

IN THE SUPREME COURT OF OHIO

CASE NO. 2011-0438

KENNETH SCHWERING,

Plaintiff/Appellee,

Vs.

TRW VEHICLE SAFETY SYSTEMS, et al.,

Defendants/Appellants.

BRIEF OF APPELLEE ON CERTIFIED QUESTION

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STATEMENT OF THE ISSUE ON APPEAL

Mr. Schwering would respectfully remind the Court of the sole question certified in this appeal:

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? [Certification Order, p. 4]

STATEMENT OF FACTS

Only five facts are material to the Court's inquiry:

1. The original action between the present parties was commenced on October 17, 2003 (Supp. 2, ¶5);
2. That action went to trial on May 18, 2009 (Supp. 2, ¶6);
3. Upon the *joint* motion of Mr. Schwering and Defendant Ford, the trial court in that proceeding declared a mistrial on June 9, 2009, *before the close of Mr. Schwering's case* (Id.);
4. Mr. Schwering filed his first and only Rule 41(A)(1)(a) dismissal of that proceeding on October 8, 2009, before a new trial date had even been discussed, much less set (Supp. 2, ¶7); and
5. Mr. Schwering filed his Complaint in the Southern District of Ohio, Western Division, on September 30, 2010 (Supp. 1).

PREFATORY STATEMENT

Plaintiff contends Defendants have improperly interjected into their respective statements of fact matters that are extraneous to this appeal. In light of the inappropriate tenor of these narratives, lest his silence in this regard be construed as a tacit admission, Mr. Schwering will reluctantly address these matters in Section IV. However, for now, Mr. Schwering respectfully

submits to the Court that: (1) the mistrial was a result of Ford's claim that Steve Meyer, Mr. Schwering's primary seat belt expert, failed to disclose testing; (2) misled by Ford's claim of nondisclosure, the trial court struck Mr. Meyer's testimony, admonished the jury to disregard his testimony and directed the bailiff to confiscate and destroy the jurors' notes about that testimony; (3) when Mr. Schwering then proved Ford's nondisclosure claim was unsupported, the Court reinstated Mr. Meyer's testimony, but the damage to both Mr. Schwering's case and Mr. Meyer's credibility was irreversible; and (4) accordingly, Mr. Schwering had no choice but to acquiesce in Ford's mistrial motion.

ARGUMENT

I. DEFENDANTS FAIL TO ACCOUNT FOR THE PIVOTAL PROCEDURAL FACT OF MISTRIAL

To date, no Ohio appellate court has addressed what effect a mistrial has on Ohio Civ. R. 41(A)(1)(a). In such a situation, this very Court has made it abundantly clear that, not only is it acceptable to consult foreign jurisdictions; it is both sensible and necessary:

This case is one of first impression in Ohio and we must look to other jurisdictions for authority. [*Pietro v. Leonetti*, 283 N.E.2d 172, 173 (Ohio 1972)]

When we do so, we find that a number of courts throughout the United States – including the 6th Circuit – agree that a mistrial wipes the procedural slate clean. In *Kilpatrick v. First Church of the Nazarene*, 531 N.E.2d 1135 (Ill. App. 4 Dist. 1988) (appeal denied 537 N.E.2d 810), the court held:

It appears then, since the section was amended to prohibit dismissal when a plaintiff feared an unfavorable result after a trial commenced, that the section was directed at each trial setting. Once that particular trial setting has commenced, then the right to dismissal is curtailed so as to prevent a plaintiff from dismissing a case in midtrial if the proceedings appear to go against him. However, the right to dismissal before commencement of that particular trial setting is not affected. **Thus, if a trial is set and commenced but, for some reason is cancelled, the right to absolute dismissal is still available.** [text omitted] **Similarly, it appears**

that if a trial is commenced and cancelled for any reason, the absolute right to dismissal reverts until the next trial setting. [Id. at 1137-8; emphasis added]

Like its Ohio counterpart, the pertinent Illinois statute is silent with regard to the term “mistrial”:

Voluntary dismissal.

(a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.

(b) The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause.

(c) After trial or hearing begins, the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof.

(d) A dismissal under subsection (a) of this Section does not dismiss a pending counterclaim or third party complaint.

(e) Counterclaimants and third-party plaintiffs may dismiss upon the same terms and conditions as plaintiffs. [IL ST CH 735 §5/2-1009]

Furthermore:

- *People v. Bowman*, 194 N.W.2d 36, 40 (Mich. App. 1971): “When a mistrial has been declared, it is as though there has been no trial, the parties are left in the same status as if no trial had ever begun.”
- *Bolstad v. Paul Bunyan Oil Co.*, 9 N.W.2d 346 (Minn. 1943): “A dismissal after a mistrial is ‘before the trial begins,’ because a **mistrial is in legal effect no trial at all**. After a mistrial the case stands as if there had been no trial of any kind.” [Id. at 347; emphasis added]
- *Phelps v. Winona & St. P. Ry. Co.*, 35 N.W. 273 (Minn. 1887): “The award of a new trial wipes out the verdict. Setting aside a verdict is as if it had never been, and it cannot be used for any purpose. **It is a mistrial, and the plaintiff has the same right to dismiss or discontinue as if no trial had ever been had.**” [Id. at 275; emphasis added]
- *Zemunski v. Kenney*, 808 F.Supp. 703 (D. Neb. 1992) (*affirmed* 984 F.2d 953): “The declaration of a mistrial **renders nugatory all trial**

proceedings with the same result as if there had been no trial at all. See C.J.S. Mistrial at 833-834 (1948).” [Id. at 709; emphasis added; quotation merged]

- The holdings of the following courts are virtually identical to that in *Zemunski*: *U.S. v. Mauskar*, 557 F.3d 219, 225 (C.A.5 2009); *U.S. v. Pappas*, 445 F.2d 1194, 1201 (C.A.3 1971); *U.S. v. Didier*, 401 F.Supp. 4, 6 (S.D. N.Y. 1975); *U.S. v. Mischlich*, 310 F.Supp. 669, 672 (D. N.J. 1970); *U.S. v. Gladding*, 265 F.Supp. 850, 854 (S.D. N.Y. 1966).
- *Commonwealth of Pennsylvania v. Mulholland*, 702 A.2d 1027, 1035-6 (Pa. 1997): “The general rule is that when reprosecution subsequent to the grant of a motion for mistrial is not barred, the proceedings revert to a pretrial status as though the original trial had never occurred.”
- *Delta Air Lines, Inc. v. Van Diviere*, 384 S.E.2d 272 (Ga. App. 1989): “Thus, we agree with the superior court that **the practical effect of the mistrial was to return the parties to a pre-trial status.**” [Id. at 273; emphasis added]
- *State v. Van Dyken*, 791 P.2d 1350, 1358 (Mont. 1990): “The general rule of law is that where the first proceeding results in a mistrial, the parties are placed in the same position as if there had been no trial in the first instance.”
- *State v. Smith*, 518 S.E.2d 294, 296 (S.C. App. 1999): “A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court.”
- *State v. Meyer*, 953 S.W.2d 822, 825 (Tex. App. Corpus Christi 1997): “After a declaration of mistrial, a case reverts to the posture it had before trial.”
- *Powers v. State*, 401 A.2d 1031, 1040 (Md. 1979): “In Maryland, a mistrial is equivalent to no trial at all.”
- *Pickle v. Bliss*, 418 P.2d 69, 74 (Okla. Cr. 1966): “A mistrial vitiates all proceedings taken in the case up to that time, and in legal effect, is equivalent to no trial at all.”
- *State v. Harris*, 679 S.E.2d 464, 468 (N.C. App. 2009) (*review denied* 683 S.E.2d 211): “When the trial court declares a mistrial, in legal contemplation there has been no trial.”
- *People v. Sons*, 78 Cal.Rptr.3d 679, 687 (Cal. App. 2 Dist. 2008) (*review denied*): “The effect of a declaration of a mistrial is as if there had been no trial on that issue.”

- *State v. Garrison*, 860 P.2d 610, 615 (Haw. App. 1993) (*certiorari denied* 863 P.2d 989): “Upon the grant of a mistrial, the trial becomes a nullity and the second trial will proceed as if there had been no previous trial.”

Defendant Ford attempts to refute this authority by citing a string of cases in which the court’s evidentiary rulings carried over into the second trial (Ford Brief at 9). Mr. Schwering submits that Ford has glossed over a significant distinction, for it is immaterial to the question at hand whether *evidentiary* rulings survive a mistrial – the crucial point Mr. Schwering’s above-cited cases establish is that a mistrial renders the commencement of that trial a *procedural* nullity.

Because the trial court’s June 9 order of mistrial *procedurally* vacated the first trial, Mr. Schwering’s dismissal without prejudice, filed before a new trial date had even been set, was undoubtedly filed “before the commencement of trial.” To deny Mr. Schwering the right to dismiss and re-file under Rule 41(A)(1)(a) would be to effectively deny, without due process of law under the Ohio and United States Constitutions, his right to seek redress for both his injuries and those that caused the horrific death of his wife.

II. MR. SCHWERING’S RIGHT TO FILE ONE RULE 41(A)(1)(A) DISMISSAL WITHOUT PREJUDICE IS ABSOLUTE

Defendants’ own cited case law also provides ample foundational support for Mr. Schwering’s right to file a unilateral dismissal without prejudice prior to the commencement of the second trial in the previous action. For instance, in *Standard Oil Co. v. Grice*, 345 N.E.2d 458 (Ohio App. 1975), the court held:

The language of Civil Rule 41(A)(1) and (C) requires no construction. It gives either party **an absolute right, regardless of motives**, to voluntarily terminate its cause of action at any time prior to the actual commencement of the trial. There is no exception in the rule for any possible circumstance that would justify a court in refusing to permit the withdrawal of a cause prior to the commencement of trial.

This is the traditional Ohio policy of encouraging voluntary terminations.
[Id. at 461; emphasis added]

This rule of law has been echoed by the following courts:

- *State ex rel. Richard v. Cuyahoga Cty. Bd. of Commrs.*, 654 N.E.2d 443 (Ohio App. 8 Dist. 1995): “The right of a plaintiff to dismiss once, regardless of motive, is absolute, even though that right may be subject to abuse. [citations omitted] The Supreme Court of Ohio has advised that ‘[a]n obvious purpose for the rule is to encourage the plaintiff to bring a rapid and complete conclusion to an action, which, for whatever the reason, cannot or should not be tried. **The rule does not require the trial court to investigate the plaintiff’s motivation for dismissing the action.**” [Id. at 445; emphasis added; quoting *Sturm v. Sturm*, 590 N.E.2d 1214, 1217 (Ohio 1992)]
- *State ex rel. Mogavero v. Belskis*, 2002 WL 31667241 (Ohio App. 10 Dist. 2002) (Not Reported) (Supp. 41-9): “Under Civ.R. 41(A)(1)(a), a plaintiff has an **absolute right, regardless of motive**, to voluntarily and unilaterally terminate his or her cause of action without prejudice at any time prior to the commencement of trial.” [Id. at 6; emphasis added; citing *Standard Oil*]
- *Capital One Bank v. Woten*, 861 N.E.2d 859 (Ohio App. 3 Dist. 2006): “Dismissal under Civ.R. 41(A)(1) gives a party an absolute right to dismiss its claim any time before commencement of the trial. [citation omitted] Traditionally, Ohio’s policy has been ‘one of encouraging voluntary terminations, even though that policy might be subject to inconvenience or even abuse.’” [Id. at 861; quoting *Frazee v. Ellis Bros., Inc.*, 682 N.E.2d 676, (Ohio App. 1996); citing *Standard Oil*]
- *Wheeler v. Best Emp. Fed. Credit Union*, 2009 WL 1244090 (Ohio App. 8 Dist. 2009) (Slip Copy) (Supp. 50-5): “It is well established law that the right to one dismissal without prejudice is absolute under Civ. R. 41(A)(1)(a), and exercising this right cannot be properly considered ‘frivolous conduct’ pursuant to R.C. 2323.51. [Id. at 7; citing *Frazee*]
- *Swearingen v. Swearingen*, 2005 WL 3494988 (Ohio App. 10 Dist. 2005) (Not Reported) (Supp. 56-60): “**A plaintiff’s motives for dismissing a case, even at the penultimate stage of the proceedings, are not relevant to our inquiry...**” [Id. at 5; emphasis added; proceeding to quote *Standard Oil*]

- *Yeager v. Schulze, Phillips & Chase*, 878 N.E.2d 1100, 1104 (Ohio App. 3 Dist. 2007): “A plaintiff has an absolute right to file one dismissal under Civ.R. 41(A)(1)(a), and when the plaintiff does so, the case is dismissed without prejudice, unless otherwise indicated, and the trial court is divested of jurisdiction.”

