ORIGINAL

IN THE SUPREME COURT OF OHIO

KENNETH M. SCHWERING, *et al.*,	:	**CASE NO. 2011-0438**
Plaintiffs-Respondents,	:	
v.	:	On a Certified Question of State Law from the U.S. District Court, Southern District of Ohio, Western Division
TRW VEHICLE SAFETY SYSTEMS, INC., *et al.*,	:	Case No. 1:10-cv-00679
Defendants-Petitioners.	:	

FILED
JUN 13 2011
CLERK OF COURT
SUPREME COURT OF OHIO

AMENDED[1] MOTION TO REQUEST TRANSMITTAL OF THE RECORD AND REQUEST FOR EXPEDITED CONSIDERATION

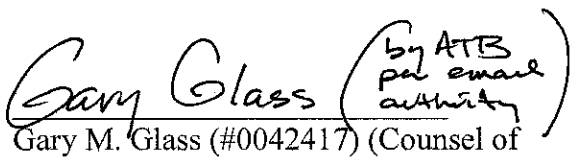
Pursuant to S. Ct. Prac. R. 14.4 and S. Ct. Prac. R. 18.4, Defendant-Petitioner Ford Motor Company and Defendant-Petitioner TRW Vehicle Safety Systems Inc. move the Court for an order requesting transmittal of the underlying record from the pending Case No. 1:10-cv-00679 in the U.S. District Court, Southern District of Ohio, Western Division.

In the Certification Order (attached as "Exhibit A"), Judge Beckwith stated that the "record before this Court" contained "relevant information to be considered in determining the certified question." Certification Order, 4. The Petitioners agree that the underlying record, which is not voluminous, contains information relevant to the consideration of the certified question, and they therefore seek to have this Court request transmittal of the record.

[1] This amended motion is being filed to attach the referenced Exhibit A, which was inadvertently omitted from the original motion that was filed on June 10, 2011.

Because the Petitioners' briefs are currently due on July 5, 2011, the Petitioners request that this motion be given expedited consideration.

Respectfully Submitted,



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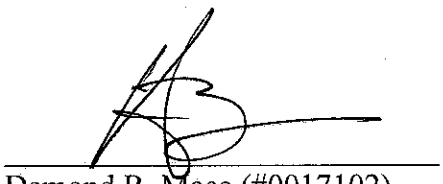

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 13th day of June, 2011.

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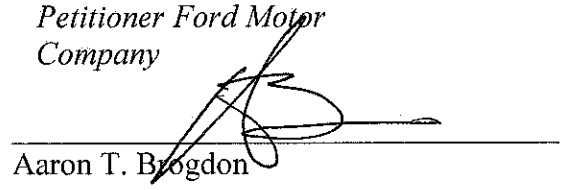

Aaron T. Brogdon

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Exhibit A

11-0438

11-0438

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KENNETH M. SCHWERING, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 1:10-CV-679
	)	
vs.	)	
	)	
TRW VEHICLE SAFETY SYSTEMS, INC., *et al*,	)	
	)	
	)	
	)	
Defendants.	)	

CERTIFICATION ORDER

Pursuant to Supreme Court of Ohio Practice Rule 18.1, the Court hereby issues this certification order to be served upon all parties or their counsel of record and filed with the Supreme Court of Ohio.

A. CASE NAME

Kenneth M. Schwering, et al., v. TRW Safety Systems, Inc., et al., United States District Court for the Southern District of Ohio, Case No. 1:10-CV-679.

B. STATEMENT OF THE CASE

1. FACTS

In September 2010, Plaintiff Kenneth M. Schwering filed products liability and negligence claims on behalf of himself and his decedent against Defendants TRW Safety Systems, Inc. and Ford Motor Company, Inc. in the United States District Court for the Southern District of Ohio. Plaintiffs' claims arise out of a 2002 SUV accident in which Kenneth Schwering was seriously injured and Beverly Schwering was fatally injured. Plaintiffs

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previously asserted the same claims against these Defendants in a suit they filed in the Hamilton County Court of Common Pleas. That lawsuit proceeded to a jury trial in which a jury was empaneled and sworn on May 18, 2009. That trial ended, however, on June 9, 2009 when the trial judge declared a mistrial during Plaintiffs' case-in-chief. Plaintiffs then filed a notice of voluntary dismissal pursuant to Ohio Civ. R. 41(A)(1)(a) and the case was closed on the state court docket.

