

IN THE SUPREME COURT OF OHIO

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

CASE NO. 06-2006, 06-2169, 06-2170,
06-2171, 06-2172, 06-2173

Relators-Appellees,)

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

v.)

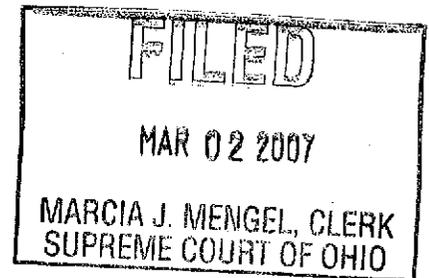
Court of Appeals
Case No. C-060760

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

Respondent-Appellant)

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

Defendants-Appellants)



**MEMORANDUM IN OPPOSITION TO MOTION OF STATE TEACHERS
RETIREMENT SYSTEM OF OHIO TO DISMISS PENDING APPEALS**

NOW COME Defendants-Appellants Medco Health Solutions, Inc., Merck-Medco Managed Care, LLC, Paid Prescriptions, LLC, Medco Health Solutions of Columbus North, Ltd., Medco Health Solutions of Columbus West, Ltd., Medco Health Solutions of Fairfield, LLC, Inc., Merck-Medco Rx Services of Florida No. 2, L.C., Merck-Medco Rx Services of Florida, L.C., Medco Health Services of Las Vegas, Inc., Medco Health Solutions of Texas, LLC (the "Medco Defendants"), and Merck & Co. ("Merck"), and hereby submit the following Opposition to the Motion of the State Teachers Retirement System of Ohio ("STRS") to dismiss the pending appeals as moot.

Stanley M. Chesley
Paul M. DeMarco
Robert Hueck II
W.B. Markovits
WAITE, SCHNEDIER, BAYLESS
& CHESLEY CO., LPA
1513 Fourth & Vine Tower
Cincinnati, Ohio 45202-3685

*Attorneys for Relator-Appellee Board of the
State Teachers Retirement System of Ohio*

Thomas W. Breidenstein
Barrett & Weber, LPA
500 Fourth and Walnut Centre
105 E. Fourth Street
Cincinnati, Ohio 45202

James E. Swaim
Flanagan, Lieberman, Hoffman & Swaim
318 West Fourth Street
Dayton, Ohio 45402

*Attorneys for Relator-Appellee Board of the
State Teachers Retirement System of Ohio*

Joseph T. Deters
Hamilton County Prosecuting Attorney
Christian J. Schaefer (0015494)
Colleen McCarren (0079858)
Assistant Prosecuting Attorneys
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2174

*Attorneys for Respondent-Appellant
Hon. David P. Davis, Judge
Hamilton County Court of Common Pleas*

Ronald S. Kopp (0004950)
Stephen W. Funk (0058506)
ROETZEL & ANDRESS, LPA
222 South Main Street, Suite 400
Akron, Ohio 44308
Phone: (330) 376-2700
Facsimile: (330) 376-4577
rkopp@ralaw.com; sfunk@ralaw.com

*Attorneys for Medco Defendants and
Merck & Co., Inc.*

Earle Jay Maiman (0014200)
Stephen L. Richey (0061570)
Thompson Hine LLP
312 Walnut Street, Suite 1400
Cincinnati, OH 45202-4029
Phone: (513) 352-6747
Facsimile: (513) 241-4771

Trial Attorneys for Medco Defendants

Renee S. Filiatraut (0041085)
Thompson Hine LLP
312 Walnut Street, Suite 1400
Cincinnati, OH 45202-4029
Phone: (513) 352-6747
Facsimile: (513) 241-4771

Trial Attorney for Merck & Co., Inc.

