

Kevin C. Schiferl (IN Bar # 14138-49)
(Pro Hac Vice Application Pending)
Frost Brown Todd LLC
201 N. Illinois Street, Suite 1900
Indianapolis, IN 46244-0961
(317) 237-3819
(317) 237-3900 (fax)
kschiferl@fbtlaw.com

*Attorneys for Defendant-Petitioner Ford Motor
Company*

Damond R. Mace (#0017102)
Squire Sanders & Dempsey
4900 Key Center
127 Public Square
Cleveland, OH 44114-1304
(216) 479-8500
(216) 479-8780
dmace@ssdlaw.com

Aaron Todd Brogdon (#0081858)
Squire, Sanders & Dempsey
41 South High Street
Suite 2000
Columbus, OH 43215
(614) 365-2725
(614) 365-2499 (fax)
abrogdon@ssd.com

*Attorneys for Defendant-Petitioner TRW
Vehicle Safety Systems, Inc.*

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS.....	2
ARGUMENT IN SUPPORT OF THE CERTIFIED QUESTION.....	3
A. ANSWERING THE QUESTION MAY DETERMINE THE FEDERAL ACTION.	3
B. THERE IS NO CONTROLLING OHIO SUPREME COURT PRECEDENT RESOLVING THE QUESTION.....	3
C. THE CERTIFIED QUESTION IS OF GREAT GENERAL INTEREST.	5
CONCLUSION.....	6
CERTIFICATE OF SERVICE	7

INTRODUCTION

On March 14, 2011, in the case of *Kenneth M. Schwering, et al. v. TRW Vehicle Safety Systems, Inc., et al.*, Case No. 1:10-CV-679 (S.D. Ohio) (the “Federal Action”), Judge Beckwith certified the following question of state law to this Court:

Where a jury has been empaneled and sworn and the trial has commenced for purposes of Ohio Civ. R. 41(A)(1)(a) and the trial court subsequently declares a mistrial, does Rule 41(A)(1)(a) permit the plaintiff to unilaterally voluntarily dismiss his or her claims without prejudice?

Defendant-Petitioner Ford Motor Company (“Ford”) respectfully requests that the Court accept the certified question and order full merits briefing. Under Sup. Ct. R. Prac. 18.1, there are two requirements for the Court to accept a certified question of state law: (1) a question of Ohio law may determine a proceeding in the certifying court; and (2) no controlling precedent exists in prior Ohio Supreme Court decisions. Both circumstances exist here.

First, an answer of “no” to the certified question would result in the dismissal of the Federal Action. This satisfies the first requirement under Sup. Ct. R. Prac. 18.1.

Second, there is no controlling precedent in prior Ohio Supreme Court decisions. Plaintiff Kenneth Schwering (“Schwering”) cites only law outside of Ohio in addressing the issue posed by the certified question. While Ford and Defendant-Petitioner TRW Safety Systems, Inc. (“TRW”) rely upon prior decisions of this Court and Ohio appellate district cases to address the intent and purpose of Civ. R. 41 underlying the certified question, there is admittedly no direct Supreme Court precedent on point. Because both elements under Sup. Ct. R. Prac. 18.1 are satisfied, this Court should accept the certified question of law.

STATEMENT OF THE CASE AND FACTS

Schwering seeks damages for products liability and negligence claims arising out of a 2002 accident in which he was seriously injured and his wife was fatally injured. He filed a complaint in the Hamilton County Court of Common Pleas (Case No. A0307981) (the “Hamilton County Action”), on October 17, 2003. Trial commenced on May 18, 2009. On June 8, 2009, as a result of the conduct of Schwering’s counsel and expert, (Doc. 33, Exs. A-D), and upon joint motion of Schwering and Ford, the trial court declared a mistrial. Doc. 33, Ex. F. During the proceedings leading up to the retrial, on October 8, 2009, Schwering unilaterally filed a notice of voluntary dismissal purporting to be without prejudice pursuant to Civ. R. 41(A)(1)(a). Doc. 33, Ex. J.

