IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. BOARD OF THE STATE TEACHERS RETIREMENT SYSTEM OF OHIO,	)	CASE NOS. 06-2006, 06-2172, 06-2173
Relators-Appellees,	)	On appeal from the Hamilton County Court of Appeals, First Appellate District
v.	)	Court of Appeals Case No. C-060760
HONORABLE DAVID P. DAVIS JUDGE, COURT OF COMMON PLEAS HAMILTON COUNTY, OHIO	)	
Respondent-Appellant	)	
MEDCO HEALTH SOLUTIONS INC., ET AL.,	)	
Defendants-Appellants	)	

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REPLY BRIEF 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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INTRODUCTION

The Merits Brief of Relator-Appellee Board of the State Teachers Retirement System of Ohio ("STRS Brief") largely ignores the applicable legal standard that has been established by this Court for granting a writ of procedendo. Instead, STRS prefers to address the underlying merits of the case and whether Judge Davis was correct in finding that STRS waived the right to another trial on the Hung Jury Issues. This is not the issue. The question presented by this appeal is whether the legal requirements for the extraordinary remedy of a writ of procedendo have been satisfied. If the legal requirements for a writ of procedendo have not satisfied, then the Court should reverse the extraordinary writ as a matter of law.

Here, upon review of the applicable case law, it should become clear to this Court that the First District Court of Appeals erred in issuing a writ of procedendo. In its Brief, STRS does not dispute that a writ of procedendo should not be used to review the merits of a trial court's ruling nor "to control how the inferior court rules" on a disputed procedural issue. *See State ex rel. Levin v. Sheffield Lake* (1994), 70 Ohio St.3d 104, 110, 1994-Ohio-385. Yet, this is exactly what has occurred in this case. The Court of Appeals wrongfully used the extraordinary writ of procedendo to reverse Judge Davis's waiver ruling and to control how the inferior court rules on the underlying Hung Jury Issues. Accordingly, the Court of Appeals' writ of procedendo must be reversed as a matter of law.

Contrary to STRS's suggestions, a reversal of the extraordinary writ does not leave STRS without an appellate remedy. STRS can challenge the validity of Judge Davis's ruling through the normal appellate process. This appellate process, however, would also allow the Medco Defendants ("Medco") and Merck & Co. ("Merck") not only to defend the correctness of the trial court's waiver ruling, but also to challenge the validity of the trial court's other rulings, including

the threshold legal question of whether Medco is a "fiduciary" that can be held liable for "constructive fraud" and "breach of fiduciary duty" under Ohio law. Accordingly, the Court should reverse the extraordinary writ and direct the court of appeals to rule upon all of the assignments of error through a direct appeal.

LAW AND ARGUMENT

A. STRS Has Failed To Demonstrate That The Legal Standard For A Writ of Procedendo Have Been Satisfied In This Case.

As previously discussed, the issue presented by this appeal is whether the legal standard for granting an extraordinary writ of procedendo has been satisfied. As set forth in our opening Merits Brief, Supreme Court precedent is clear and "well-settled that the writ of procedendo will not issue for the purpose of controlling or interfering with ordinary court procedure." *State ex rel. Utley v. Abruzzo* (1985), 17 Ohio St.3d 203, 204. Moreover, it cannot be used to request "immediate review" of an alleged procedural error nor "control how the inferior court rules" on a disputed legal 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); *State of Ohio ex rel. Safety National Casualty Corp. v. Cook*, 2006-Ohio-3066, ¶ 10, 13, 2006 WL 1667712, *2 (Ohio App. 6 Dist. June 12, 2006) (refusing to grant writ of procedendo to reverse the trial court's ruling on a waiver issue because "the writ is not intended to instruct the lower court as to what its judgment should be").

In its Merits Brief, STRS does not dispute that a writ of procedendo is not appropriate where an appellate court seeks to reverse a trial court's legal ruling. Moreover, it does not dispute that STRS bears the burden to prove that it can satisfy the legal requirements for an extraordinary writ, including that it "possesses a clear legal right to the relief requested" and that

"there exists no adequate remedy in the ordinary course of law." (STRS Brief, pg. 10) (emphasis added). In so doing, however, STRS offers no evidence or legal argument to establish *how* this legal standard has been met in this case, except to state in a conclusory fashion that "[t]he court of appeals correctly concluded that STRS satisfied all of these requirements." *Id.* This statement hardly is sufficient to satisfy STRS's burden of proof. In fact, if anything, the silence in the STRS Brief on how the Court of Appeals can reverse the trial court's substantive waiver ruling through a writ of procedendo only further demonstrates that the Court of Appeals erred in issuing an extraordinary writ.