INTRODUCTION

This appeal arises from a writ of procedendo that was wrongfully issued by the First District Court of Appeals to compel the Honorable David P. Davis of the Hamilton County Court of Common Pleas to proceed with a jury trial in a civil case. In the proceedings below, the Court of Appeals issued a writ of procedendo that overruled the trial court's ruling that STRS had waived the right to another jury trial as a matter of law. It is well-established, however, that a writ of procedendo should not be used to review the merits of a trial court's ruling nor "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. Thus, as set forth in the Merits Brief filed on December 28, 2006, and in the Reply Brief filed on February 15, 2007, this Court should reverse the writ of procedendo that was wrongfully issued by the Court of Appeals in this case.

The merits of these important appeals have now been fully briefed and are ready for decision by this Court. Although the trial judge, in accordance with the writ of procedendo, has *scheduled* a new trial date for August 27, 2007, this proposed trial date is still six (6) months away and will likely not proceed until after the Court rules on the merits of the pending appeals. Indeed, until this Court rules on the pending Supreme Court appeals, the trial court *lacks the jurisdiction* to proceed with another trial, which would be "inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm" the writ of procedendo issued by the Court of Appeals. *See State ex rel. Blanchard Valley Nat'l Health Association v. Bates*, 2006-Ohio-6520, 112 Ohio St.3d 146, 858 N.E.2d 406 (Dec. 27, 2006). The appeals therefore are not moot. The trial court has not yet proceeded with another trial in accordance with the writ of procedendo, and it lacks the jurisdiction to do so, until the Court rules on the merits of the appeals. Accordingly, the motion to dismiss the appeals should be denied.

STATEMENT OF FACTS

As previously discussed, the above-referenced appeals involve the question of whether the Court of Appeals erred in issuing a Peremptory 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 relevant facts are set forth in the Merits Brief filed by the Medco Defendants and Merck on December 28, 2006, and in the Supplement to the Briefs (“Supp.”) that was filed on November 17, 2006, by Judge Davis in Appeal No. 06-2006.

A. Summary of Plaintiff’s Complaint.

As set forth therein, the underlying civil action was first 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”). 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. Medco’s relationship with STRS began in the 1990s and was based upon written contracts that specifically set forth the benefits that would be provided to STRS and expressly disclaimed that Medco was a “fiduciary” with any heightened duty beyond the contractual duties set forth therein.

In its Complaint, STRS alleged, among other claims, three (3) primary claims for damages against the Medco Defendants:

- (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 charges a \$8.30 dispensing fee that was not authorized by the contract; and

- (3) Breach of Fiduciary Duty/Constructive Fraud: that Medco breached an alleged fiduciary duty by marking up the price of generic drugs at mail order.

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

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 a 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 Order of 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. (Supp. 5, 14-34). 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. 48).

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

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. 65-70). 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. 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 its 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. 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 all 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**.”

(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). The writ of procedendo is attached hereto as Exhibit A and ordered that “[t]he trial court *shall proceed with retrial* of those claims or causes of action upon which the jury could not reach a verdict.” (*Id.*)

D. The Supreme Court Appeals.

On October 25, 2006, Judge Davis filed a notice of appeal from the entry granting the peremptory writ. (Supp. 402). Medco and Merck have filed their own notices of appeal from the peremptory writ in Supreme Court Case No. 2006-2006, along with notices of appeal from the denials of the motion 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 were appeals of right, and the second set of appeals were 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.

On December 21, 2006, Medco and Merck filed a Motion to Stay Writ of Procedendo Pending Appeal. Although the trial court initially agreed with Medco and Merck that it lacked jurisdiction to schedule a new trial pending resolution of the Supreme Court appeal, Judge Davis subsequently decided to *schedule* a new trial date for August 27, 2007, after this Court denied Medco and Merck’s Motion to Stay the Writ of Procedendo on January 24, 2007. The scheduled trial, however, is still approximately six (6) months away. Accordingly, even if the trial court has jurisdiction to proceed with another trial, there still remains plenty of time for this Court to decide the merits of the appeal before any retrial proceeds, particularly if the Court issues an Order to expedite the appeals.