Ford and TRW promptly objected to Schwering’s attempt to unilaterally dismiss the case without prejudice under Civ. R. 41(A)(1)(a) on the grounds that the dismissal was not “before the commencement of trial.” Doc. 33, Exs. K and L. On November 17, 2009, Judge Niehaus, who presided over the Hamilton County Action, advised counsel by letter that because of the notice of dismissal, he no longer had jurisdiction over the case. Doc. 33, Ex. M. The case was closed on the state court docket, and the Federal Action, asserting the same claims, was filed on September 30, 2010. Doc. 1.¹

Ford and TRW each filed separate Motions to Dismiss in the Federal Action (Docs. 14 and 12, respectively). They contend that because the dismissal in the Hamilton County Action did not occur “before the commencement of trial” under Civ. R. 41(A)(1)(a), it was a dismissal on the merits pursuant to Civ. R. 41(B)(3). Schwering responded to the Motions to Dismiss by contending that the mistrial rendered the first trial a nullity, and therefore, the dismissal was proper and without prejudice under Civ. R. 41(A)(1)(a). Doc. 22.

Judge Beckwith, *sua sponte*, issued an Order requesting that the parties brief whether a certified question of state law would be appropriate (Doc. 31), and after briefing (Docs. 32, 33, and 34) indicated no opposition to certification, certified the question of state law to this Court. Doc. 35.

ARGUMENT IN SUPPORT OF THE CERTIFIED QUESTION

A. ANSWERING THE QUESTION MAY DETERMINE THE FEDERAL ACTION.

The first criterion the Court reviews in determining whether to accept a certified question of state law is whether the question “may be determinative of the proceeding.” Sup. Ct. R. Prac. 18.1. Here, the certified question requests the Court to answer whether a plaintiff’s unilateral voluntary dismissal after trial was commenced and a mistrial declared is without prejudice pursuant to Civ. R. 41(A)(1)(a).

The answer will be dispositive of the Federal Action if the Court answers the certified question in the negative by holding that the dismissal was not pursuant to Civ. R. 41(A)(1)(a). In that instance, the dismissal would fall under Civ. R. 41(B)(3): “**any dismissal not provided for in this rule ... operates as an adjudication upon the merits** unless the court, in its order for dismissal, otherwise specifies.” (emphasis added). Because the outcome of the Federal Action may be determined if this Court answers the certified question, the first element necessary for the Court to accept the certified question under Sup. Ct. Prac. R. 18.1 is satisfied.

B. THERE IS NO CONTROLLING OHIO SUPREME COURT PRECEDENT RESOLVING THE QUESTION.

The second criterion the Court reviews in determining whether to accept a certified question of state law is whether there is any “controlling precedent in the decisions of [the]

¹ All references to “Doc.” in this action refer to the docket listing for the Federal Action.

Supreme Court.” Sup. Ct. R. Prac. 18.1. Here, there is no directly applicable case law of this Court (or any other Ohio court) expressly answering the certified question.

The sole issue to be answered by the Court is whether a plaintiff can unilaterally voluntarily dismiss without prejudice under Civ. R. 41(A)(1)(a) after a jury is empaneled and sworn, evidence is received, and a mistrial is declared. A decision from this Court would necessarily answer the question of when a trial has “commenced” for the purposes of Civ. R. 41(A)(1)(a).

Although this Court has not addressed the issue, lower court decisions support Ford’s position. For the purposes of Civ. R. 41(A)(1)(a), “a civil trial commences when the jury is empaneled and sworn, or, in a bench trial, at opening statements.” *Fraze v. Ellis Bros* (1996), 113 Ohio App. 3d 828, 831, 682 N.E.2d 676; see also *Douthitt v. Garrison* (1981), 3 Ohio App. 3d 254, 256, 444 N.E.2d 1068; *ComDoc v. Advance Print Copy Ship Ctr.*, Ninth Dist. App. No. 24212, 2009-Ohio-2998, ¶ 12; *Standard Oil Co. v. Grice* (1975), 46 Ohio App. 2d 97, 101, 345 N.E.2d 458. This would appear to resolve the issue, as the text of Civ. R. 41(A)(1)(a) does not provide an exception where a mistrial is ordered. There also appears to be no Ohio case law suggesting that a mistrial affects the plain meaning of the “commencement of trial” language in the Rule.