In its Merits Brief, STRS generally does not respond to nor distinguish any of the writ of procedendo cases cited in the Merits Brief of Defendants-Appellants Medco *et al.* ("Medco Brief"). For example, STRS offers no argument in opposition to the recent, unpublished decision in *State of Ohio ex rel. Safety National Casualty Corp. v. Cook,* 2006-Ohio-3066, ¶¶ 13-17, 2006 WL 1667712 (Ohio App. 6 Dist.), which was addressed on page 9 of the Medco Brief. In *Safety National Casualty Corp.*, the court of appeals refused to use an extraordinary writ of procedendo in order to reverse a trial court's ruling that a party had waived the right to arbitration. The waiver 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.*

In its Brief, STRS concedes that a writ of procedendo should be issued only if Judge Davis had "refused" to proceed to judgment. *See* STRS Brief, pg. 10, fn. 5. As in *Safety National Casualty Corp.*, however, the record in this case confirms that Judge Davis did not

refuse to rule. Rather, like the trial judge in *Safety National Casualty Corp.*, the trial judge specifically ruled on the disputed waiver issue as a matter of law. Under such circumstances, the validity of Judge Davis's waiver ruling is "not germane," because, as the court reasoned in *Safety National Casualty Corp.*, "the writ is not intended to instruct the lower court as to what its judgment should be." *Id.* at ¶ 10, 13. As in *Safety National Casualty Corp.*, the trial judge had "not refused to rule" on the waiver issue, so a writ of procedendo should never have been issued. *Id.* at ¶ 13. Rather, any legal error that may have been committed in ruling on the waiver issue must be reviewed by appeal, not by a writ of procedendo. *Id.*

B. STRS Has Failed To Establish That The September 5, 2006 Order Was Not A Final And Appealable Order.

In its Merits Brief, STRS also does not dispute that a writ of procedendo is not a substitute for appeal and should never be issued where an adequate remedy exists by way of appeal. Although STRS repeatedly argues that the September 5th judgment entry was not a final, appealable order, it does not present any case law that substantiates this assertion. STRS agrees that "[t]o be appealable under R.C. § 2505.02, an order or judgment must determine the action and prevent a judgment." (STRS Brief, p. 14). Here, STRS does not dispute that Judge Davis conclusively decided and resolved the Hung Jury Issues in Defendant's favor by concluding that Plaintiff had waived the right to another trial. By so doing, Judge Davis conclusively resolved and decided <u>all</u> of the pending claims and motions, including the Hung Jury Issues, and left nothing more to determine in the trial court. Accordingly, under R.C. 2505.02, the Order of September 5, 2006, was final and appealable as a matter of law.

In its Merits Brief, STRS argues that the September 5, 2006 Order is not final because it did not grant a dispositive motion on the merits of the Hung Jury Issues, such as a motion for summary judgment or a motion for judgment notwithstanding the verdict. (STRS Brief, pp. 14-

15). This argument is based upon a distinction without a difference. By concluding that STRS had waived the right to another trial, Judge Davis effectively resolved the Hung Jury Issues in Defendant's favor. While he did not grant summary judgment in Defendant's favor, he nevertheless entered a final judgment by resolving all of the claims and issues that were pending in the case. STRS's objection, therefore, is not with the finality of the trial court's judgment, but with the merits of the trial court's waiver ruling.

In its Merits Brief, STRS also argues, without any legal support, that the September 5, 2006 Order was not final and appealable because it did not specify which party prevailed on the Hung Jury Issues. (STRS Brief, pg. 15). STRS's insistence that a final appealable order must state "once and for all which side prevailed on which parts of the case" represents a form over substance approach to defining a final appealable order, which is unsupported by case law. This Court has long 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. Here, the practical effect of Judge Davis's ruling was to resolve the Hung Jury Issues in Defendant's favor, to terminate the case or controversy in the trial court, and to "leave nothing" remaining for the trial court to determine. Accordingly, under R.C. 2505.02, the Order was final and appealable. *See* Medco Brief, p. 11 (citing *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).