Furthermore, in *Swearingen*, the court noted that Sup. R. 36(D)’s interdiction of “judge-shopping” does not prohibit re-filing a dismissed case in another county (2005 WL 3494988 at 5). Mr. Schwering has found no decisional or statutory law which would preclude a federal corollary; nor have Defendants offered any such authority. To be sure, “a plaintiff’s choice of forum should rarely be disturbed.” [*United Capital Ins. Co. v. Brunswick Ins. Agency*, 761 N.E.2d 66, 71 (Ohio App. 9 Dist. 2001) (*appeal denied* 757 N.E.2d 774); quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)] Finally, both the saving and limitation statutes of Ohio are applicable in a federal diversity action. [*Andrew v. Bendix Corp.*, 452 F.2d 961, 962 (C.A.6 1971), *cert. denied*, 406 U.S. 920 (1972); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 806 (N.D. Ohio 2006); *Vostack v. AXT*, 510 F. Supp. 217, 220 (S.D. Ohio 1981)]

III. DEFENDANTS’ PUBLIC POLICY ARGUMENT PLOTS A FALSE TRAIL

Despite Defendants’ insistence otherwise, neither the cause of the mistrial in this matter nor the advisability of mistrials in general are at issue in this appeal. In fact, none of the cases Defendants cite regarding when a trial commences for the purpose of voluntary dismissal involves a mistrial. In fact, Defendants’ entire line of argument on the issue of public policy is refuted by the plain language of Rule 41(A)(1) itself which, with what has come to be known as the “double dismissal rule,” absolutely forestalls the likelihood that a plaintiff could abuse the procedure by filing such dismissals in perpetuity:

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, **except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.** [Emphasis added]

It is critical to note here that, in every case Defendants cite to promote their “perpetual dismissal” theory, the court refers to the legal era that predated (a) the instatement of the Civil Rules and, thus, (b) Rule 41’s double dismissal provision. In every case that addressed Rule 41, the reviewing court unreservedly upheld a plaintiff’s right to file one voluntary, unilateral dismissal without prejudice prior to the commencement of trial.¹

In keeping with the rules of statutory construction (Ford Brief at 7), Mr. Schwering would further observe that the double dismissal rule is the **only restriction** the legislature placed on a plaintiff’s Rule 41(A)(1)(a) prerequisite. As the court noted in *Standard Oil*:

While [Civil Rule 41(A)(1)(a)] may be subject to abuse, as was recognized by the civil rules committee, **the only limitation imposed is that a notice of dismissal operates as an adjudication upon the merits when filed by a party who once previously dismissed an action based on the same claim.** [345 N.E.2d 458 at 461, emphasis added]

The Court will please recall that the Rule 41(A)(1)(a) dismissal Mr. Schwering filed on October 8, 2009, is the only dismissal that has ever been filed in any matter between these parties arising from the underlying automobile accident.

As delineated immediately above and in Section II of this brief, the **sole** public policy underlying Rule 41(A)(1)(a) is to preserve a plaintiff’s “absolute right to file one dismissal”² voluntarily and unilaterally – *and regardless of motive*³ – prior to the commencement of trial. Furthermore, Mr. Schwering would submit that Defendants were not the only parties who incurred considerable expense in the first trial of this case – Mr. Schwering sought justice for the

¹ *Frysjnger v. Leech*, 512 N.E.2d 337, 342 (Ohio 1987); *Chadwick v. Barba Lou, Inc.*, 431 N.E.2d 660, 665 (Ohio 1982); *Olynyk v. Andrish*, 2005 Ohio 6632 at ¶11 (Ohio App. 2005) *aff’d sub nom. Olynyk v. Scoles*, 868 N.E.2d 254 (Ohio 2007); *Brookman v. N. Trading Co.*, 294 N.E.2d 912 (Ohio App. 1972); *Frazee v. Ellis Bros., Inc.*, 682 N.E.2d 676, 678 (Ohio App. 1996); *Standard Oil Co. v. Grice*, 345 N.E.2d 458, 461 (Ohio App. 1975)

² *Yeager*, 878 N.E.2d 1100 at 1104

³ *State ex rel. Richard v. Cuyahoga Cty. Bd. of Commrs.*, 654 N.E.2d 443 (Ohio App. 8 Dist. 1995)

wrongful death of his beloved wife, Beverly, and his own permanent injuries, and the prospect of not recouping his own sizeable outlay for expert witness fees, exhibits and travel was a factor Mr. Schwering had to weigh carefully in deciding whether to exercise his dismissal prerogative. In any event, contrary to Defendants' complaints, these costs need not be duplicated on retrial. Fed. R. Civ. P. 32(a)(8) provides:

A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

And Fed. R. Evid. 804(b)(1) recognizes a *former testimony* exception to the Hearsay Rule:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Finally, two key distinctions Defendants fail to concede are that (a) Mr. Schwering's dismissal was an entirely separate event from the mistrial (for which Defendant Ford bears responsibility⁴) and (b) it was the mistrial that ended the first trial, not the dismissal.⁵ At the precise time when Mr. Schwering filed his dismissal, no costs had been expended preparing for the next trial. Hence, answering the certified question affirmatively will in no conceivable way condone economic waste. In any event, Rule 41(D) allays any such concern by providing a defendant with an avenue to recover its costs in a procedural posture different from that in this case, where the first trial setting is aborted via a dismissal rather than a mistrial.

⁴ See Section IV.

⁵ The Court will please bear in mind that Mr. Schwering did not file his dismissal for an entire 3 months after the mistrial. This fact alone demonstrates that the dismissal was not the endgame of some master mistrial plan on Mr. Schwering's part.

IV. CORRECTION OF THE RECORD ON THE PERIPHERAL ISSUE OF MISTRIAL

Though the *cause* of the mistrial is irrelevant to this appeal as the certified question has been articulated, Defendants have so distorted the facts of the one at hand in an apparent attempt to prejudice this Court against him that Mr. Schwering must set the record straight. As Mr. Schwering demonstrated in *Plaintiff's Motion to Lift Stay and Supplemental Response with Regard to Certifying the Question of Rule 41(A)(1)(a) Refiling to the Ohio Supreme Court* (Supp. 75-93), not only is **every accusation** made against his counsel **untrue**, but:

- The entire furor over expert Steve Meyer's testimony was sparked by the lone allegation of Defendant Ford that Mr. Meyer was relying on undisclosed Exhibit #114.49 (Supp. 18-19, 21, 26); and
- Not only did Ford counsel's previous correspondence expose this allegation as **false** (Supp. 80-8, specifically 87: "From the list of exhibits of Meyer, we do NOT have exhibit numbers 115, 116 or 2088. We are able to find the rest of your list for Meyer.") (Clearly, this included the supposedly nonexistent Exhibit #114.49), but
- So did the fact that, in his report addressed to Ford's trial counsel, Ford's own expert had discussed that very testing 15 months earlier, long before a jury was ever picked (Supp. 89-93).

As to Defendants' allegations that Mr. Meyer's answers were evasive, this was merely an illusion conjured up by meticulously selective questioning on Defendants' part (Supp. 32-8). Ford's motivation in engineering the controversy may be gleaned from the fact that, by the trial judge's own admission, Mr. Meyer's testimony was singularly compelling:

The testimony that he gave made me sit here and go, “What are we trying this case for?” (Supp. 22)

Finally, it is notable that it was Defendant Ford which first requested a mistrial (Supp. 28-9, 31-2, 40), and Mr. Schwering who resisted (Supp. 38-9), only to later acquiesce in light of the fact that the trial judge had irrevocably prejudiced his case by (a) wrongly maligning Mr. Meyer in front of the jury and (b) instructing the bailiff to seize and destroy all notes the jurors had made during Mr. Meyer’s testimony before (c) deciding to reinstate Mr. Meyer’s testimony in lieu of admitting he was wrong for striking it to begin with (Supp. 16-27, 61-74).

V. ETHICAL ADMONITION

It is Mr. Schwering’s impression that Defendants’ briefs (a) call undue attention to Plaintiff’s counsel and (b) take reckless liberties with their phraseology.⁶ In so doing, they exceed the bounds of professional decorum prescribed by this and lower appellate courts:

The proper role of the attorney at the trial table is not that of a contestant seeking to prevail at any cost but that of an officer of the court, whose duty is to aid in the administration of justice and assist in surrounding the trial with an air conducive to an impartial verdict. [*Jones v. Macedonia-Northfield Banking Co.*, 7 N.E.2d 544, 548 (Ohio 1937)]

When argument spills into disparagement not based on any evidence, it is improper. [*Clark v. Doe*, 695 N.E.2d 276, 283 (Ohio App. 1 Dist. 1997)]

Counsel is obligated to refrain from unwarranted attacks on opposing counsel, the opposing party, and the witnesses. [Text and citations omitted] Abusive comments directed at opposing counsel, the opposing party, and the opposing party’s witnesses should not be permitted. [*Roetenberger v. Christ Hosp.*, 839 N.E.2d 441, 446 (Ohio App. 1 Dist. 2005)]

⁶ “Respondents’ counsel ... procured a mistrial” (TRW Brief at 1); “Respondents’ counsel chose to ... unprofessionally berate” the trial judge (Id. at 4); accusing Mr. Schwering of “forum shopping, manipulative tactics and gamesmanship” (Id. at 11); excessively showcasing quotes from the trial judge criticizing Mr. Meyer (Ford Brief at 4); ascribing to Mr. Schwering “risky trial tactics” and “intentional attempts to procure a mistrial” (Id. at 12, 14); repeating the delusive allegation that Mr. Schwering failed to disclose evidence (Id.) despite unequivocal knowledge of this accusation’s untruth (See Section IV).

Mr. Schwering would hope that Defendants and their counsel temper all future briefing and oral argument in conformance with these principles.

CONCLUSION AND REQUEST FOR RELIEF

Just as the reasons for a Rule 41(A)(1)(a) dismissal are of no consequence to the Ohio legislators and courts who have, without exception, vigilantly safeguarded that right for the better part of half a century, so the cause of the mistrial that preceded the dismissal in the case at bar bears no significance to the inquiry certified to this Court – especially so in light of the fact that the mistrial at issue was necessitated by the conduct of the counsel of the complaining party. The only aspect of that mistrial which is pertinent to this Court’s decision is the mere fact that it was declared. There is ample suasive authority holding that, when Mr. Schwering filed his dismissal *three months later*, no “commencement of trial” had occurred because the previous trial had been rendered procedurally nonexistent by the mistrial. Under these specific facts, Mr. Schwering’s right to file a voluntary and unilateral dismissal without prejudice is sacrosanct.

The facts underlying this lawsuit are that Mr. Schwering’s wife, Beverly, was driving a 2001 Explorer Sport when its own inherent instability caused it to roll over on a highway while she was performing an evasive maneuver. Despite properly wearing her available three-point safety harness (manufactured by TRW) and having the driver window rolled completely up, Beverly was ejected through that window, suffered agonizing trauma, and died due to blood loss from her severed leg (Supp. 3). Mr. Schwering (who himself suffered permanent injuries in that accident) has the fundamental right, under the Ohio and U.S. Constitutions, to have a jury determine Defendants’ liability for this tragedy.

Mr. Schwering therefore requests that the Court answer *Yes* to the question at hand.

Respectfully submitted,

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Counsel for Plaintiff/Appellee

IN THE SUPREME COURT OF OHIO

CASE NO. 2011-0438

KENNETH SCHWERING,

Plaintiff/Appellee,

Vs.

TRW VEHICLE SAFETY SYSTEMS, et al.,

Defendants/Appellants.

APPELLEE'S SUPPLEMENT

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CERTIFICATE OF SERVICE

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Counsel for Plaintiff/Appellee

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

KENNETH M. SCHWERING, Personal)
Representative of the Estate of)
Beverly D. Schwering, Deceased, and)
KENNETH M. SCHWERING,)
Individually,)

Plaintiffs,)

v.)