LAW AND ANALYSIS

A. THE INSTANT APPEALS FROM THE WRIT OF PROCEDENDO ARE NOT MOOT.

STRS’s Motion is based on the argument that the above-referenced appeals are moot because Judge Davis has complied with the writ of procedendo by *scheduling* a new trial. See STRS’s Motion, p. 3. The writ of procedendo, however, directed Judge Davis to *proceed* with a retrial, which cannot and will not happen for at least another six (6) months. Until the trial commences on August 27, 2007, therefore, the writ of procedendo and the corresponding appeals

therefrom, are not moot. To the contrary, if the Court grants the appeal and reverses the writ of procedendo, the new trial date can and should be vacated as a matter of law.

Indeed, the case law is clear that an appeal from a writ of mandamus or procedendo is not moot unless the compelled action is actually performed and *completed*. In *Smith v. Fuerst*, 89 Ohio St.3d 456, 457 (2000), for example, the act that was the subject of the mandamus petition (service of a journal entry) had “*already been performed*” under Civ. R. 5. *Id.* at 457. Similarly, in *State ex rel. Graham v. Niemeyer*, 106 Ohio St.3d 466, 466 (2005), the writ of procedendo that compelled the trial court to rule on a new trial motion only became moot because the motion had already been denied. *See also State ex rel. Grove v. Nadel*, 84 Ohio St.3d 252, 252-253 (1998) (“[T]he court correctly dismissed Grove’s procedendo action on remand from this court because Judge Nadel had already performed the requested act, *i.e.*, he journalized his January 1997 decision denying Grove’s motion for a copy of his transcript.”); *Troy McIntosh Original Action v. State of Ohio*, 2002 WL 31430317, *1 (Ohio App. 8 Dist.) (writ of procedendo action to compel common pleas court to rule on motion for bond pending appeal was moot where motion had been denied) (copy attached as Exhibit B).

Here, the writ of procedendo directs Judge Davis to “proceed” with retrial. *See* Writ of Procedendo, Exhibit A. The trial judge has not yet proceeded with a retrial and in fact such a retrial will not proceed until August 27, 2007, at the earliest. In this regard, this case is similar to *State ex rel. Howard v. Doneghy*, 102 Ohio St.3d 355 (2004), another writ of procedendo case. In *Howard*, the appellant sought a writ of procedendo to compel Judge Doneghy of the Lucas County Court of Common Pleas “to proceed to judgment” in his administrative appeal pending in the common pleas court. *Id.* at 355. After the court of appeals issued an order that directed Judge Doneghy to proceed to judgment, Judge Doneghy in fact performed this act by *entering judgment against Howard*. *Id.*

Accordingly, this Court agreed that the writ of procedendo had been rendered moot by the trial court's entry of "*judgment* in the underlying case." (emphasis added).

In *Howard*, it was the judgment in the underlying case that rendered the writ of procedendo moot. Similarly, in this case, the writ of procedendo is not moot unless and until the trial court actually "proceeds" with another trial, which will not occur until August 27, 2007. (In fact, there is nothing precluding Judge Davis from again modifying his position and vacating the trial date.) By then, the Supreme Court likely will have had an opportunity to rule on the validity of the writ of procedendo and to determine on the merits whether it was properly issued. Indeed, to the extent necessary, Medco and Merck would request that the Court expedite the scheduling of oral argument in the appeals, which have already been briefed and are ready for decision by this Court. By so doing, the Court can ensure that the important issues in this case are decided on the merits.

B. THE TRIAL COURT LACKS JURISDICTION TO PROCEED WITH ANOTHER TRIAL UNTIL AFTER THE COURT DECIDES THE PENDING APPEALS ON THE MERITS.