C. STRS Does Not Dispute That A Writ of Procedendo Should Not Be Used To Deprive Any Party Of The Right To Timely Appellate Review.

In Medco and Merck's Proposition of Law #3, Defendants requested that this Court reverse the writ of procedendo because it wrongfully deprived Medco and Merck of their right to timely

appellate review of the trial court's final judgment entry. STRS is not the only party that seeks to challenge the trial court's legal rulings. Medco and Merck also seek to appeal the trial court's final judgment entry, by, among other things, establishing that Plaintiff's breach of contract claims conflict with the plain language of the written contracts, and that Medco is not a "fiduciary" that cannot be held liable for "constructive fraud" and "breach of fiduciary duty" under Ohio law. Under App. R. 12, such assignments of error ordinarily should be heard and decided by the court of appeals at the same time as any assignments of error that may be prosecuted by STRS. Indeed, if Medco and Merck can prevail on their legal arguments, the STRS assignments of error may become moot, as there may be no need for another trial on the Hung Jury Issues as a matter of law.

In its Merits Brief, STRS does not dispute that that a writ of procedendo should not be issued if it wrongfully deprives a party of the right to timely appellate review. Although STRS makes the conclusory assertion that "the court of appeals did not cherry-pick the waiver issue and deny defendants review on all other issues," it does not cite anything in the record or the case law to substantiate this position. (STRS Brief, pg. 21). Indeed, it cannot seriously be disputed that the net result of the court of appeals' orders is that STRS was able to obtain a prompt appellate review on the merits of the trial court's waiver ruling, but that Merck and Medco were not able to obtain appellate review of their assignments of error. The net result was that the Court of Appeals granted a new trial on the Hung Jury Issues, even though the need for such a trial may have been nullified if Medco and Merck's assignments of error had been addressed and considered under App. R. 12. Accordingly, for this additional reason, the Court should reverse the writ of procedendo and require the Court of Appeals to resolve *all* of the disputed issues via a direct appeal.

D. Medco and Merck Clearly Had The Right To Participate And Be Heard On The Merits Of The Extraordinary Writ That Was Issued In This Case.

STRS does not dispute that, as a party to the underlying proceedings, Medco and Merck had the clear legal "right" to participate in the original action that was filed by STRS in the Court of Appeals. The original action arose from and directly affected the underlying civil proceedings and Medco and Merck clearly had substantial and important interests at stake that were not adequately represented by Judge Davis who must remain neutral in the underlying case. Although STRS now denies that it named Medco and Merck as Defendants in the original petition, a review of the record confirms that each of the Defendants was individually named in the Petition. (Supp. 2). In any event, the fact remains that it would set a dangerous precedent if this Court were to hold that a party can file an original action directly affecting an underlying civil proceeding without naming all of the parties to the underlying proceeding. While Judge Davis was the Respondent, Medco and Merck still had the right to participate in the petition, which directly affected their rights and the outcome of the underlying civil case. If this Court were to hold that STRS can circumvent a party's rights simply by failing to name them as parties to the petition, it would only encourage other petitioners to follow this course of action in filing actions for extraordinary relief in other cases.

In its Brief, STRS argues that the Court of Appeals denied the motions to intervene because they were "moot." (STRS Brief, pg. 23, fn. 24). This is not clear from the court of appeals' orders, but it is really beside the point. This Court has long recognized that a party to a pending civil proceeding who may be directly affected by the issuance of extraordinary writ has a right to participate (and to intervene if necessary) on the merits before the petition is granted. *State ex rel. Watkins v. Eighth District Court of Appeals* (1998), 82 Ohio St.3d 532, 534; *State ex rel. SuperAmerica Group v. Licking Cty. Bd. Of Elections* (1997), 80 Ohio St.3d 182, 685 N.E.2d 507,

509. Here, a motion to intervene should not even have been necessary, but where, as here, it has been filed, it should be granted. Regardless of whether the court of appeals would have agreed with Medco and Merck's legal arguments, the fact remains that Medco and Merck had the legal right to be heard on the merits before the petition was granted. As it stands now, however, it appears that the Court of Appeals took the position that Medco and Merck did not have the right to be heard, and that the petition could be granted without considering Medco and Merck's positions at all. This is clear legal error that should be reversed by this Court.