TRW VEHICLE SAFETY SYSTEMS, INC.,)
4505 W. 26 MILE ROAD)
WASHINGTON, MI 48094)

Serve: CT CORPORATION SYSTEM)
1300 EAST NINTH STREET)
CLEVELAND, OH 44114)

AND)

FORD MOTOR COMPANY, INC.)
THE AMERICAN ROAD ROOM 12)
DEARBORN, MI 48126)

Serve: CT CORPORATION SYSTEM)
1300 EAST NINTH STREET)
CLEVELAND, OH 44114)

Defendants.)

Case No. **1:10CV679**

Judge

COMPLAINT OF PLAINTIFFS

**WITH JURY DEMAND
ENDORSED HEREON**

J. BECKWITH

L. HOGAN

FILED

SEP 30 2010

**JAMES BONINI, Clerk
CINCINNATI, OHIO**

COMES NOW the Plaintiff herein, by counsel, and for his causes of action against the
above named Defendants for Damages and states as follows:

Parties

1. At all times mentioned herein, Plaintiff **KENNETH M. SCHWERING** has been a resident of Decatur County, Indiana, and is currently the duly appointed Personal Representative of the Estate of Beverly D. Schwering, Deceased.

2. Defendant **TRW VEHICLE SAFETY SYSTEMS, INC.** (hereinafter "TRW"), is a Delaware corporation authorized to do business in the State of Ohio, with its principal place of business located at *4505 W. 26 Mile Rd., Washington, MI 48094*, and its registered agent for service of process in the State of Ohio being: CT Corporation System, 1300 East Ninth Street, Cleveland, OH 44114.

3. Defendant **FORD MOTOR COMPANY, INC.** (hereinafter "Ford"), is a Delaware corporation authorized to do business in the State of Ohio, with its principal place of business located at The American Road Room 12, Dearborn, MI 48126, and its registered agent for service of process in the State of Ohio being: CT Corporation System, 1300 East Ninth Street, Cleveland, OH 44114.

Jurisdiction

4. Jurisdiction is appropriate pursuant to 28 U.S.C. 1332.

Procedural History

5. This cause of action was originally filed on or about October 17, 2003, in the Hamilton County Court of Common Pleas under Case No. A0307981.

6. The case proceeded to jury trial between May 18, 2009 and June 9, 2009. On June 9, 2009, the Presiding Senior Judge Richard A. Niehaus declared a mistrial during Plaintiff's case-in-chief.

7. On October 8, 2009, pursuant to Civ. R. Rule 41(A)(1)(a), Plaintiffs voluntarily

dismissed said original cause of action.

8. This Complaint is brought pursuant to Ohio's one year saving statute, O.R.C. 2305.19.

Facts

9. On December 28, 2002, Beverly D. Schwering ("Decedent"), the decedent, was the operator of a 2001 Ford Explorer Sport ("Explorer"), VIN number 1FMYU70E11VA2303, traveling westbound on I-74 near the New Haven Road exit in Hamilton County, Ohio. The Plaintiff, Kenneth Schwering, was a front seat passenger. The Explorer was designed, developed, tested, manufactured, distributed and otherwise placed into the stream of commerce by Defendant Ford.

10. At said time and place, a 1990 Nissan Maxima driven by Peter H. Karountzos ("Karountzos"), was also traveling westbound on I-74.

11. The vehicles driven by the Decedent and Karountzos made contact. As a proximate result of said contact and/or evasive maneuvers taken by Decedent, the Explorer went out of control on the travel-portion of said highway and began a series of rollovers. Said Explorer eventually made contact with a guardrail, and then left the highway, rolling down an incline before eventually coming to a stop in a ravine.

12. During the rollover phase of the incident described above, the Decedent's seat back failed and she was ejected through the driver-side window of the Explorer, which had shattered and failed to restrain her and, as a result, she sustained fatal injuries. Also during the rollover phase the Plaintiff, Kenneth Schwering, sustained serious head injuries as a result of the collapse of said Explorer's roof.

13. At all times prior to her ejection, the Decedent was restrained by a three-point

safety restraint system, namely Model/Code#T-9161 and date/production code number 08-3-00-1, which was designed, developed, tested, manufactured and/or distributed by Defendant TRW, and/or Defendant Ford.

14. On December 28, 2002, the Explorer involved in this fatal collision was in substantially the same condition as when it was originally sold.

15. The Explorer, its driver's side seat back and safety restraint systems, including driver's window, seatbelt assembly, and/or slider bar, were being used by the Decedent and Plaintiff, Kenneth Schwering, in a manner reasonably anticipated by the Defendants at the time of this fatal collision.

16. At no time on December 28, 2002, or prior thereto, did the Plaintiff or Decedent misuse said Explorer, its driver's side window and/or its safety restraint systems, including the seatbelt assembly, driver's seat back, and/or slider bar.

Strict Liability

17. Plaintiff iterates and adopts as if fully rewritten herein his foregoing allegations.

18. Plaintiff alleges that the TRW seatbelt assembly system and Explorer, including seat back and windows, slider/traveler bar involved in this fatal incident were each in a defective condition at the time of the crash, resulting in a vehicle which was unreasonably dangerous as both contemplated and defined by the Ohio Product Liability Act, O.R.C. §2307.71 to §2307.80.

19. Plaintiff further alleges that the TRW seatbelt assembly system and the Explorer were each defectively designed, manufactured, marketed, and misrepresented, rendering said Explorer and its safety restraint systems, including the seatbelt assembly, driver's side seat back, driver's traveler/slider bar, and/or driver window, in a defective condition, unreasonably dangerous, and each was a contributing and/or proximate cause of the Decedent's injuries and

death, as well as Plaintiff's injuries.

20. Said seatbelt assembly system, for the reasons above, created an unreasonable risk of enhanced injury by virtue of its design by TRW.

21. The Explorer and its safety restraint systems, including seatbelt assembly, driver's side seat back, traveler/slider bar, and/or driver's window, were distributed, sold, and/or placed into the stream of commerce by Defendants, TRW and Ford, and were not changed, altered or misused after purchase.

22. Said Explorer and its safety restraint systems, including seatbelt assembly, driver's side seat back, traveler/slider bar, and/or driver's window were in a defective condition, unreasonably dangerous as designed, taking into consideration the utility of said Explorer, its safety restraint systems, including seatbelt assembly, driver's side seat back, traveler/slider bar and/or driver's window, and the risk involved with their use.

23. At the time said Explorer and its safety restraint systems left the control of Defendants, there was a safer alternative design for said Explorer and its safety restraint systems.

24. Said Explorer and/or its safety restraint systems were in a defective condition, unreasonably dangerous as designed, including but not limited to any of the following reasons:

(A) The TRW driver's seatbelt assembly system failed to properly restrain the Decedent, and was thus designed in a defective condition, unreasonably dangerous in that it was not reasonably fit and safe for its intended purpose.

(B) The TRW driver's seatbelt assembly system was designed in such a manner that it can introduce excessive slack, or spool out, during an accident sequence, leaving the driver/occupant unrestrained and unprotected.

(C) Ford failed to adequately test the Explorer's safety restraint systems,

including the seatbelt assembly system, with respect to occupant protection and safety, despite its knowledge that said vehicle might be subject to reasonably foreseeable rollover collisions.

(D) The driver's side seat back in the subject vehicle broke rearward during the accident sequence due to manufacturing and/or design defects, further contributing to the overall defects in the Explorer's safety restraint and occupant retention systems, allowing the decedent to be ejected from the vehicle.

(E) Ford failed to design, manufacture and equip the Explorer with laminated/safety glass in the driver's window, which would have prevented decedent's ejection. Ford also failed to adequately test the Explorer's occupant safety restraint feature/system.

(F) The subject Ford Explorer, which was designed, manufactured, assembled and constructed by Ford, was defective at the time of this incident due to the propensity of the Explorer to rollover during foreseeable emergency and accident avoidance maneuvers, including but not limited to the circumstances involved in this fatal collision. Said defect existed at the time of the sale of the Explorer, and Ford knew at the time of said Explorer's design and manufacture that a rollover was the most dangerous type of collision for light truck vehicles, as measured by both deaths and incapacitating injuries per involved occupant.

(G) The Explorer was designed so that it would not maintain a reasonable level of stability after a reasonably foreseeable event of taking evasive action/maneuvers to avoid a collision.

(H) The handling characteristics of the Explorer cause it to lose control in the reasonably foreseeable event of such an evasive maneuver.

(I) Ford did not increase the track width or lower the center of gravity of the Explorer to improve its rollover resistance, despite its knowledge that said design alternatives

improved resistance to rollover.

(J) Ford failed to adequately test the Explorer to determine its deficiencies in stability and handling in reasonably foreseeable collision-avoidance maneuvers.

(K) Ford failed to adequately test the Explorer's ability to protect occupants in rollover collisions, despite its knowledge that the vehicle might be subject to reasonably foreseeable rollover collisions.

(L) Ford failed to adequately test, design and/or manufacture the Explorer with a roof and/or driver's side window sufficient to withstand foreseeable rollover damage, and said failure led to the increased likelihood of injury and/or death.

(M) Ford failed to adequately test the total effect that reducing the size of tires equipped on said Explorers would have on said vehicle's overall performance, despite its knowledge that reducing tire size significantly improved resistance to rollover.

(N) Said Explorer, for the reasons enumerated above, created an unreasonable risk of enhanced injury by virtue of its design by Defendant Ford.

Marketing/Warning Defect

25. Plaintiff reiterates and adopts as if fully rewritten herein his foregoing allegations.

26. There were misrepresentations and inadequate warnings in the marketing of the Explorer in regard to its safety restraint systems, including the seatbelt assembly, seat back and/or driver's window, at the time said Explorer and/or its aforementioned components left possession of Ford and TRW. These misrepresentations and inadequate warnings were contributing and/or proximate causes of the incident, as well as its resultant injuries and death.

27. Ford and TRW failed to give adequate warnings of the dangers of the subject Explorer and/or its safety restraint systems, which were known by Defendants or, by the

application of reasonably developed human skill and foresight, should have been known by Defendants. Ford and TRW also failed to give adequate instructions to avoid such dangers, which failure rendered the subject Explorer and/or its safety restraint systems unreasonably dangerous as marketed.

28. Ford and/or TRW failed to give warnings and instructions regarding the use of the Explorer and/or its safety restraint systems, including the seatbelt assembly, in a form that could reasonably be expected to catch the attention of a reasonably prudent person under the specific circumstances of this accident. Furthermore, the content of the warnings and instructions actually provided failed to give average users, such as the Schwerings, a fair indication of the nature and extent of the known danger and how to avoid it. Acts or omissions of Ford and/or TRW which constitute marketing defects include:

(A) Ford and TRW failed to warn Plaintiff, his Decedent and the public that the Explorer's seatbelt assembly and/or safety restraint system could develop excessive slack and/or spool out during certain accident/rollover sequences, such as this one, leaving the occupants of the vehicle unrestrained and unprotected.

(B) Ford chose not to warn Plaintiff or his Decedent of the dangerous propensities of the Explorer's tires, particularly when installed and operated both oversized and underinflated (*i.e.* less than 35 PSI), which exacerbated the Explorer's inherent instability, resulting in rollover accidents that caused death and serious bodily injury to numerous consumers.

(C) Ford failed to warn Plaintiff or his Decedent that, if reasonably foreseeable evasive maneuvers were taken in an Explorer, the Explorer's handling characteristics would result in a rollover and cause serious bodily injury and/or death.

(D) Ford failed to warn Plaintiff or his Decedent that the Explorer was not designed, manufactured or equipped with laminated safety glass in the driver's window, despite its knowledge that such glass provides occupant containment in a rollover that is superior to that afforded by tempered glass.

(E) Ford failed to warn Plaintiff or his Decedent of the susceptibility of the Explorer's roof to cave in during rollovers, which could cause and/or enhance injuries, including death.

(F) Ford and/or TRW failed to warn Plaintiff or his Decedent that the Explorer's safety restraint system, including seatbelt assembly, was not tested to determine its effectiveness in restraining its occupants in multiple impact rollover type accidents such as this one.

(G) Ford failed to warn Plaintiff or his Decedent that the Explorer's seat backs could break and/or unexpectedly recline during a multiple impact collision such as the subject accident, which could adversely affect the driver's ability to maintain control of the vehicle, further exacerbating the failure of the safety restraint system to properly restrain its occupant.

Breach of Implied Warranty of Merchantability
O.R.C. §1302.27 (U.C.C. 2-314)

29. Plaintiff reiterates and adopts as if fully rewritten herein his foregoing allegations.

30. The Explorer and/or its safety restraint systems, including seatbelt assembly, seat back and/or driver's window, and the tire, as sold by Defendants, Ford and/or TRW, were unfit for the ordinary purpose for which such vehicle and/or safety restraint systems are used and intended.

