. 18 (emphasis original)) ignores the fact that they have ***no appellate rights*** unless there is a final, appealable order. Defendants ironically cite *Niemiec*, *supra*, as support for their contention that the waiver issue could be decided by a direct appeal from the September 5th Entry. But they ignore the difference between the September 5th Entry and the entry in *Niemiec*. To be appealable under R.C. § 2505.02, an order or judgment must determine the action and prevent a judgment.[15] A careful review of the wording of the September 5th Entry – particularly in comparison with Judge Davis's unrevoked March 1st Entry – shows that it neither determined the action nor prevented a judgment.

There are a limited number of procedural mechanisms authorized by the Civil Rules for the elimination of claims, e.g., a summary judgment under Rule 56, a directed verdict under Rule 50(A), and a JNOV under Rule 50(B). The only motion under the Civil Rules that defendants filed seeking to eliminate the hung jury issues was a JNOV

[15] *Stewart v. Midwestern Indemn. Co.* (1989), 45 Ohio St.3d 124, 126, 543 N.E.2d 1200, 1202.

motion and that motion was ***denied*** by Judge Davis in the March 1st Entry. The September 5th Entry neither revoked the March 1st Entry nor mentioned any other motion authorized by the Civil Rules for eliminating claims. Until defendants file a dispositive motion actually authorized by the Civil Rules and that motion is granted in a proper entry that constitutes a final order, the rebates claim and the punitive damages issue remain unresolved and pending.[16]

Even apart from the inconsistency created by the fact that (a) the March 1st Entry denied the only rule-authorized motion capable of eliminating the rebates claim and the punitive damages issue while (b) the September 5th Entry purported to find a waiver of "a new trial," the language of the September 5th Entry simply does not equate to a final, appealable order or judgment.

As noted above, to be appealable under R.C. § 2505.02, an order must determine the action and prevent a judgment.[17] The logical *sine qua non* of an order that determines an action and prevents a judgment is language specifying once and for all which side prevailed on which parts of the case. The September 5th Entry issued by Judge Davis specified that plaintiff STRS prevailed on its breach of fiduciary duty and constructive

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[16] *Williams v. Waller* (8th Dist., Cuyahoga Cty., Dec. 26, 1996), 1996 WL 736829,*5 (an order that determines liability and compensatory damages, but which does not determine punitive damages, is not a final appealable order); *Horner v. Toledo Hospital* (1993), 94 Ohio App.3d 282, 287-288, 640 N.E.2d 857, 861 ("prayer for punitive damages is not a separate claim in itself but rather an issue in the overall claim for damages").

[17] *Stewart v. Midwestern Indemn. Co.* (1989), 45 Ohio St.3d 124, 126, 543 N.E.2d 1200, 1202.

fraud claims and was awarded $7,815,000 in compensatory damages.[18] That entry also specified that defendants prevailed on STRS's breach of contract claim regarding mail order dispensing fees.

But did that or any other entry issued by Judge Davis specify which party prevailed on (1) the rebates claim, and (2) punitive damages related to the fiduciary duty and constructive fraud claims? A careful review of Judge Davis's March 1st Entry and his September 5th Entry reveals that neither entry specified which party prevailed on the rebates claim or on punitive damages. To be sure, the September 5th Entry stated that STRS waived a "new trial" by failing to file a new trial motion within 14 days of the jury's discharge. But that entry did not go on to say that, therefore, the defendants must prevail on the rebates claim or on punitive damages.

The September 5th Entry began by reiterating the amount the jury awarded to STRS, then stated as follows:

> 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 **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**.

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[18] STRS presented evidence that Medco breached contracts by failing to pay almost $50 million in rebates. The jury hung on that claim.

SO ORDERED.

(Supp. 136-137). At best, this is the language of an interlocutory order, in that it merely recites certain motions and the trial court's rulings thereon. Rule 54(A) ("A judgment shall not contain a recital of pleadings . . . .").

Contrary to defendants' argument that the September 5th Entry "resolved all of the pending claims," it did not finally determine the rights of the parties in relation to either the rebates claim or punitive damages. See *Ohio Appellate Practice* (Baldwin, 2005 ed.), § 2.3, p. 27 (the final judgment rule requires a "final entry determining the rights of the parties in a lawsuit," which "must omit any recital of pleadings"). Although the September 5th Entry mentioned the trial court's finding "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)," it notably ***did not enter a judgment against STRS either on the rebates claim or on punitive damages.*** Nor, in light of the March 1st Entry, can it be said that the September 5th Entry entered a judgment for defendants on the rebates claim or on punitive damages. When defendants explicitly asked Judge Davis to enter judgment in their favor on the rebates claim or on punitive damages, he refused – in the March 1st Entry. (Supp. 107).