It is well-established that the filing of a notice of appeal divests a lower court of any jurisdiction to consider or rule upon any of the issues that are the subject of the pending appeal. When a case is appealed, the trial court retains jurisdiction to issue orders only if they are "not inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." *State ex rel. Blanchard Valley Health Ass'n v. Bates* (2006), 112 Ohio St.3d 146, 148, 2006-Ohio-6520, ¶ 15; (citations omitted); *State ex rel. Rock v. State Emps. Retirement Bd.* (2002), 96 Ohio St.3d 206, 2002-Ohio-3957, ¶ 8; *Yee v. Erie Cty. Sheriff's Dep't* (1990), 51 Ohio St. 3d 43, 44. This well-established rule applies to appeals taken to the Ohio Supreme Court from a judgment of the court of appeals. *See State ex rel. Cotton v. Ghee* (1998), 84 Ohio St.3d 54, 56; *Howard v. Catholic Social Services of Cuyahoga County* (1994), 70 Ohio St.3d 141, 146. Thus, during the

pendency of the instant appeal, the trial court lacks the jurisdiction to take any action, such as proceeding with another trial, that would be inconsistent with the Supreme Court's jurisdiction to review the propriety of the writ of procedendo that was issued by the Court of Appeals.

The recent Supreme Court decision of *Blanchard Valley Health Ass'n*, 112 Ohio St.3d 146, *supra*, well exemplifies why the trial court lacks jurisdiction to proceed with another trial in this case. In that case, Blanchard Valley Health Ass'n filed a motion in the Lucas County Court of Common Pleas under R.C. 2711.02 to stay a civil action pending the completion of arbitration between the parties. The trial judge denied the motion for a stay pending arbitration, however, and Blanchard Valley filed a notice of appeal. *Id.* at 147, 2006-Ohio-6520, ¶ 5-6. Notwithstanding the pendency of an appeal over whether to stay the proceedings pending arbitration, the trial judge nevertheless stated on the record that he "intended to proceed with a May 24 trial" unless "the court of appeals instructed him to stop." *Id.* at ¶ 6. Blanchard Valley then filed a writ of prohibition in the court of appeals to prevent the trial judge from proceeding with his scheduled trial pending the resolution of Blanchard Valley's appeal, and the court of appeals granted the extraordinary writ of prohibition. *Id.*, ¶ 7-8.

Upon review, this Court affirmed the writ of prohibition, concluding that "the court of appeals correctly held that [the trial judge] patently and unambiguously lacked jurisdiction to proceed with the underlying case pending the appeal." *Id.* at 149, 2006-Ohio-6520, ¶ 17. "[W]e have consistently held that once an appeal is perfected, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." *Id.* at 148, ¶ 15. Here, the Court explained, the issue on appeal was whether the trial court should proceed with trial pending arbitration, or stay the proceedings pending arbitration. *Id.* In such a situation, the Court held that "[p]roceeding with the trial in the underlying case would

have been inconsistent with the court of appeals' jurisdiction to review the propriety of Judge Bates' judgment denying the motion for a stay pending arbitration." *Id.*

The same reasoning has equal application here. In this case, the issue on appeal is whether the court of appeals erred in issuing a writ of procedendo to compel the trial court to proceed with another trial of the Hung Jury Issues before allowing an appeal from the trial court's final judgment entry of September 5, 2006. In such a situation, "[p]roceeding with the trial in the underlying case would [be] inconsistent with [the Supreme Court's] jurisdiction to review the propriety of [the court of appeals'] judgment [issuing a writ of procedendo to compel a new trial and dismissing the appeals]." *Id.*, 112 Ohio St.3d at 149, 2006-Ohio-6520, ¶ 16. Although Medco and Merck would be entitled to seek a writ of prohibition, if necessary, to bar the trial court from proceeding with another trial, such a writ is not necessary at this juncture because it is anticipated that the Court can decide the pending appeals well before August 27, 2007. Accordingly, Medco and Merck have not filed a writ of prohibition at this time.

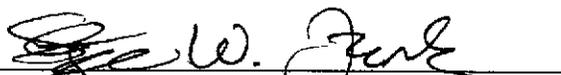
C. THE COURT SHOULD EXPEDITE RESOLUTION OF THE APPEALS.