31. The unfit condition was a contributing or proximate cause of the injuries/death of Plaintiff or the Decedent.

Breach of Implied Warranty of Fitness for a Particular Purpose
O.R.C. §1302.28 (U.C.C. 2-315)

32. Plaintiff reiterates and adopts as if fully rewritten herein his foregoing allegations.

33. At the time Plaintiff and his Decedent purchased the subject Explorer, Defendants Ford and TRW knew (1) the particular purpose for which the Explorer and/or its safety restraint systems were required and (2) that Plaintiffs were relying on the skill and judgment of the Defendants to select or furnish a suitable vehicle with optimal safety restraint systems, including seatbelts, seat backs and glass.

34. The Explorer and/or its safety restraint systems were unfit for the particular purpose for which they were purchased; namely, to provide reasonably safe transportation and effective safety restraint systems that would (1) keep the user restrained when involved in an accident and (2) that would be reasonably stable during reasonably foreseeable collisions and/or evasive maneuvers.

Breach of Express Warranty
O.R.C. §1302.26 (U.C.C. 2-313)

35. Plaintiff incorporates as if fully rewritten herein his foregoing allegations.

36. The express warranties breached by Ford and/or TRW include, but are not limited to, the following:

(A) That the TRW seatbelt assembly system in the Explorer would properly function in this type of accident sequence and not allow its restrained occupant to become unrestrained and unprotected;

(B) That the Explorer was a safe and well-designed vehicle that would not lose control and stability in reasonably foreseeable impacts and/or evasive maneuvers; and

(C) That the Explorer's seat back would not unexpectedly recline, and the

driver's side window would not shatter, allowing the ejection of the driver, which could enhance injury and result in death.

Negligence

37. Plaintiff incorporates as if fully rewritten herein his foregoing allegations.

38. Defendants were negligent in the following respects:

(A) TRW failed to warn Plaintiff and his Decedent of the dangerous propensity of the seatbelt assembly system in the Explorer to fail;

(B) TRW negligently manufactured the seatbelt assembly system, which failed to keep the Decedent restrained during the fatal incident;

(C) TRW negligently designed the seatbelt assembly system which failed to keep the Decedent, restrained during the fatal incident;

(D) TRW negligently marketed the seatbelt assembly system, which failed to keep the Decedent restrained during the fatal incident;

(E) Ford failed to warn Plaintiff or his Decedent that the OEM tires on the Explorer were oversized, and that there was an increased risk of injury if said tires were maintained at a pressure below 35 PSI;

(F) Ford negligently designed the Explorer so that it would become unstable during minimal impact and/or evasive maneuvers;

(G) Ford negligently designed the driver's seat back of the Explorer such it could recline or fail in reasonably foreseeable rollovers. Ford also failed to warn consumers of said dangers.

(H) Ford was negligent in testing the Explorer to determine the likelihood of rollovers during impact and/or evasive maneuvers;

(I) Ford negligently designed and manufactured the Explorer driver's window by its failure to construct same of laminated safety glass, which would have prevented or reduced the likelihood of occupant ejection in cases of rollover. Ford negligently failed to test said Explorer for the consequences of glass failure, and negligently failed to warn the consuming public, including Plaintiff and his Decedent, of the resulting safety risks;

(J) Ford negligently designed and manufactured the Explorer's safety restraint system, including its seat back assembly, driver's seat back and driver's side window, by failing to construct same to prevent occupant ejection in cases of rollover. Ford negligently failed to test said Explorer for the consequences of said failures, and negligently failed to warn the consuming public, including Plaintiff and his Decedent, of the resulting safety risks;

Gross Negligence/Willful and Wanton Misconduct

39. Plaintiff incorporates as if fully rewritten herein his foregoing allegations.

40. The conduct of Defendants Ford and/or TRW constituted gross negligence and/or willful and wanton misconduct in that said Defendants: (a) engaged in conduct involving an extreme degree of risk, considering the probability and magnitude of potential harm to others; (b) had actual awareness of the risks involved, but nevertheless proceeded in conscious indifference to the rights, safety and welfare of the general public, including Plaintiff and his Decedent; and (c) failed to reduce said risks to an acceptable minimal level, despite their knowledge that alternative, safer designs were available and were both technologically and economically feasible.

WHEREFORE, Plaintiff Kenneth M. Schwering, for himself, as personal representative of his wife's estate and as his wife's next of kin, seeks damages in excess of \$75,000.00 from the Defendants for the following losses and damages:

- A. The reasonable value of Decedent's future support and lost earnings, lost services, and consortium;
- B. The reasonable value of Decedent's loss of society, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education suffered by the surviving spouse, Kenneth Schwering, and Decedent's children, Deanna and Angela;
- C. Mental anguish incurred by the surviving spouse, Kenneth Schwering, and decedent's children, Deanna and Angela;
- D. The reasonable value of Decedent's pain and suffering prior to her death;
- E. The reasonable value incurred by Decedent's estate for reasonable and necessary medical, funeral and burial expenses;
- F. Plaintiff Kenneth M. Schwering's bodily injuries, some of which may be permanent;
- G. Plaintiff Kenneth M. Schwering's disfigurement and scarring;
- H. Plaintiff Kenneth M. Schwering's past, present and future medical expenses;
- I. Plaintiff Kenneth M. Schwering's past, present and future loss of wages, and his future loss/impairment of earning capacity;
- J. Plaintiff Kenneth M. Schwering's past, present and future pain and suffering;
- K. Plaintiff Kenneth M. Schwering's past, present and future mental anguish;
- L. Plaintiff Kenneth M. Schwering's past, present and future loss of time and other pecuniary losses;
- M. Plaintiff Kenneth M. Schwering's emotional distress;
- N. Plaintiff Kenneth M. Schwering's decreased ability, or complete inability, to

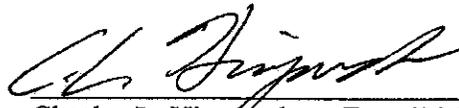
perform his normal life functions; and

O. Any other damages allowed by law, including but not limited to prejudgment interest.

Exemplary/Punitive Damages

As a result of the willful, wanton or grossly negligent conduct of Defendants Ford and/or TRW as described herein, exemplary or punitive damages should be assessed against said Defendants in an amount in excess of \$75,000.00.

BARRON PECK BENNIE & SCHLEMMER



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- AND -

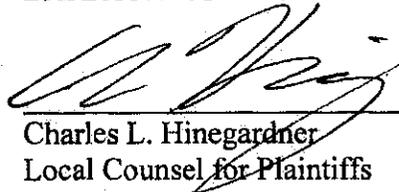
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ATTORNEYS FOR PLAINTIFF

JURY DEMAND

Plaintiff hereby demands a trial by a jury of his peers.

BARRON PECK BENNIE & SCHLEMMER



Charles L. Hinegardner
Local Counsel for Plaintiffs

1 COURT OF COMMON PLEAS
2 HAMILTON COUNTY, OHIO

3 KENNETH M. SCHWERING, Personal
4 Representative of the Estate of
5 Beverly D. Schwering, Deceased, and
6 KENNETH M. SCHWERING, Individually,
7 Plaintiff,

7 vs. Case No. A-0307981

8 TRW VEHICLE SAFETY SYSTEMS, INC, et al,
9 Defendants.

10 COMPLETE TRANSCRIPT OF PROCEEDINGS

11 APPEARANCES:

12 Mr. Jason Robinson, Esq.,
13 Mr. Richard Denney, Esq.,
14 Ms. Lydia JoAnn Barrett, Esq.
15 Mr. Arthur H. Schlemmer, Esq.,
16 Mr. Richard S. Eynon, Esq.,
17 Mr. David M. Brinley, Esq.,
18 On behalf of Plaintiffs.

19 Mr. Kevin C. Schiferl, Esq.,
20 Mr. Gary Glass, Esq.,
21 Mr. Todd Croftchik, Esq.,
22 Mr. Clifford Mendelsohn, Esq.
23 On Behalf of Ford Motor Company.

24 Mr. Damond R. Mace, Esq.,
25 Mr. Aaron T. Brogdon, Esq.,
26 On Behalf of TRW Vehicle Safety Systems.

27 BE IT REMEMBERED that upon the jury trial of
28 this cause, heard on Monday, June 8, 2009,
29 before the Honorable Richard Niehaus, a said
30 Judge of the Court of Common Pleas, the
31 following proceedings were had, to wit:

1 So I would like you to consider our
2 motion to reinstate Mr. Meyer's
3 testimony. And then if that's not
4 possible, then we have to move from
5 there. If you would overrule this
6 motion, then I would be going to our next
7 motion, which would be to ask you for a
8 mistrial. That's a whole different
9 argument.

10 In a nutshell, we would join Ford's
11 motion for a mistrial, if we are going to
12 exclude Mr. Meyer. Under those
13 circumstances, Mr. Schwering can't get a
14 fair trial.

15 On our first motion, I am finished.

16 MR. GLASS: When does the motion
17 for recusal come into play? If you lose
18 the motion to reinstate Meyer and lose
19 the motion for mistrial, is that where
20 the Judge is unfair, biased and will
21 recuse himself? Is that what you are
22 saying?

23 MR. MACE: He already said it.

24 THE COURT: What are we doing now?

25 MR. MACE: TRW would like to move

1 He said no, I don't have any
2 testimony. I can't recall. Again, that
3 was his testimony.

4 As the Court has found here reading
5 page 5 of the Order, by denying he
6 conducted previously undisclosed testing
7 at issue, Mr. Meyer avoided a Rule 26D
8 challenge. In addition, he avoided 702,
9 703, 402 and 403 review by the Court,
10 scientific reliability before the
11 testimony was offered at trial.

12 Again, on Friday morning, we
13 revisited with Your Honor, requested a
14 ruling. You held it in abeyance, allowed
15 him to testify.

16 We have an objection as to his
17 ability to testify. As we go forward,
18 the theory is, gee, we gave you a disk
19 and on the disk was 114.49.

20 You weren't present on Friday when
21 the proffer was made by plaintiffs, but I
22 introduced at that time --

23 THE COURT: Proffer is what you
24 believe the evidence will demonstrate. I
25 ruled. I don't know what TRW was doing.

1 I will ask him after trial what he had
2 been doing.

3 MR. SCHIFERL: I wholly agree with
4 Your Honor. My point was, when Mr.
5 Denney made his proffer record, at that
6 time he was making similar accusations
7 Mr. Schlemmer repeated this morning.

8 For the Court's benefit, we
9 tendered, marked and put in the record
10 Defendant's Exhibit A, which was the disk
11 we received from the plaintiffs, which
12 does not -- you can put it in the
13 computer and look at it -- does not have
14 on it Exhibit 114.49, yet it has 114.
15 whatever exhibits are on it. The point
16 being, that until Friday morning, we had
17 not seen this testing in this case that
18 Mr. Meyer is relying upon.

19 For those reasons, we believe the
20 motion that's before the Court should be
21 denied. We believe the Court's opinion
22 on the exclusion testimony of Mr. Meyer
23 hit on all squares, the points that were
24 raised and the pertinent points with
25 regard to his testimony.

1 and lo and behold, he remembers it all
2 crystal clear about these tests. You
3 were correct in sanctioning him and
4 excluding his testimony due to their
5 failure to disclose these tests in
6 violation of Rule 26.

7 MR. SCHLEMMER: Some point, we'll
8 have to look into our own hearts and
9 decide that for ourselves. What I would
10 like to do is I have the e-mails. I
11 would like them marked so the Court can
12 look at them that we referenced.

13 MR. SCHIFERL: Can I get a copy as
14 well?

15 MR. SCHLEMMER: Here is the
16 April 23 letter from Mr. Denney to all
17 defense counsel, and I will let you look
18 at this, too. It is directly to what Mr.
19 Schiferl just said about they got these
20 million DVDs. This letter April 23, 2009
21 starts out: In accordance with the
22 agreement between trial counsel
23 plaintiffs' Second Amended Exhibit List
24 with multiple CD and DVDs to take place
25 of the exhibits.

1 Specifically, it says in Item
2 Number 4, set of three DVDs containing
3 Steve Meyer Exhibits 114.1 through
4 114.71. Specifically, a three DVD set.
5 I submit if you ask Ford's counsel and
6 their supporting staff if they have those
7 and got this letter, I submit to you they
8 will be forced on the record to admit it.
9 This is the three DVD set.