The sum total of the March 1st Entry and the September 5th Entry is that Judge Davis still has not entered a judgment ***for or against any party*** on the rebates claim or on punitive damages. Ohio courts have long held that an order that merely recounts the result of trial court proceedings – e.g., the granting of a summary judgment, a jury verdict, the denial of a new trial, or some other trial court finding – without stating that

judgment is entered for or against any party is not a final, appealable order.[19] The September 5th Entry is a classic example of such an order.

In sum, the September 5th Entry did not determine the action or prevent a judgment because it did not state which party won and which party lost on the two hung jury issues. Indeed, given the inconsistency between the March 1st Entry and the September 5th Entry, neither entry could be construed as a final determination of the parties' rights in relation to the rebates claim and the punitive damages issue. The lack of an adequate appellate remedy satisfied the only disputed prerequisite for a writ of procedendo. Not only was the court of appeals correct in dismissing STRS's protective appeal, it also was correct in recognizing a writ of procedendo as STRS's only avenue of immediate relief.

Defendants' argument that the court of appeals should not have resorted to a writ of procedendo because "Judge Davis did not refuse to rule on the Hung Jury Issues" (Defendants' Brief, p. 10) is a red herring. The point is that Judge Davis has refused to proceed to retrial on the rebates claim and the punitive damages issue. In the absence of an appealable judgment for or against any party on that contract claim and the punitive damages issue, Judge Davis's persistence in erroneously ruling that STRS waived retrial of them by not moving for a new trial within 14 days of the jury's discharge warranted specific direction from the court of appeals to Judge Davis to proceed with the retrial –

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[19] See, e.g., *State ex rel. Fisher v. City of Cleveland* (8th App. Dist., Cuyahoga Cty.), 2003 WL 21246062, 2003-Ohio-2754; *Bautista v. Kolis* (2001), 142 Ohio App.3d 169, 754 N.E.2d 820; *Coon v. Barnes* (1994), 95 Ohio App.3d 349, 642 N.E.2d 449; *Hassan v. Moorhead* (1971), 28 Ohio App.2d 201, 275 N.E.2d 876; *International Managed Care Strategies, Inc. v. Franciscan Health Partnership, Inc.* (1st App. Dist., Hamilton Cty., Sept. 13, 2002), 2002 WL 31039656, *2-3.

via the means that STRS properly presented to the court of appeals, the well-established writ of procedendo. Writs of procedendo historically have been used when an appellate court dismisses an appeal, as the most appropriate means of informing the trial court that the court of appeals will not proceed and that instead the trial court should. Antieau, Chester J., *The Practice of Extraordinary Remedies*, § 3.04, p. 824; *McCord v. Briggs & Turivas* (Ill. 1930), 170 N.E. 320, 324-25. This is precisely what occurred here.

2. There was an alternative ground for finding no appellate adequate remedy. Based on the same reasoning that the court of appeals employed in dismissing *STRS I*, the September 5th Entry was not a final, appealable order.

In the absence of a final, appealable order, a court of appeals has no jurisdiction to decide an appeal.[20] In its April 6, 2006 entry dismissing Appeals C-060196, C-060197, and C-060229 in *STRS I*, which this Court declined to review, the court of appeals unequivocally ruled that there was "no final, appealable order" from the trial court. As those dismissals confirmed, the court of appeals had no jurisdiction over *STRS I*.[21] Because there was no more basis for the court of appeals to hold that STRS waived its right to retrial of the hung jury issues than there was when the court of appeals dismissed *STRS I*, STRS's protective appeal from the September 5th Entry was just as subject to dismissal as the three appeals in *STRS I* proved to be.

As in *STRS I*, whether the entry issued by Judge Davis was appealable – and, thus, whether the court of appeals had jurisdiction over an appeal from the September 5th Entry – depended in part on whether STRS waived its right to retrial of the hung jury issues.

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[20] R.C. § 2505.02; *Chef Italiano Corp. v. Kent State University* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus.