This case lends itself to a simple solution that should satisfy the concerns of all parties. STRS wants to proceed with another trial on August 27, 2007. Medco and Merck, on the other hand, want to ensure that the instant appeals are heard and decided before any new trial proceeds. While Medco and Merck anticipate that the Court can rule on the merits of the appeals well before August 27, 2007, Appellants respectfully request that the Court issue an Order expediting the appeals, if necessary, to ensure that they are decided before the proposed trial date of August 27, 2007. By so doing, the Court can ensure that the important issues presented herein are decided on the merits before any retrial proceeds in the trial court.

CONCLUSION

For these reasons, Medco and Merck respectfully request that this Court deny STRS's Motion to Dismiss and issue an Order expediting the disposition of these appeals, if necessary, so they may be decided before the proposed trial date of August 27, 2007.

Respectfully submitted,



Ronald S. Kopp, Esq. (0004950)
Stephen W. Funk, Esq. (0058506)
ROETZEL & ANDRESS
222 South Main Street, Suite 400
Akron, Ohio 44308
Telephone: (330) 376-2700
Facsimile: (330) 376-4577

*Attorneys for Medco Defendants and
Merck & Co., Inc.*

Earle Jay Maiman (0014200)
Stephen L. Richey (0061570)
Thompson Hine LLP
312 Walnut Street, Suite 1400
Cincinnati, OH 45202-4029
Phone: (513) 352-6747
Facsimile: (513) 241-4771

Trial Attorneys for Medco Defendants

Renee S. Filiatraut
Thompson Hine LLP
312 Walnut Street, Suite 1400
Cincinnati, OH 45202-4029
Phone: (513) 352-6747
Facsimile: (513) 241-4771

Trial Attorney for Merck & Co., Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2007, a true and correct copy of the foregoing *Memorandum in Opposition to Motion of State Teachers Retirement System of Ohio to Dismiss Pending Appeals* was served upon the below-listed counsel of record via first-class U.S. mail, postage prepaid:

Stanley M. Chesley
Paul M. DeMarco
Robert Hueck II
W.B. Markovits
WAITE, SCHNEDIER, BAYLESS
CHESLEY CO., LPA
1513 Fourth & Vine Tower
Cincinnati, Ohio 45202-3685

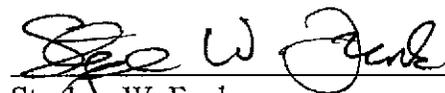
Thomas W. Breidenstein
Barrett & Weber, LPA
500 Fourth and Walnut Centre
105 E. Fourth Street
Cincinnati, Ohio 45202

James E. Swaim
Flanagan, Lieberman, Hoffman & Swaim
318 West Fourth Street
Dayton, Ohio 45402

Attorneys for Relator-Appellee
Board of the State Teachers Retirement System
of Ohio

Joseph T. Deters
Hamilton County Prosecuting Attorney
Christian J. Schaefer (0015494)
Colleen McCarren (0079858)
Assistant Prosecuting Attorneys
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2174

Attorneys for Respondent-Appellant
Hon. David P. Davis, Judge
Hamilton County Court of Common Pleas



Stephen W. Funk

~~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.

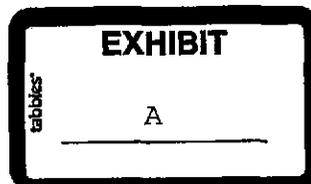
The Court further finds that the motion for a peremptory writ of procedendo is well taken and is granted. The trial court shall proceed with retrial of those claims or causes of action upon which the jury could not reach a verdict.

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)



H

Troy McIntosh Original Action v. State Ohio App. 8 Dist., 2002.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

TROY McINTOSH ORIGINAL ACTION,

Petitioner,

v.

STATE of Ohio, Respondent.

No. 81395.

Decided Oct. 31, 2002.

In state inmate's civil action against state, the Court of Common Pleas, Cuyahoga County, No. CR-328529, denied inmate's motion for bond pending appeal. Inmate petitioned for writ of procedendo. The Court of Appeals, Terrence O'Donnell, J., held that: (1) the petition was moot, and (2) inmate's failure to file litigation history affidavit warranted dismissal of petition.