10 If you want to challenge what Mr.
11 Schiferl is telling you versus what I
12 just told you, take the DVD that he
13 submitted that says 114.49 is not on it,
14 you won't find any on it unless he made
15 it himself. Here is the letter we sent
16 them that specifically states, a
17 three-set DVD set.

18 THE COURT: What exhibit number is
19 that? You said you wanted to mark it.

20 MR. SCHLEMMER: It has marked on it
21 Plaintiffs' Exhibit D, this letter.

22 THE COURT: You were using numbers.
23 If it can be anything --

24 MR. SCHLEMMER: I understand.

25 THE COURT: It will be D, then.

1 MR. SCHLEMMER: It is marked on
2 there.

3 MR. SCHLEMMER: Mr. Glass got up
4 here and said they were totally
5 surprised, yet for an hour and a half,
6 they never made one objection.

7 THE COURT: I know. If they were
8 really surprised, this is not a minor
9 situation. The testimony that he gave
10 made me sit here and go, what are we
11 trying this case for?

12 MR. SCHLEMMER: I agree.

13 THE COURT: Doesn't make a
14 difference what I think except at the
15 time, I thought, wow.

16 MR. SCHLEMMER: Based on the
17 premise you were operating under,
18 everything you did after that, I have no
19 problem with at all including striking
20 all of his testimony.

21 THE COURT: It wasn't just for 26D.
22 It is to inform people experts are not
23 fact witnesses, generally. They are
24 permitted to do what they do because they
25 are helpful to the Court and jury and

1 my ruling really means. Go ahead. What
2 else do you want to say?

3 MR. SCHLEMMER: I want to say that
4 I believe that the premise you made your
5 original ruling on was based on the fact
6 you believe he lied to you the day
7 before, and he didn't. That's the bottom
8 line.

9 I went back and read it, I see how
10 you got there. I am just as ignorant as
11 everybody else, maybe more so, relative
12 to this background and how things
13 happened in these cases.

14 It is clear he didn't lie, and the
15 defendants were not surprised about it.

16 THE COURT: Lying and surprise
17 aren't necessarily --

18 MR. SCHLEMMER: It is, to me. I
19 don't know if you want to hear our other
20 motions now.

21 MR. EYNON: You need to ask this
22 Judge if they would respond to his
23 question whether they received the three
24 disks, as we testified. They dodged it,
25 they never have responded, for the

1 record. I need that on the record as to
2 whether they received the three disks.

3 THE COURT: What did he say?

4 MR. SCHLEMMER: He didn't answer
5 the question. He said, we received lots
6 of DVDs.

7 We filed the three DVDs that
8 contain Mr. Meyer's depositions with our
9 motions. Originals were filed with the
10 clerk's office.

11 THE COURT: Which motion?

12 MR. SCHLEMMER: Referring to
13 exhibit --

14 THE COURT: Motion to reinstate?

15 MR. SCHLEMMER: Yes, along with
16 Exhibit D, which is the letter that
17 points out there are three DVDs.

18 THE COURT: He wants to know if you
19 got the 3 DVDs.

20 MR. SCHIFERL: Mr. Eynon is asking
21 an irrelevant question on the opinions of
22 the expert. With regard to the evidence,
23 we got and I will produced for the Court,
24 my paralegal has back here everything we
25 ever got from them. That is not the

1 issue.

2 THE COURT: He wanted you to say
3 that on the record.

4 MR. SCHIFERL: Sure, Rich, we got
5 three things with a cover letter.

6 MR. EYNON: No, I want to know if
7 they got that exhibit in the disks --

8 THE COURT: Let the record reflect
9 we have three lawyers jostling for
10 control of the podium.

11 He said he got everything you gave
12 him. That would include what you say is
13 on there, I guess.

14 MR. EYNON: Then there can't be
15 surprise.

16 THE COURT: Are we going to have
17 tag team arguing, still?

18 Fine, we will do tag team. That
19 shows I am prejudiced because I asked
20 maybe we could have order.

21 Continue the way we have. Let's
22 go.

23 MR. SCHLEMMER: Don't be mad.
24 Isn't that what happened --

25 THE COURT: Are you not finished?

1 MR. GLASS: Less than two years. I
2 am confused about what he was trying to
3 say.

4 MR. DENNEY: I know you are
5 confused. Here is the trick that has
6 been played on you. I ask you to
7 seriously consider this. If you read
8 what I put in the motion to reinstate, it
9 is clear you have been tricked. They
10 tell you we don't have this exhibit.
11 That's not true. If you confront these
12 four lawyers as officers of the Court,
13 you make them tell you what's on the
14 three disks they have got. The Meyer
15 exhibits, April 23rd letter, and look at
16 Mr. Schiferl's e-mail from his own
17 fingers says he had that exhibit.

18 In response to Ms. Barrett, I have
19 got all of these except I don't have
20 these three. 114.49 is not one of the
21 three. In his own words, he got up here
22 and told you he didn't have them. It is
23 in the record. It is in the motion where
24 he said he didn't have it and he did have
25 it. He did know this issue was coming.

1 evasive. But the surprise I thought it
2 constituted, I do not believe is what I
3 originally thought it was. I am not
4 going to charge the jury that I did
5 anything wrong. You have got to be
6 kidding. I will tell them to reinstate.
7 I am not going to tell them what we do
8 here. They don't understand it, anyway.

9 But before we start back into any
10 testimony with Mr. Meyer, we are going to
11 do a complete 702, 703, 401, 403 on the
12 question of test results. I believe his
13 answers were very evasive despite the
14 spin. I don't want to hear any more. I
15 made a decision.

16 I will tell the jury not to exclude
17 his testimony other than the testimony --
18 well, we don't have to get into --
19 obviously, we will know that when we
20 bring him up here after that.

21 In the meantime, are we prepared to
22 go forward?

23 MR. DENNEY: Can I speak to that
24 issue and ask for assistance from the
25 Court in that regard? We have Dr.

1 COURT OF COMMON PLEAS
2 HAMILTON COUNTY, OHIO

3
4 KENNETH M. SCHWERING, Personal
5 Representative of the Estate of
6 Beverly D. Schwering, Deceased, and
7 KENNETH M. SCHWERING, Individually,
8
9 Plaintiff,

10 vs. Case No. A-0307981

11 TRW VEHICLE SAFETY SYSTEMS, INC, et al,
12
13 Defendants.

14 COMPLETE TRANSCRIPT OF PROCEEDINGS

15 APPEARANCES:

16 Mr. Jason Robinson, Esq.,
17 Mr. Richard Denney, Esq.,
18 Ms. Lydia JoAnn Barrett, Esq.
19 Mr. Arthur H. Schlemmer, Esq.,
20 Mr. Richard S. Eynon, Esq.,
21 Mr. David M. Brinley, Esq.,
22 On behalf of Plaintiffs.

23 Mr. Kevin C. Schiferl, Esq.,
24 Mr. Gary Glass, Esq.,
25 Mr. Todd Croftchik, Esq.,
26 Mr. Clifford Mendelsohn, Esq.
27 On Behalf of Ford Motor Company.

28 Mr. Damond R. Mace, Esq.,
29 Mr. Aaron T. Brogdon, Esq.,
30 On Behalf of TRW Vehicle Safety Systems.

31 BE IT REMEMBERED that upon the jury trial
32 heard in this cause, on Thursday, June 4, 2009,
33 before the Honorable Richard Niehaus, a said
34 Judge of the Court of Common Pleas, the
35 following proceedings were had, to wit:

1 THE COURT: Okay.

2 (Discussion was held in chambers.)

3 MR. SCHIFERL: I move for mistrial

4 We discussed Exhibit 298 ad nauseam.

5 Your Honor ruled he was not to discuss it

6 in open court.

7 THE COURT: Not enough for a

8 mistrial. Overruled on the mistrial.

9 Didn't get in yet.

10 MR. SCHIFERL: The gratuitous

11 comments of counsel in open court to

12 discuss a document that's on their

13 exhibit list without laying the proper

14 foundation when Your Honor ruled that he

15 was to do that at a side bar or outside

16 the presence of counsel, I take exception

17 to. Let's talk about Exhibit 2088. 2088

18 is the film he wants to show of a 1991,

19 the UN46, which you ruled was out

20 already. Seat back, which I will tell

21 you is not the same seat back that's at

22 issue in this vehicle. We can continue

23 to lay groundwork and try to smooze the

24 evidence, but that seat in the '91

25 Explorer is not the same seat. The

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

KENNETH M. SCHWERING, Personal
Representative of the Estate of
Beverly D. Schwering, Deceased, and
KENNETH M. SCHWERING, Individually,
Plaintiff,

vs. Case No. A-0307981

TRW VEHICLE SAFETY SYSTEMS, INC, et al,

Defendants.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

Jason Robinson, Esq.,
Richard Denney, Esq.,
Lydia JoAnn Barrett, Esq.
Arthur H. Schlemmer, Esq.,
Richard S. Eynon, Esq.,
David M. Brinley, Esq.,
On behalf of Plaintiffs.

Kevin C. Schiferl, Esq.,
Gary Glass, Esq.,
Todd Croftchik, Esq.,
Clifford Mendelsohn, Esq.
On Behalf of Ford Motor Company.

Damond R. Mace, Esq.,
Aaron T. Brogdon, Esq.,
On Behalf of TRW Vehicle Safety Systems.

BE IT REMEMBERED that upon the pretrial motions in this cause, heard on Wednesday, June 4, 2009, Afternoon Session, before the Honorable Richard Niehaus, a said Judge of the Court of Common Pleas, the following proceedings were had, to wit:

6 1 These were not produced in
6 2 discovery, were not referred to in
6 3 depositions, and we've still never seen
6 4 the tests. And then he comes here in
6 5 open court and he's asked about -- he
6 6 just blurts out about these tests. And
6 7 he talks about them and says, gosh, darn
6 8 it, this alternative design would have
6 9 prevented these injuries, and sits down.

6 10 Now, we were very careful yesterday
6 11 when we voir dired him. We wanted Your
6 12 Honor to exercise your gatekeeping
6 13 function here to prevent this from
6 14 happening, you had indicated that you
6 15 were holding this in abeyance. This is a
6 16 critical issue. I know you cited some
6 17 cases earlier, but this is not a nuance
6 18 in this case.

6 19 THE COURT: No, that was not the
6 20 motion before.

6 21 MR. GLASS: Right.

6 22 THE COURT: No, I agree with you
6 23 that this is not a nuance.

6 24 MR. GLASS: And so the cat is out
6 25 of the bag, the jury has heard about some

7 1 tests, the jury has heard about some
7 2 tests that supposedly could be
7 3 dispositive of an issue in this case, and
7 4 we would respectfully ask for a mistrial.

7 5 MR. DENNEY: Would you like my
7 6 response, Your Honor?

7 7 THE COURT: Either that or we can
7 8 pick a new trial date.

7 9 MR. DENNEY: Your Honor, the all
7 10 belts to seat technology was referred to
7 11 in Page 136 of his deposition, and 137, I
7 12 read it last night. The exhibit, 114.23,
7 13 is the ABTS technology exhibit that
7 14 includes a list of vehicles with all
7 15 belts to seats in them, exactly like we
7 16 talked about.

7 17 When he was asked about it
7 18 yesterday, the question he was asked was
7 19 whether they had done a complete vehicle
7 20 test under substantially similar
7 21 characteristics to this accident; in
7 22 other words, go out and roll it a
7 23 complete vehicle up a rail, like this
7 24 accident. That's what they asked him.
7 25 And they were very careful about that

8 1 because they knew he had tested all of
8 2 these alternative designs, Ford has
8 3 always known that over the years, they've
8 4 deposited him in all these cases.

8 5 And they were careful about the way
8 6 they phrased it because they know two
8 7 things about it. They know, one, you
8 8 can't duplicate this accident in a
8 9 repeatable test, because rollover
8 10 accidents on a highway are impossible to
8 11 duplicate, repeatable tests, and
8 12 everybody knows that, and they've
8 13 testified to that for years.

8 14 So when they carefully ask him that
8 15 complete vehicle question, did you do a
8 16 test of the complete vehicle with the
8 17 alternative design under the
8 18 circumstances of this accident, it will
8 19 always be a no, always. Because you
8 20 couldn't go out and duplicate this
8 21 accident if you ran a hundred more wrecks
8 22 just exactly like it, exactly like it on
8 23 the highway, you wouldn't get exactly the
8 24 same results. We all know that. That's
8 25 a given in these cases.