[21] *Chef Italiano Corp. v. Kent State University, supra*, 44 Ohio St.3d 86.

As discussed above, there could be no waiver under Rule 50(B). Thus, the rebates claim and the punitive damages issue must be considered unresolved; therefore, there can be no no final, appealable order.

Not only is there no legal basis for a waiver under these circumstances, there also is no basis for deviating from the reasoning employed and the precedent established by the court of appeals in *STRS I*. In *STRS I*, Medco twice asked the court of appeals to salvage its argument that STRS waived retrial of the hung jury issues. And the court of appeals in *STRS I* twice rejected Medco's entreaties. In opposing dismissal in *STRS I*, Medco argued that STRS waived retrial of the hung jury issues. If the court of appeals had agreed with Medco on that, it logically would have retained jurisdiction over the *STRS I* appeals. But the court of appeals dismissed them and this Court eventually declined jurisdiction to review the dismissals. Then, in what was styled as a "motion for clarification" of the dismissals in *STRS I*, Medco asked the court of appeals to rule that it did not intend its dismissals to mean that it was rejecting Medco's "waiver" argument. Medco even said it had "every confidence" that the court of appeals did not mean to reject its "waiver" argument in dismissing the appeals. So in its motion for clarification in *STRS I*, Medco asked the court of appeals simply to say that it had not addressed Medco's "waiver" argument in dismissing the appeals.

Medco's motion for clarification in *STRS I* essentially asked the court of appeals to salvage Medco's "waiver" argument. The court of appeals overruled that motion as "not well taken," a ruling this Court also later declined to review. In *STRS I*, the court of appeals and this Court had every opportunity to validate Medco's "waiver" argument as a basis for appellate jurisdiction, but both courts refused to do it. Under the law of the case

doctrine, a litigant cannot re-raise arguments actually raised before an appellate tribunal.[22] Therefore, STRS's protective appeal from the September 5th Entry afforded it just as inadequate a legal remedy as Appeal Number C-060229 in *STRS I* did.

3. Contrary to defendants' mischaracterization, the court of appeals did not cherry-pick the waiver issue and deny defendants review on all other issues. Rather, because the September 5th Entry was not appealable, the court of appeals entertained the waiver issue as the only issue raised in STRS's writ petition.

Defendants essentially argue that the court of appeals has run amok by considering at an early stage of an appeal whether STRS waived retrial of the rebates claim and the punitive damages issue. They complain that they "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." Defendants' Brief, p. 15. Defendants mischaracterize the court of appeals' actions as resulting from that court's conscious selection of one and only one issue – the waiver issue – to review. The court of appeals did not select the waiver issue for review to the exclusion of all other issues. Rather, it correctly focused on the waiver issue as central both to its jurisdiction to entertain appeals from the September 5th Entry and to the writ petition contemporaneously pending before it.

Defendants' attempt to make this straightforward analytical approach seem off-base is itself baseless. Leading up to the September 5th Entry, Judge Davis treated the waiver issue as the key to whether or not his work on this case was finished. If STRS

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[22] *City of Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St. 3d 402, 404-05, 659 N.E.2d 781, 784; *The State ex rel. Dannaher v. Crawford, Judge* (1997), 78 Ohio St. 3d 391, 394, 678 N.E.2d 549, 552-553.

waived retrial, he evidently reasoned, his work was finished and whatever judgment he issued would be final. Or so his reasoning went. It was equally legitimate, therefore, for the court of appeals to treat the waiver issue as the key to whether or not Judge Davis' work on the case truly was finished. If the court of appeals concluded STRS did not waive retrial, Judge Davis' work was not finished, the hung jury claims/issues would have to be retried, the purported "judgment" issued by Judge Davis could not be legally final, and the appellate court lacked jurisdiction over the appeal.