Writ dismissed.
West Headnotes

[1] Courts 106 ↪ 209(2)

106 Courts

106VI Courts of Appellate Jurisdiction

106VI(A) Grounds of Jurisdiction in General

106k209 Procedure in General

106k209(2) k. In Issuance of Writs. Most

Cited Cases

State inmate's petition for writ of **procedendo**, to compel trial court to rule on his motion for bond pending appeal in inmate's civil action against state, was moot, where trial court had ruled on the motion by denying it.

[2] Courts 106 ↪ 209(2)

106 Courts

106VI Courts of Appellate Jurisdiction

106VI(A) Grounds of Jurisdiction in General

106k209 Procedure in General

106k209(2) k. In Issuance of Writs. Most

Cited Cases

Failure of state inmate to comply with statutory requirement of providing affidavit describing each

civil action or appeal filed by him within previous five years in any state or federal court warranted dismissal of petition for writ of procedendo to compel trial court to rule on his motion for bond pending appeal in inmate's civil action against state. R.C. § 2969.25.

Writ of Procedendo.

Rosalind V. Taylor, Esq., Cleveland, OH, for petitioner.

William D. Mason, Cuyahoga County Prosecutor, L. Christopher Frey, Assistant, Cleveland, OH, for respondent.

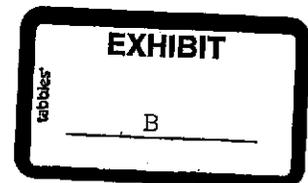
TERRENCE O'DONNELL, Judge.

*1 {¶ 1} On June 5, 2002, the petitioner, Troy McIntosh, commenced this procedendo action to compel the common pleas court to rule on a motion for bond pending appeal which he filed on May 16, 2002, in the underlying case, *State of Ohio v. Troy McIntosh*, Cuyahoga County Common Pleas Court Case No. CR-328529. For the following reasons we dismiss this procedendo action sua sponte because it is moot.

*1 {¶ 2} On June 18, 2002, the trial court in the underlying case denied McIntosh's motion for bond pending appeal. (A copy of that journal entry is attached.)

*1 [1] {¶ 3} A writ of **procedendo** is an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. See *Yee v. Erie County Sheriff's Department (1990)*, 51 Ohio St.3d 43, 553 N.E.2d 1354. **Procedendo** is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Watkins v. Eighth District Court of Appeals*, 82 Ohio St.3d 532, 1998-Ohio-190, 696 N.E.2d 1079. Thus, in the present case, because the trial court has proceeded to judgment on the relevant matter, this **procedendo** action is moot.

*1 [2] {¶ 4} In addition, the petitioner has also failed to comply with R.C. 2969.25, which requires a petitioner to supply an affidavit describing each civil action or appeal filed by the petitioner within the previous five years in any state or federal court. The failure to comply with R.C. 2969.25 warrants dismissal of the complaint for a writ. See *State ex rel.*



Zanders v. Ohio Parole Board, 82 Ohio St.3d 421, 1998-Ohio-218, 696 N.E.2d 594 and State ex rel. Alford v. Winters, 80 Ohio St.3d 285, 1997-Ohio-117, 685 N.E.2d 1242. Further, the petitioner failed to support his complaint with an affidavit "specifying the details of the claim" as required by Local Rule 45(B)(1)(a). State ex rel. Wilson v. Calabrese (Jan. 18, 1996), Cuyahoga App. No. 70077, and State ex rel. Smith v. McMonagle (July 17, 1996), Cuyahoga App. No. 70899.

*1 {¶ 5} Accordingly, this action is dismissed. Costs assessed against petitioner. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. See Civ.R. 58(B). So ordered.

PATRICIA ANN BLACKMON, P.J., and JAMES J. SWEENEY, J., CONCUR.

Ohio App. 8 Dist., 2002.

Troy McIntosh Original Action v. State

Not Reported in N.E.2d, 2002 WL 31430317 (Ohio App. 8 Dist.), 2002 -Ohio- 5979

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