9 1 114.52 in my exhibits, given to
9 2 these defendants, is the all belts to
9 3 seat spit test. 114.23, given to these
9 4 defendants, is the all belts to seats
9 5 test. These go back over a year
9 6 disclosure to these attorneys, over a
9 7 year since they've had those exhibits.

9 8 So there is absolutely zero
9 9 surprise in any of this. The testimony
9 10 is consistent with his testimony in the
9 11 deposition that they did not follow up on
9 12 at Page 137. They were under an absolute
9 13 duty and obligation to follow up on it if
9 14 they wanted to know how he knew those
9 15 things.

9 16 THE COURT: What things?

9 17 MR. DENNEY: That the all belts to
9 18 seats would work in a rollover, and what
9 19 testing had been done. 2216 of our
9 20 exhibits, Your Honor, is an ABTS timeline
9 21 that includes all of these designs he was
9 22 talking about, and the papers.

9 23 THE COURT: He was objecting to a
9 24 particular situation.

9 25 MR. DENNEY: Your Honor --

10 1 THE COURT: And I understand what
10 2 you're talking about. But he's talking
10 3 about a particular situation where your
10 4 witness said I took a seat out of an
10 5 F150, that has the alternative design,
10 6 and completely tested it in a Ford
10 7 Explorer, and it would have prevented her
10 8 injuries. Now that is --

10 9 MR. DENNEY: Remember him telling
10 10 you, yesterday, Your Honor, it's in that
10 11 transcript that he'd have to go back and
10 12 look to know if the spit test he ran with
10 13 the alternative design were specifically
10 14 a 2001. And he told them that yesterday.
10 15 There was no surprise to any of that.
10 16 The question was, was it a 2001, 2002,
10 17 was it a '99 was it a '96.

10 18 THE COURT: You're saying that
10 19 yesterday he indicated that he actually
10 20 did this, took this seat out of an F150.
10 21 He didn't say anything like that. He
10 22 said I can't remember. So now today he
10 23 goes, now -- which by the way, stretches
10 24 any means of credibility. You don't
10 25 remember taking a seat out of a Ford

11 1 product and putting it in here and
11 2 testing the seatbelt? I mean that's
11 3 incredible.

11 4 MR. DENNEY: But the question is,
11 5 Your Honor, not that, but whether it's a
11 6 '99 or '98 or '96. They asked him
11 7 specifically a 2001.

11 8 THE COURT: He said it was a -- but
11 9 it wasn't disclosed that he did that
11 10 testing with this -- you don't consider
11 11 that to be a serious situation?

11 12 MR. DENNEY: Let me tell you what I
11 13 don't consider serious about it, Your
11 14 Honor -- and I do consider it serious to
11 15 have the accusation made. But when they
11 16 say --

11 17 THE COURT: Why are you taking this
11 18 personally when your witness sat there
11 19 and said he couldn't remember any
11 20 particulars about any testing, but today
11 21 he comes in and he makes real particular
11 22 assertions that are -- I mean, it's
11 23 incredible that you could forget that in
11 24 24 hours.

11 25 MR. DENNEY: He told you yesterday,

12 1 and counsel just read the answer, where
12 2 he said I've tested Explorers in various
12 3 spit tests and various configurations, I
12 4 just don't remember if it was a 2001
12 5 versus a 2000 or '99 or '98.

12 6 THE COURT: And I also forgot that
12 7 I took out my alternative design out of a
12 8 Ford and put it in that, and then said it
12 9 would have prevented the injury to this
12 10 lady.

12 11 MR. DENNEY: They didn't ask him
12 12 that, Judge, yesterday. Look at the
12 13 transcript. They asked him if he ran a
12 14 wreck like this wreck.

12 15 THE COURT: Quite frankly, I don't
12 16 know what test he ran, do you?

12 17 MR. GLASS: Neither do we, Judge.
12 18 That's why we asked the question.

12 19 THE COURT: Which did he say he ran
12 20 to come up with the conclusion that she
12 21 would have been saved by this system?

12 22 MR. DENNEY: He ran several tests.
12 23 He tested the seat back to see if it
12 24 would fail.

12 25 THE COURT: They didn't object to

13 1 that.

13 2 MR. DENNEY: They didn't object to
13 3 what they're objecting to right now, I
13 4 was getting ready to say that, Your
13 5 Honor. I keep getting cut off by these
13 6 lawyers, I would like to finish what I'm
13 7 saying. It is a very important issue.
13 8 We tested -- we went through this this
13 9 morning for about 30 minutes, and not one
13 10 objection, not one single objection.

13 11 The Ohio rule requires specifically
13 12 that you object when the evidence is
13 13 offered, and that you make your objection
13 14 known and you may not move for a mistrial
13 15 unless you do that. They did not do
13 16 that. I will challenge this record.
13 17 They did not make an objection. They sat
13 18 there and cooled their heels.

13 19 MR. GLASS: Because he told us he
13 20 didn't do any tests, and didn't recall
13 21 any tests. And then he comes out and he
13 22 blurts it out about some test. We asked
13 23 for a gatekeeper function and it wasn't
13 24 done, it was held in abeyance, and now
13 25 cat's out of the bag.

14 1 MR. DENNEY: May I finish, Your
14 2 Honor?

14 3 THE COURT: Yes, you may. Please,
14 4 sir.

14 5 MR. DENNEY: It's not one question.
14 6 They sat there and listened to 20
14 7 questions in a row without objection,
14 8 without getting up on their feet and
14 9 saying a word. And then they went to
14 10 lunch and thought about it and thought
14 11 they'd come back here and try to move for
14 12 a mistrial to get out of this trial
14 13 because they don't like the way this jury
14 14 looks like now.

14 15 The fact of the matter is, Your
14 16 Honor, the Ohio rules are abundantly
14 17 clear, you must object when the evidence
14 18 is offered, when the question is asked.
14 19 If you don't, you may not move for a
14 20 mistrial here. That is the rule here, I
14 21 have read it.

14 22 And the fact of the matter is, Your
14 23 Honor, that it was appropriate testimony.
14 24 They were warned about it in the
14 25 deposition.

19 1 I made in chambers, it's not on the
19 2 record.

19 3 With regard to TRW's position,
19 4 Ford's motion does not apply in any way
19 5 to the claims being made against TRW.
19 6 TRW has not asked for a mistrial, any
19 7 relief that's granted should pertain as
19 8 to Ford. Even if a mistrial is granted,
19 9 TRW stands ready, willing, and able to
19 10 proceed forward on all claims against TRW
19 11 and ask that those claims proceed. It
19 12 would be highly prejudicial for TRW to
19 13 have to get ready for a new trial date.
19 14 We're ready to try these claims now and
19 15 want to go on.

19 16 THE COURT: Okay. The question
19 17 that they're talking about that they
19 18 asked was, with regard to the issue of
19 19 alternative designs, am I correct, sir,
19 20 that you have never tested your proposed
19 21 alternative designs in a U207, 2001 Ford
19 22 Explorer Sport?

19 23 That may be correct, I'm not
19 24 certain.

19 25 The next question is: You

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

Court of Appeals of Ohio, Tenth District, Franklin County.

STATE ex rel. James MOGAVERO, Robert Mogavero, Raymond Rueble, Paula Myers and Gina Parrish, Relators,

v.

Lawrence A. BELSKIS, Judge, Respondent.

No. 02AP-164. Decided Nov. 27, 2002.

Residuary beneficiaries filed complaint seeking declaratory judgment with regard to certain provisions of will and trust. After beneficiaries moved for summary judgment against adversarial beneficiary, and probate court made certain rulings interpreting trust, residuary beneficiaries appealed, and Court of Appeals dismissed appeal on basis that probate court's order did not constitute final appealable order, 2001 WL 1117542, following which residuary beneficiaries filed voluntary dismissal and second declaratory judgment action. The District Court, Franklin County, then attempted to exercise jurisdiction in the probate matter. Beneficiaries sought writ of prohibition, on ground that voluntary dismissal had terminated probate court's jurisdiction. The Court of Appeals, Petree, J., held that beneficiaries' notice of dismissal of action was timely filed, thus divesting probate court of jurisdiction.

Motion for summary judgment and request for writ of prohibition granted.

West Headnotes (8)

1 Prohibition ¶ Nature and Scope of Remedy

Elements of prohibition claim are: (1) that trial judge is about to exercise judicial or quasi-judicial power; (2) that exercise of that power is not authorized under law; and (3) that denial of writ will cause injury for which there is no adequate legal remedy.

2 Prohibition ¶ Adequacy of Remedy by Appeal or Writ of Error

If trial court has general subject-matter jurisdiction over cause of action, court can determine its own jurisdiction, and party challenging court's jurisdiction has adequate remedy by way of appeal; thus, existence of right to appeal jurisdictional determination will generally foreclose issuance of writ of prohibition.

3 Prohibition ¶ Existence and Adequacy of Other Remedies ¶ Want or Excess of Jurisdiction

Notwithstanding general rule that trial court has power to determine its own jurisdiction, where inferior court patently and unambiguously lacks jurisdiction over cause, prohibition will lie to prevent any future unauthorized exercise of jurisdiction and to correct results of prior jurisdictionally unauthorized actions; thus, if inferior court's lack of jurisdiction is patent and unambiguous, relator is no longer required to establish lack of adequate legal remedy.

4 Prohibition ¶ Particular Acts or Proceedings

Residuary beneficiaries were entitled to writ of prohibition against probate judge's exercise of jurisdiction over declaratory judgment action regarding provisions of will and trust, where record established that beneficiaries' notice of dismissal of action was timely filed, thus patently and unambiguously divesting judge of jurisdiction over action; "trial" before magistrate which purportedly made notice of dismissal untimely was actually summary judgment proceeding. Rules Civ.Proc., Rule 41(A)(1)(a).

Opinion

PETREE, J.

5 Pretrial Procedure

⦿Time for Dismissal; Condition of Cause

Under voluntary dismissal rule of civil procedure, plaintiff has absolute right, regardless of motive, to voluntarily and unilaterally terminate his or her cause of action without prejudice at any time prior to commencement of trial. Rules Civ.Proc., Rule 41(A)(1)(a).

3 Cases that cite this headnote

6 Pretrial Procedure

⦿Effect

Voluntary dismissal deprives trial court of jurisdiction over matter dismissed; after its voluntary dismissal, action is treated as if it had never been commenced.

7 Judgment

⦿Hearing and Determination

Summary judgment proceeding is not trial but rather hearing upon motion.

8 Pretrial Procedure

⦿Effect

When case has been properly dismissed pursuant to voluntary dismissal rule, court patently and unambiguously lacks jurisdiction to proceed. Rules Civ.Proc., Rule 41(A)(1)(a).

1 Cases that cite this headnote

Attorneys and Law Firms

Marc K. Fagin, for relators.

Ron O'Brien, Prosecuting Attorney, and Harland H. Hale, for respondent.

*1 { ¶ 1 } On October 28, 1983, Pauline L. Cianflona executed an inter vivos trust, naming as co-trustees her brother, Edward Lombardo, and BancOhio National Bank. Paragraph 3 of the trust provided, in pertinent part, that Cianflona "shall have the right to * * * amend, modify or terminate this agreement at any time. * * *"

{ ¶ 2 } On August 12, 1993, Cianflona amended the trust, directing the co-trustees to distribute \$10,000 to her grandnephew, Robert Lombardo, one-half of the remainder to The Salvation Army, and one-half of the remainder to six named individuals, equally. On November 3, 1993, Cianflona again amended the trust. The November 3, 1993 amendment was identical to the August 12, 1993 amendment, except that one of the individuals was removed as residuary beneficiary. Cianflona's brother, Edward Lombardo, an attorney, drafted the original trust, as well as both amendments.

{ ¶ 3 } On September 19, 1995, Cianflona executed a will. The will, also drafted by Edward Lombardo, made a specific gift of real and personal property to Cianflona's grandson, gave \$5,000 to The Salvation Army, and divided the remainder of the estate between the same five individuals named as residuary beneficiaries in the trust.

{ ¶ 4 } On October 5, 1995, Cianflona removed National City Bank (successor to BancOhio National Bank) as co-trustee of the trust and appointed Key Trust Company, N.A. ("Key Trust") as successor co-trustee.