In Schwering’s Combined Opposition to the Motions to Dismiss in the Federal Action, he acknowledges “no Ohio court has yet to rule on the issue.” Doc. 22, p. 5. He goes on to cite numerous irrelevant cases about the effect of a mistrial (all from jurisdictions outside of Ohio), none of which addresses whether a plaintiff may unilaterally voluntarily dismiss without prejudice under Ohio Civ. R. 41(A)(1)(a) after a mistrial. Doc. 22, pp. 5-7.

Accordingly, the second element of Sup. Ct. R. Prac. 18.1 is also satisfied, in that there is no controlling precedent from this Court. The issue of whether a plaintiff may unilaterally voluntarily dismiss an action without prejudice under Civ. R. 41(A)(1)(a) after a trial has commenced before a jury, but later declared a mistrial, is a question of first impression before this Court. This Court should accept and answer the certified question.

C. THE CERTIFIED QUESTION IS OF GREAT GENERAL INTEREST.

The Court also should address the certified question because it poses an issue of great general interest, as that term is used in S. Ct. Prac. R. 3.1(B)(2). The Court's answer to the certified question is critical because it will clarify the purpose of a frequently used Civil Rule.

Civil Rule 41(A)(1)(a) was designed to give the plaintiff "an absolute right, regardless of motives, to voluntarily terminate its cause of action at any time prior to the actual commencement of the trial." *Standard Oil*, 46 Ohio App. 2d at 101. If the Court answers the certified question in the affirmative, however - that after a mistrial, plaintiffs may still voluntarily dismiss their claims without prejudice - such a holding will encourage attempts to procure a mistrial when a trial is not going the plaintiff's way. Such a holding also would be contradictory to this Court's holding in *Frysingher v. Leech* (1987), 32 Ohio St. 3d 38, 42, 512 N.E.2d 337, acknowledging that the purpose of Civ. R. 41(A)(1)(a) was to prevent a scenario where "plaintiffs could try and retry their causes indefinitely until the most favorable circumstances for submission were finally achieved." *Id.*; quoting *Beckner v. Stover* (1969), 18 Ohio St. 2d 36, 40, 247 N.E.2d 300.

The Court should accept the certified question to address whether the spirit and intent of Rule 41(A)(1)(a) should allow a litigant to commence a trial, produce a mistrial, unilaterally file an opposed "voluntary dismissal," and then file the exact same claims in a new action in a

different court. Answering the certified question will close a potential loophole in this practice that can be used for forum shopping.

CONCLUSION

The certified question presents a dispositive issue of Ohio law in the Federal Action that is not resolved under current Ohio Supreme Court precedent. This Court should accept the question for briefing on the merits.

Respectfully submitted,



Gary M. Glass (#0042417) (Counsel of Record)
THOMPSON HINE LLP
312 Walnut Street, 14th Floor
Cincinnati, OH 45202-4029
(513) 352-6700
(513) 241-4771 (fax)
gary.glass@thompsonhine.com

Elizabeth B. Wright (#0018456)
elizabeth.wright@thompsonhine.com
Conor A. McLaughlin (#0082524)
conor.mclaughlin@thompsonhine.com
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114-1291
(216) 566-5500

(216) 566-5800 (fax)
Kevin C. Schiferl (IN Bar # 14138-49)
(Pro Hac Vice Application Pending)
Frost Brown Todd LLC
201 N. Illinois Street, Suite 1900
Indianapolis, IN 46244-0961
(317) 237-3819
(317) 237-3900 (fax)
kschiferl@fbtlaw.com

*Attorneys for Defendant-Petitioner Ford Motor
Company*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 6th day of April, 2011.

Arthur H. Schlemmer
Michael S. Barron
Charles L. Hinegardner
Barron Peck Bennie & Schlemmer LLC
3074 Madison Road
Cincinnati, OH 45209

Attorneys for Plaintiffs-Respondents Kenneth M. Schwering, Individually, and as representative of the Estate of Beverly Schwering

Damond R. Mace
Squire Sanders & Dempsey
4900 Key Center
127 Public Square
Cleveland, OH 44114-1304

Aaron Todd Brogdon
Squire, Sanders & Dempsey
41 South High Street
Suite 2000
Columbus, OH 43215

Attorneys for Defendant-Petitioner TRW Vehicle Safety Systems, Inc.



Gary M. Glass