Since the question of jurisdiction is the first order of business for an appellate tribunal, the court of appeals had every reason to consider the waiver issue up front. Its evident conclusion that the September 5th Entry was not an appealable order in form and content and in that there had been no waiver left it without jurisdiction over STRS's protective appeal and the cross-appeals, and left Judge Davis with no discretion but to retry the hung jury claims/issues. Finding itself without appellate jurisdiction and presented with a petition for a writ of procedendo, the court of appeals correctly issued simultaneous entries dismissing STRS's protective appeal and defendants' cross-appeals and granting the writ of procedendo commanding Judge Davis to do the only thing left to do – retry the hung jury claims/issues.[23]

Defendants' arguments disregard the fact that Judge Davis simply failed for the second time to enter an order that, in both form and substance, is appealable. The court of appeals could not have entertained any appeal from the September 5th Entry, no matter

[23] This Court has made it exceptionally clear that a writ is the appropriate mechanism for commanding a trial judge to proceed when that is the only thing he or she has discretion to do. *State ex rel. State Fire Marshal v. Curl* (2000), 87 Ohio St.3d 568, 573, 722 N.E.2d 73, 77. The court of appeals' entry did not tell Judge Davis how to conduct the retrial, but only that he must proceed.

how badly it wanted to do so. As explained above, the court of appeals correctly recognized that Judge Davis's failure to issue an entry that constitutes a final, appealable order left it without appellate jurisdiction and left STRS without any adequate appellate remedy for compelling a retrial, opening the door to the writ of procedendo.[24]

[24] Under their Fourth Proposition of Law, defendants contest the court of appeals' denial of their motion to intervene. They claim they were listed as "defendants" on STRS's petition for a writ of procedendo. They were listed in the caption because the court of appeals requires that the defendant below be specified, not because STRS intended to make defendants part of the writ proceedings. The court of appeals correctly disposed of defendants' motion to intervene because the simultaneous granting of the writ and dismissal of the appeals – two correct decisions – rendered the intervention motion moot.

CONCLUSION

The writ of procedendo granted in this case was grounded in the court of appeals' firm conviction that Judge Davis's refusal to proceed was clearly erroneous and unjustified. This was not an abuse of the court of appeals' broad discretion, nor does Judge Davis attempt to characterize it as such. Based on the foregoing discussion, there can be no reasonable dispute about the following propositions:

- A retrial of the hung jury issues is mandatory, even without a formal motion for new trial, because "the first trial never was completed."[25]
- Rule 49(B) requires that properly submitted interrogatories be answered, or the case retried.[26]
- A hung jury is not among the reasons for a granting a "new trial" under Rule 59(A).
- A retrial following a hung jury is not a "new trial" in the Rule 59 sense.[27]
- Rule 50(B) allows, but does not require, the filing of a motion for a new trial along with a JNOV motion.
- Rule 50(B) does not address when a party *not* seeking JNOV must file a new trial motion and, therefore, if any time requirement for a new trial motion applied, it would be that provided by Rule 59(B) (i.e., within 14 days after judgment), a requirement with which STRS indisputably complied.

As the foregoing litany of indisputable facts demonstrates, there was no basis for Judge Davis to avoid declaring a mistrial as to the hung jury issues or to hold that STRS waived

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[25] *Aetna Casualty & Surety Co. v. Niemiec*, 172 Ohio St. at 55, 56; *Dyer v. Kaszubski, supra*; *Clopton v. Saint Ann's Hospital, supra*; *Siemer v. Patton, supra.*

[26] *Clopton, supra*; *see also* R.C. § 2315.06 ("When the jury is discharged during a trial or after a cause is submitted, such may at once be tried again, or on a future day, as the court directs.").

[27] *Newark Shopping Ctr. v. Morris Skilken & Co.*, 5 Ohio App.2d at 242.

retrial on these issues by failing to file a new trial motion within 14 days of the jury's discharge.

Contrary to appellants' arguments, this case is well suited to a writ of procedendo. In this case, the trial judge clearly is refusing to proceed to judgment (i.e., retrial), precisely the scenario for which procedendo will lie. By recognizing that Judge Davis had no basis for refusing to proceed to judgment, the court of appeals removed the pall unjustly cast over STRS and its counsel, prevented the needless waste of the parties' and its own resources, and ultimately avoided piecemeal appeals (i.e., now and following the inevitable retrial). Due to deficiencies that rendered the September 5th Entry non-appealable, no appellate remedy available to STRS could remove this unjust pall as expeditiously as justice requires. The writ was properly granted. STRS respectfully asks the Court to affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served on this 25th day of January 2007, by regular mail upon Christian J. Schaefer, Esq., counsel for respondent-appellant Hon. David P. Davis, upon Earle Jay Maiman, Esq., counsel for the Medco defendants, and upon Renee Filiatraut, Esq., counsel for Merck & Co, Inc.

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