{ ¶ 5 } Cianflona died on November 22, 1998. Her will was thereafter admitted to probate.

{ ¶ 6 } On October 5, 1999, relators, James Mogavero, Robert Mogavero, Raymond Reuble, Paula Myers, and Jeanne Parrish (the five individuals named as residuary beneficiaries of the will and the trust), filed a complaint in the Franklin County Court of Common Pleas, Probate Division, against Edward Lombardo, Key Trust, The Salvation Army, Attorney General Betty D. Montgomery, and Robert Lombardo seeking a declaratory judgment with regard to certain provisions of Cianflona's will and trust. In the complaint, relators alleged, among other things, that subsequent to Cianflona's execution of the November 3, 1993 amendment to the trust, her son, Sam Mogavero, reviewed Cianflona's testamentary dispositions and suggested to Cianflona that her disposition to The Salvation Army from the trust be reduced from one-half of the residuary estate to a lump sum total of \$5,000. Relators further alleged that Cianflona agreed with this suggestion and retained

Edward Lombardo to draft the appropriate documents to effectuate this change. According to relators, Edward Lombardo incorporated the change into Cianflona's will, but "failed to modify or terminate Cianflona's inter-vivos Trust" in accordance with Cianflona's intentions. Relators also charged Edward Lombardo with improper self-dealing and undue influence or conflict of interest in drafting both the will and the trust.

{ ¶ 7 } On December 23, 1999, relators filed a "Motion for Default/Summary Judgment" against The Salvation Army because it failed to file an answer or motion in response to the complaint. Both the Attorney General and The Salvation Army filed responses. The motion was set for hearing on January 24, 2000. On January 24, 2000, a magistrate found that "irrespective of the motion before the Court, the Court must still construe the meaning of the Will and Trust in question." Accordingly, the magistrate ordered the parties to submit briefs and responses "as to the interpretation of the Will and Trust," with opportunities provided for responses. The briefing schedule, as ordered by the magistrate, terminated on March 20, 2000.

*2 { ¶ 8 } In their briefs, relators contended, inter alia, that they should be permitted to submit extrinsic evidence in order to prove their contention that Edward Lombardo failed to carry out Cianflona's expressed intent to modify the trust subsequent to the November 3, 1993 amendment in a manner consistent with her will. In particular, relators argued that both Sam Magavero and Mike Pickens, Mogavero's employee and a witness to Cianflona's will, would testify that sometime after November 3, 1993, Cianflona expressly stated her intention to modify the trust in order to limit her testamentary disposition to The Salvation Army to \$5,000. Relators further argued that since Paragraph 3 of the trust preserved Cianflona's right to "amend, modify, or terminate" the trust, but failed to specify the manner in which she could take such action, extrinsic evidence was properly admissible to demonstrate her intent to orally modify the testamentary terms of the trust subsequent to the execution of the November 3, 1993 amendment.

{ ¶ 9 } In a decision filed June 5, 2000, the magistrate framed the issues to be determined as "whether the will and trust should be construed against the Salvation Army in that they failed to timely file an Answer, whether the trust was revoked and, to what, if anything, is the Salvation Army entitled." (Mag. Dec. p. 4.) The magistrate determined that Cianflona's will should be construed as leaving \$5,000 to The Salvation Army, and the trust should be construed as leaving fifty percent of the remainder of the trust corpus to The Salvation Army. The magistrate also determined that the trust "was in effect at the death of the decedent and the distribution of the trust is pursuant to the November 3, 1993 amendment

as opposed to the original provision pouring the trust assets into the will for distribution from the estate." (Mag. Dec. p. 8.) The magistrate concluded that because both documents were clear and unambiguous, extrinsic evidence was not permitted. The magistrate made no determination regarding relators' allegations of undue influence, improper self-dealing, or conflict of interest by Edward Lombardo.

{ ¶ 10 } Relators timely objected to the magistrate's decision. Specifically, relators argued that the magistrate "unilaterally broadened the scope of the purpose of the briefs" by determining the ultimate issue in the case, i.e., to what, if anything, was The Salvation Army entitled. (Exhibit 14, "Plaintiffs' Combined Objections to Magistrate's Decision and Request for Status Conference," p. 6.) Relators contended that the purpose of the briefs was limited to setting forth arguments as to whether extrinsic evidence should be admitted regarding Cianflona's intent to orally amend the trust after November 3, 1993. In other words, relators maintained that the question was "not whether Ms. Cianflona's Trust was unambiguous but whether her subsequent statements after the second amendment to her Trust constitute[d] an oral modification of that instrument." (Exhibit 14, "Plaintiffs' Combined Objections to Magistrate's Decision and Request for Status Conference," p. 8.) Relators argued that the magistrate's expansion of the briefs to include the ultimate issue in the case deprived them of the opportunity to present such evidence at an evidentiary hearing.

*3 { ¶ 11 } In an entry filed December 27, 2000, the court adopted the magistrate's findings of fact, "sustained" the magistrate's decision, and overruled relators' objections. More specifically, the court stated:

{ ¶ 12 } "The parol evidence rule provides that when parties have expressed their intent in a writing, extrinsic evidence is not admissible for the purpose of varying or contradicting the writing. * * * Even if a writing is ambiguous, parol evidence is admissible to interpret, but not to contradict, the express language. * * * Extrinsic evidence is not admissible where it would change the legal effect of the instrument. * * *

{ ¶ 13 } "Looking at the 'four-corners' of the Trust and Will, the terms of the instruments are clear and unambiguous, therefore, extrinsic evidence is not admissible. Furthermore, the proposed evidence of oral testimony regarding the Trust contradicts the express language of Ms. Cianflona's Trust, would change the legal effect of [the] Trust, and thus, is inadmissible." (Citations omitted.)

{ ¶ 14 } The probate court's judgment did not determine relators' claims of undue influence, improper self-dealing,

or conflict of interest by Edward Lombardo.

{ ¶ 15} Relators appealed the probate court's judgment to this court. This court issued a decision dismissing relators' appeal on the basis that the probate court's order did not constitute a final appealable order pursuant to R.C. 2505.02 and Civ.R. 54(B). *Mogavero v. Lombardo* (Sept. 25, 2001), Franklin App. No. 01AP-98. In particular, this court noted that the probate court's entry addressed only the claims related to the construction of the language of Cianflona's trust and will without addressing relators' claims of undue influence.

{ ¶ 16} Thereafter, the probate court scheduled the matter for a hearing to take place on January 24, 2002, in order to resolve all remaining issues.

{ ¶ 17} On January 18, 2002, relators filed a notice of voluntary dismissal without prejudice pursuant to Civ.R. 41(A)(1)(a). On the same day, relators filed another declaratory judgment action in the Franklin County Court of Common Pleas, General Division, raising essentially the same issues which were raised in the probate court action.

{ ¶ 18} Relators did not appear for the January 24, 2002 hearing. On January 29, 2002, the magistrate issued a decision finding that relators' Civ.R. 41(A)(1)(a) dismissal was ineffective, since a "trial" had commenced on March 21, 2000, the day following the last date to submit briefs as to the interpretation of the will and trust from the four corners of those documents. The magistrate explained:

{ ¶ 19} " * * * The hearing becomes a bifurcated hearing, the first part being to determine with arguments by brief as to the meaning of the document from its four corners. The second part, (only if necessary) is testimony adduced from extrinsic witnesses to determine the meaning of the document outside of the four corners." (Mag. Dec. pp. 2-3.)

*4 { ¶ 20} Accordingly, the magistrate concluded, as a matter of law, that the case was not subject to a Civ.R. 41(A)(1)(a) dismissal and was thus still pending. Thereafter, the magistrate concluded that because no evidence was submitted as to relators' allegations of undue influence, improper self-dealing, or conflict of interest by Edward Lombardo, that portion of relators' complaint should be dismissed. In addition, the magistrate reaffirmed the probate court's judgment as to the interpretation of the will and trust and expressly dismissed the remainder of the complaint.

{ ¶ 21} Relators filed objections to the magistrate's decision, arguing that the probate court lacked jurisdiction to proceed because relators' filing of the Civ.R. 41(A)(1)(a) dismissal on January 18, 2002, effectively

terminated the action.

{ ¶ 22} On February 11, 2002, relators filed an original action in this court, seeking a writ of prohibition ordering respondent, Lawrence A. Belskis, Judge of the Franklin County Court of Common Pleas, Probate Division, to refrain from exercising further jurisdiction in relators' probate court action.

{ ¶ 23} The matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The parties filed an agreed stipulation of evidence, and relators filed their own supplement exhibits. Relators and respondent each filed motions for summary judgment and responses thereto. After consideration thereof, the magistrate issued a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) Therein, the magistrate concluded that for purposes of Civ.R. 41(A)(1)(a), "trial" commenced in March 2000, and relators' notice of voluntary dismissal was not effective to deprive the probate court of its jurisdiction. Accordingly, the magistrate recommended that this court grant summary judgment in favor of respondent.

{ ¶ 24} Relators have filed objections to the magistrate's decision. The matter is now before this court for a full, independent review.

{ ¶ 25} In support of their motion for summary judgment, relators maintain that trial had not commenced at the time they filed the Civ.R. 41(A)(1)(a) voluntary dismissal; thus, the timely filed Civ.R. 41(A)(1)(a) dismissal notice divested the probate court of jurisdiction in the matter. Moreover, relators contend that pursuant to the Civ.R. 41(A)(1)(a) dismissal, respondent "patently and unambiguously" lacks jurisdiction over the cause; thus, prohibition will lie not only to prevent the future unauthorized exercise of jurisdiction, but also to correct the results of previous jurisdictionally unauthorized acts. In addition, relators assert that because respondent's lack of jurisdiction was patent and unambiguous, the fact that any further probate proceedings might be reviewable on appeal does not foreclose their right to bring a prohibition action.

1 { ¶ 26} Relators will be entitled to summary judgment only if they can establish the elements of their prohibition claim. Those elements are: (1) that respondent is about to exercise judicial or quasi-judicial power; (2) that the exercise of that power is not authorized under the law; and (3) that the denial of the writ will cause an injury for which there is no adequate legal remedy. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 178, 631 N.E.2d 119. These elements are in the conjunctive; that is, relators must demonstrate that all three elements have been satisfied before this court will issue a writ.

rel. *J. Richard Gaier Co., L.P.A. v. Kessler* (1994), 97 Ohio App.3d 782, 784, 647 N.E.2d 564.

*5 2 3 { ¶ 27} With regard to the second and third elements of a prohibition action, the Ohio Supreme Court has stated that if a trial court has general subject-matter jurisdiction over a cause of action, the court can determine its own jurisdiction, and a party challenging the court's jurisdiction has an adequate remedy by way of appeal. *State ex rel. Eryart v. O'Neill* (1995), 71 Ohio St.3d 655, 656, 646 N.E.2d 1110. Accordingly, the existence of the right to appeal a jurisdictional determination will generally foreclose the issuance of a writ of prohibition. *State ex rel. Ragozine v. Shaker* (Dec. 28, 2001), Trumbull App. No.2001-T-0122. However, the Ohio Supreme Court has also recognized an exception to this general rule. "[W]here an inferior court patently and unambiguously lacks jurisdiction over the cause * * * prohibition will lie to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions." *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 161, 656 N.E.2d 1288, citing *State ex rel. Lewis v. Moser* (1995), 72 Ohio St.3d 25, 28, 647 N.E.2d 155. Thus, if the inferior court's lack of jurisdiction is patent and unambiguous, the relator is no longer required to establish the lack of an adequate legal remedy. *State ex rel. Rogers v. McGee Brown* (1997), 80 Ohio St.3d 408, 410, 686 N.E.2d 1126.

{ ¶ 28} In applying the foregoing to the circumstances in this case, this court first notes that it is uncontroverted that relators have satisfied the first element of their prohibition claim; i.e., the record readily demonstrates that the probate magistrate issued a decision, relators filed objections to that decision, and respondent is about to exercise judicial power by entering judgment on the magistrate's decision. However, the record also indicates that relators cannot satisfy the third element of their prohibition claim. In his decision, the probate magistrate recommended dismissal of relators' complaint as to the allegations of undue influence, improper self-dealing or conflict of interest by Edward Lombardo, reaffirmed respondent's prior decision as to the interpretation of the will and trust and dismissed all other aspects of the complaint. If respondent were to overrule relators' objections, adopt the magistrate's decision and enter judgment against relators, relators would have an adequate legal remedy by way of direct appeal, as such a determination by respondent would constitute a final appealable order.