E. Judge Davis Was Correct in Ruling That STRS Waived its Right to a New Trial On The Hung Jury Issues Under Civ. R. 6(B) and 50(B).

As Medco and Merck have repeatedly declared, the issue presented by this appeal is whether the well-established standards for a writ of procedendo were satisfied by the court of appeals, not whether Judge Davis erred in concluding that STRS waived the right to a new trial on the Hung Jury Issues. If STRS is correct that that Judge Davis erred in holding that Plaintiff waived the right to another trial, then it can raise this assignment of error through a direct appeal. The law is clear, however, that a writ of procedendo cannot be used as a substitute for appeal or as a vehicle to rule on the merits of a disputed issue of law. Accordingly, even if STRS is correct about the merits of Judge Davis's waiver ruling, it nevertheless does not justify the extraordinary writ that was issued in this case.[1]

Given that most of the STRS Merits Brief addresses the merits of Judge Davis's waiver ruling, however, Medco and Merck will address STRS's legal arguments regarding the waiver ruling on the merits. The ruling is based upon the plain language of Civ. R. 50(B), which

[1] It must be noted that it is wholly incongruous for STRS to simultaneously argue the lack of a final appealable order, thereby justifying the issuance of a writ of procedendo, while at the same time attacking the merits of Judge Davis' ruling as if it were the subject of this appeal.

addresses the timing of any motions for judgment notwithstanding the verdict or for a new trial that may be filed in a case where "a verdict was not returned" on any issue. In particular, Civ. R. 50(B) reads, in relevant part, as follows:

> [I]f a verdict was not returned, such party, ***within fourteen days after the jury has been discharged***, may move for judgment in accordance with his motion. A motion for new trial may be joined with this motion, or a new trial may be prayed for in the alternative. * * * If no verdict was returned the court may direct the entry of judgment or may order a new trial.

Id. (emphasis added).

Although the filing of a motion for a new trial is optional, the deadline for filing any post-trial motion for a judgment notwithstanding the verdict or for a new trial is clear. If a verdict was not returned, a motion for judgment or for a new trial must be filed "within fourteen days after the jury has been discharged." *Id.* Moreover, under Civ. R. 6(B), this 14-day deadline is mandatory and may not be enlarged or extended by the trial court. *See* Civ. R. 6(B) (trial court "may not extend the time for taking any action under Rule 50(B), 59(B), 59(D) and 60(B)"). Accordingly, if a motion under Civ. R. 50(B) is not timely filed within fourteen days of the discharge of the jury, it cannot be raised at a later time. *Horner v. Toledo Hosp.* (1993), 94 Ohio App.3d 282 (trial court lacks authority under Civ. R. 6(B) to grant extension of time for filing motion for new trial); *Town & Country Drive-In Shopping Centers, Inc. v. Abraham* (1975), 46 Ohio App.3d 262, 267 ("Civ. R. 6(B) absolutely prohibits the trial court from extending the time to file motions" under the rules set forth therein).

Here, it is undisputed that the jury was discharged on December 19, 2005. Moreover, as STRS admits in its Merits Brief, no request was made by STRS to set a second trial on the Hung Jury Issues until January 19, 2006, 31 days after the jury was discharged by the trial judge. *See* STRS Brief, pg. 3. While STRS contends that it was granted an enlargement of time by the trial

court, this argument must fail as a matter of law because Civ. R. 6(B) clearly prohibits any enlargement of time for motions filed under Civ. R. 50(B). *Id.* Accordingly, the trial court correctly followed the mandatory requirements of Civ. R. 6(B) in concluding that STRS had waived the right to a new trial as a matter of law.

In its Merits Brief, STRS argues that that it did not need to request a new trial under Civ. R. 50(B) because of this Court's ruling in *Aetna Casualty Co. & Surety Co. v. Niemiec* (1961), 172 Ohio St. 53. (STRS Brief, p. 11). As previously explained in our opening Merits Brief, however, *Aetna Casualty & Surety Co.* is inapplicable to this case because it was decided in 1961, almost a decade before Ohio Civ. Rule 50(B) was promulgated. *See* Medco's Brief, pp. 14-15. Indeed, if anything, *Aetna Casualty & Surety Co.* fully supports Medco and Merck's position because, in that case, the Court did not issue a writ of procedendo. Rather, it only considered the waiver issue because the trial judge had granted a new trial and entered a final judgment in that case. Moreover, the Court did not address the 14-day deadline set forth in Civ. R. 50(B) because it did not exist at that time. Accordingly, *Aetna Casualty* is inapplicable here.