2. CIRCUMSTANCES GIVING RISE TO THE QUESTION OF LAW

Rule 41(A)(1)(a) of the Ohio Rules of Civil Procedure permits a party, without an order of the court, to voluntarily dismiss a claim "by filing a notice of dismissal at any time before the commencement of trial [.]" Defendants moved to dismiss Plaintiffs' federal lawsuit on the grounds that Plaintiffs could not have voluntarily dismissed their earlier state lawsuit without prejudice without an order of the trial court or without a stipulation by the parties because the trial had "commenced" for purposes of Rule 41(A)(1)(a) when the jury was empaneled and sworn. Therefore, according to the Defendants, Plaintiffs' voluntarily dismissal of their claims operated as an adjudication on the merits. *See* Ohio Civ. R. 41(B)(3)("[A]ny dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies[.]"). Consequently, Defendants argue, the District Court must give preclusive effect to the state court judgment and dismiss the federal complaint.

Plaintiffs, on the other hand, contend that the state court's declaration of a mistrial rendered the proceedings a nullity and, in essence, revived their right to voluntarily dismiss their claims without prejudice pursuant to Rule 41(A)(1)(a). Therefore, according to Plaintiffs, they

have a right to refile their claims pursuant to the Ohio Savings Statute. Ohio Rev. Code § 2305.19.

Defendants argue that the meaning of Rule 41(A)(1)(a) is clear from its text and that Plaintiffs lost the right to voluntarily dismiss their claims unilaterally once the jury was empaneled and sworn. *Frazee v. Ellis Bros. Inc.*, 113 Ohio App.3d 828, 831, 682 N.E.2d 676 (1996); *Standard Oil Co. v. Grice*, 46 Ohio App.2d 97, 100-01, 345 N.E.2d 458 (1975). Plaintiffs' position that the right to dismiss their claims without prejudice was reinstated upon the declaration of a mistrial finds support in cases from other jurisdictions construing similar statutes. *E.g. Bolstad v. Paul Bunyan Oil Co.*, 9 N.W.2d 346, 347 (Minn. 1943)("A dismissal after a mistrial is 'before the trial begins,' because a mistrial is in legal effect no trial at all."); *Kirkpatrick v. First Church of the Nazarene*, 531 N.E.2d 1135, 1137 (Ill. Ct. App. 1988)("[I]f a trial is set and commenced but, for some reason is cancelled, the right to absolute dismissal is still available.").

The Supreme Court of Ohio has described the right of dismissal under Rule 41(A)(1)(a) as "absolute," *Industrial Risk Insurers v. Lorenz Equip. Co.*, 69 Ohio St.3d 576, 579, 635 N.E.2d 14 (1994), and other courts have noted that the purpose of the rule is to further the traditional policy in Ohio to encourage voluntary terminations. *E.g., Clay Hyder Trucking Lines, Inc. v. Riley*, 16 Ohio App.3d 224, 225, 475 N.E.2d 183 (1984).

As a matter of comity, this Court must give a state court judgment the same preclusive effect it would have in the courts of that state. *Dubuc v. Green Oak Tp.*, 312 F.3d 736, 744 (6th Cir. 2002). In this case, if Plaintiffs were not entitled to unilaterally voluntarily dismiss their

claims without prejudice after the declaration of a mistrial by the trial judge, their claims before this Court would be precluded.

3. THE QUESTION OF LAW TO BE ANSWERED

The question of law to be answered by the Supreme Court of Ohio is as follows:

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?

4. RELEVANT INFORMATION FOR CONSIDERING THE CERTIFIED QUESTION OF LAW

This Court, as the certifying court, refers the Supreme Court of Ohio to the briefing of the parties and the record before this Court for the relevant information to be considered in determining the certified question.

C. NAMES OF THE PARTIES

Plaintiffs: Kenneth M. Schwering, as personal representative of the Estate of Beverly D. Schwering, deceased, and Kenneth M. Schwering, individually.

Defendants: TRW Vehicle Safety Systems, Inc., and Ford Motor Company, Inc.

D. COUNSEL FOR EACH PARTY

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E. **DESIGNATION OF MOVING PARTY**

The Defendants are the moving parties.

RESPECTFULLY SUBMITTED,

Date March 14, 2011

s/Sandra S. Beckwith
Sandra S. Beckwith
Senior United States District Judge