In its Merits Brief, STRS also cites Civ. R. 49(B), as requiring a new trial whenever jury interrogatories are not answered. *See* STRS Brief, p. 11. This is not necessarily the case. Civ. R. 49(B) does not address the timing of a request for a new trial following the discharge of the jury. Civ. R. 50(B) addresses this issue. Thus, while STRS could have cited Civ. R. 49(B) as grounds for requesting a new trial, the undisputed fact remains that STRS did not make such a request until after the 14-day deadline in Civ. R. 50(B) had expired.

STRS further argues that its request for a second trial on the Hung Jury Issues was not actually a motion for "new trial" as defined by Ohio Civ. R. 59(A), but rather a continuation of the first trial. *See* STRS Brief, p. 12. In support of its proposition, STRS cites to an Iowa

decision and a 1964 Ohio decision issued before the adoption of Rule 50. *Id.* While STRS attempts to argue semantics on this point, its "Proposed Entries" filed on January 19, 2006, clearly requested a new trial. They specifically requested that the Court enter an Order, stating that the Hung Jury Issues "will be determined ***in the second trial, which shall be scheduled as soon as possible.***" (*See* Supp. 53) (emphasis added). This Proposed Entry, which is at the heart of Judge Davis's contested ruling, was clearly a request for a new trial. As such, STRS's after-the-fact arguments about the nature of their request are irrelevant and misplaced.

Finally, the Court should reject the STRS argument that the "law of the case" doctrine somehow bars Medco and Merck from making any waiver arguments at this time. The trial court's order of March 1, 2006, and the subsequent appellate orders of April 6, 2006 and April 26, 2006, were not definitive and do not establish any law of the case. (*See* Supp. 107, 128, 133). None of these rulings directly addressed or foreclosed the legal argument that STRS waived its right to a new trial on the Hung Jury Issues. Although this argument was addressed orally by the trial court at the February 22nd hearing, it was not conclusively decided in a written judgment entry until September 5, 2006. The trial court's judgment entry of March 1, 2006, therefore, did not expressly address the argument that STRS waived its right to a new trial. Thus, the Court of Appeals' dismissal order did not expressly address this issue as well.

Indeed, even if the Appellate Court's dismissal orders of April 2006 were based upon the belief that the trial court should re-try the Hung Jury Issues, such orders still would not constitute the "law of the case." In general, "[c]ourts have held that a trial court should not apply the doctrine of the law of the case when the appellate court makes conclusions relating to issues that were not decided originally by the trial court." *See Crestmont Cleveland Partnership v. Ohio Department of Health,* 139 Ohio App.3d 928, 934 (10th Dist. 2000) (finding that law of the case

doctrine did not preclude a second motion to dismiss where appellate court was barred from addressing merits of first motion to dismiss). Any rulings the Appellate Court would have made in *STRS I,* therefore, relating to STRS's waiver of a new trial, would have been *de novo,* as this argument was not addressed in the Trial Court's final judgment entry until September 5, 2006. As such, the law of the case doctrine would not apply.

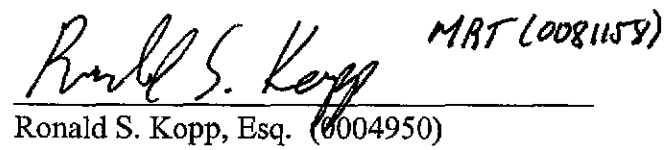
* * *

In closing, we again want to remind the Court that the issue presented in this appeal is not the merits of the September 5th Order, but whether the trial court's waiver ruling can be reversed through the issuance of an extraordinary writ. A review of Supreme Court precedent makes clear that the legal standards for a writ of procedendo have not been satisfied in this case. The Court therefore should reverse the writ of procedendo that was wrongfully issued by the Court of Appeals 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.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2007, a true and correct copy of the foregoing Reply Brief of Defendants-Appellants Medco Health Solutions, Inc., et al. to Merit Brief of Relator-Appelle State of Ohio Ex Rel. Board of the State Teachers Retirement System of Ohio 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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