4 { ¶ 29} Thus, relators are entitled to a writ of prohibition only if the record establishes that relators' Civ.R. 41(A)(1)(a) notice of dismissal was timely filed, thus divesting respondent of jurisdiction over the action, and, if so, that the loss of jurisdiction stemming from such dismissal was patent and unambiguous. For the reasons

that follow, we conclude that relators have met that burden.

{ ¶ 30} Civ.R. 41(A)(1)(a) provides, in relevant part, as follows:

{ ¶ 31} "**Rule 41. Dismissal of actions**

*6 { ¶ 32} "**(A) Voluntary dismissal; effect thereof**

{ ¶ 33} "**(1) By plaintiff * * *** Subject to the provisions of Civ.R. 23(E), Civ.R. 23.1, and Civ.R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

{ ¶ 34} "(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant[.]"

5 6 { ¶ 35} Under Civ.R. 41(A)(1)(a), a plaintiff has an absolute right, regardless of motive, to voluntarily and unilaterally terminate his or her cause of action without prejudice at any time prior to the commencement of trial. *Standard Ohio v. Grice* (1975), 46 Ohio App.2d 97, 101, 345 N.E.2d 458; *Douthitt v. Garrison* (1981), 3 Ohio App.3d 254, 255, 444 N.E.2d 1068. "It is axiomatic that such dismissal deprives the trial court of jurisdiction over the matter dismissed. After its voluntary dismissal, an action is treated as if it had never been commenced. * * * " *Gilbert v. WNIR 100 FM* (2001), 142 Ohio App.3d 725, 756 N.E.2d 1263, quoting *Zimmie v. Zimmie* (1964), 11 Ohio St.3d 94, 95, 464 N.E.2d 142. Moreover, "when a party files a voluntary dismissal pursuant to Civ.R. 41(A)(1)(a), the case ceases to exist. In effect, it is as if the case had never been filed." *Sturm v. Sturm* (1991), 61 Ohio St.3d 298, 302, 574 N.E.2d 522.

7 { ¶ 36} As noted previously, the probate magistrate determined, and this court's magistrate agreed, that relators' notice of voluntary dismissal was not timely filed; i.e., it was not filed prior to the commencement of trial as required by Civ.R. 41(A)(1)(a). In so determining, both magistrates found that for purposes of Civ.R. 41(A)(1)(a), "trial" in the instant matter had commenced on March 21, 2000, the day following the last day of the briefing schedule set by the probate magistrate on January 24, 2000. We do not agree with this conclusion. Notwithstanding the probate magistrate's attempt to characterize the proceedings before him as something other a summary judgment proceeding, the record reflects that the matter was indeed before the magistrate on relators' motion for summary judgment. The Ohio Supreme Court has determined that "a summary judgment proceeding is not a trial but rather a hearing upon a motion." *First Bank of Marietta v. Mascrate, Inc.* (1997), 79 Ohio St.3d 503, 509, 684 N.E.2d 38, quoting

L.A. & D., Inc. v. Lake Cty. Bd. of Comms. (1981), 67 Ohio St.2d 384, 423 N.E.2d 1109. See, also, *Perdue v. Handelman* (1980), 68 Ohio App.2d 240, 241, 429 N.E.2d 165. Thus, we find that relators' voluntary dismissal of their probate action was effective to divest the probate court of jurisdiction over the matter, as "trial" had not commenced at the time relators' notice of dismissal was filed.¹

8 { ¶ 37} Having determined that respondent lost jurisdiction over the matter when relators properly filed the Civ.R. 41(A)(1)(a) dismissal, we find that relators have established the second element of their claim for prohibition; i.e., that any further exercise of judicial power by respondent is not authorized under the law. Further, "[w]hen a case has been properly dismissed pursuant to Civ.R. 41(A)(1), the court patently and unambiguously lacks jurisdiction to proceed * * *"
Fogle, supra, at 161, 656 N.E.2d 1288. Accordingly, relators were not required to establish the third element of their prohibition claim, i.e., the lack of adequate legal remedy. *State ex rel. Hunt v. Thompson* (1992), 63 Ohio St.3d 182, 183, 586 N.E.2d 107.

*7 { ¶ 38} As noted previously, relators' prohibition action is before this court on the parties' cross-motions for summary judgment. To prevail on a motion for summary judgment, the moving party must demonstrate: (1) that there are no genuine issues of material fact remaining to be litigated; (2) that the nature of the evidence is such that, even when the evidence is construed in favor of the nonmoving party, a reasonable person could only reach a conclusion in favor of the moving party; and (3) that the moving party is entitled to judgment as a matter of law. *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197.

{ ¶ 39} Upon examination of the magistrate's decision and an independent review of the file, this court concludes, pursuant to the foregoing analysis, that relators have satisfied the summary judgment standard in regard to both elements of their prohibition claim. As such, we adopt the magistrate's findings of fact, but reject the magistrate's conclusions of law to the extent indicated in this decision.

{ ¶ 40} Accordingly, relators' objections are sustained, and their motion for summary judgment and request for a writ of prohibition are hereby granted.

Objections sustained; motion for summary judgment and writ of prohibition granted.

TYACK, P.J., and DESHLER, J., concur.

APPENDIX A

MAGISTRATE'S DECISION

Rendered on May 22, 2002

IN PROHIBITION ON MOTIONS FOR SUMMARY JUDGMENT

{ ¶ 41} Relators have filed this original action seeking a writ of prohibition from this court ordering respondent, Lawrence A. Belskis, Judge of the Franklin County Court of Common Pleas, Probate Division ("probate court"), to refrain from exercising jurisdiction in relators' probate court action in case number 468,941-A on the basis that relators had voluntarily dismissed the probate court action on January 18, 2002, pursuant to Civ.R. 41(A)(1).

Findings of Fact

{ ¶ 42} 1. On October 5, 1999, relators filed a complaint in the Franklin County Court of Common Pleas, Probate Division, seeking declaratory judgment concerning provisions of the amended will and trust of Pauline L. Cianflona ("Cianflona"). Relators alleged improper self-dealing, and undo influence or conflict of interest by Edward Lombardo, who allegedly drafted the trust and will. Relators also claimed that Cianflona's amended trust should be construed as having been orally modified in a manner consistent with her will. Specifically, in a will created after the trust, Cianflona made a testamentary disposition to the Salvation Army of America ("Salvation Army") in the amount of \$5,000. Relators alleged that the provisions of Cianflona's amended trust should be construed so that a disposition from the amended trust to the Salvation Army would be reduced from one-half of the residuary estate to the sum of \$5,000.

{ ¶ 43} 2. On December 23, 1999, relators filed a motion for default/summary judgment against the Salvation Army because it had failed to file an answer or motion in response to relators' complaint.

*8 { ¶ 44} 3. Relators' motion was scheduled for a hearing on January 24, 2000.

{ ¶ 45} 4. On January 24, 2000, a magistrate issued an order finding that "irrespective of the motion before the Court, the Court must still construe the meaning of the

Will and Trust in question.” The magistrate also issued a briefing schedule ordering the parties to submit briefs and responses as to the interpretation of the will and trust.

{ ¶ 46} 5. Briefs were submitted.

{ ¶ 47} 6. The magistrate issued a decision, dated June 5, 2001, wherein he made certain findings of fact and conclusions of law. Most notably, the magistrate concluded that both the will and trust were clear and unambiguous on their face and that extrinsic testimony and evidence would not be permitted. The magistrate concluded that, pursuant to item IV of her will, Cianflona gave to the Salvation Army the sum of \$5,000. The magistrate also concluded that there was no language in the will revoking the trust and that the trust, through its amendments, no longer poured over into the will. As such, the magistrate concluded that the \$5,000 bequest in the will is an addition to the fifty percent remainder bequest provided in the trust.

{ ¶ 48} 7. Relators timely objected to the magistrate’s decision.

{ ¶ 49} 8. In an entry filed December 27, 2000, the probate court adopted the magistrate’s findings of fact, “sustained” the magistrate’s decision, and overruled relators’ objections. The trial court’s judgment did not address relators’ allegations of undue influence, and improper self-dealing or conflict of interest by Edward Lombardo.

{ ¶ 50} 9. Relators appealed the probate court’s decision to this court.

{ ¶ 51} 10. On September 25, 2001, this court issued a decision dismissing relators’ appeal on the basis that the probate court’s order did not constitute a final appealable order pursuant to R.C. 2505.02 and Civ.R. 54(B). *Mogavero v. Lombardo* (2001), Franklin App. No. 01AP-98. This court noted that the probate court’s entry only addressed the claims related to the construction of the language of Cianflona’s will and trust without addressing relators’ claims of undue influence.

{ ¶ 52} 11. Thereafter, the probate court scheduled the matter for a hearing to take place on January 24, 2002, to resolve all remaining issues.

{ ¶ 53} 12. On January 18, 2002, relators filed a notice of voluntary dismissal without prejudice pursuant to Civ.R. 41(A)(1).

{ ¶ 54} 13. On the same day, January 18, 2002, relators filed another declaratory judgment action in the Franklin County Court of Common Pleas raising essentially the same issues which were raised in the probate court action.

{ ¶ 55} 14. Relators did not appear for the hearing on January 24, 2002.

{ ¶ 56} 15. Following the January 24, 2002 hearing, the magistrate issued a decision containing findings of fact and conclusions of law. The magistrate found that, for purposes of Civ.R. 41(A), the trial had commenced the day following the last date to submit briefs as to the interpretation of the will from the four corners of the document, that being March 21, 2000. As such, the magistrate found that, as a matter of law, the case was not subject to a Civ.R. 41 stipulation of dismissal and that the case remained pending. Thereafter, the magistrate concluded as follows:

*9 { ¶ 57} “ * * * The Magistrate finds that the complaint alleged many things but the prayer was very narrow. The prayer of the complaint asked for a construction of the trust. A second item in the prayer asked for a generic granting of relief for any other matter. Inasmuch as no evidence was submitted as to the plaintiff’s allegations of undue influence, improper self dealing, or conflict of interest by Mr. Edward Lombardo, that portion of the complaint is hereby dismissed.

{ ¶ 58} “ * * *

{ ¶ 59} “This Magistrate reaffirms the prior decision of the Court as to the interpretation of the will and trust and dismisses all the other aspects of the complaint.”

{ ¶ 60} 16. Relators filed objections to the magistrate’s decision arguing that the probate court lacked jurisdiction because relators had filed a notice of voluntary dismissal without prejudice pursuant to Civ.R. 41(A)(1)(a) on January 18, 2002, six days before the scheduled hearing.

{ ¶ 61} 17. On February 11, 2002, relators filed the instant complaint in prohibition.

{ ¶ 62} 18. On March 6, 2002, a status conference was held and a scheduling order was issued.

{ ¶ 63} 19. The parties have filed an agreed stipulation of evidence and relators have filed their own supplemental exhibits. Both sides have filed motions for summary judgment and responses thereto.

{ ¶ 64} 20. The matter is now before this magistrate on the parties’ respective motions for summary judgment.

Conclusions of Law

{ ¶ 65} The issue in the present case is very narrow:

whether relators' notice of dismissal filed on January 18, 2002 in the probate court effective to deprive the probate court of jurisdiction in the matter or had the trial commenced, as the court concluded, on March 21, 2000, when briefs had been filed and the matter was first submitted to the magistrate. For the reasons that follow, this magistrate concludes that, for purposes of Civ.R. 41(A), the probate court case had commenced in March 2000 and relators' notice of voluntary dismissal was not effective to deprive the probate court of its jurisdiction.

{ ¶ 66} Relators seek a writ of prohibition asking this court to prohibit the probate court from exercising jurisdiction. In order to be entitled to a writ of prohibition, relators must establish that: (1) the probate court is about to exercise judicial or quasi-judicial power; (2) the exercise of that power is unauthorized by law; and (3) the denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. *State ex rel. Henry v. McMonagle* (2000), 87 Ohio St.3d 543, 721 N.E.2d 1051.

{ ¶ 67} A motion for summary judgment requires the moving party to set forth the legal and factual basis supporting the motion. To do so, the moving party must identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264. Accordingly, any party moving for summary judgment must satisfy a three-prong inquiry showing: (1) that there is no genuine issue as to any material fact; (2) that the parties are entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, which conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* 54 Ohio St.2d 64, 375 N.E.2d 46.

*10 { ¶ 68} Civ.R. 41(A)(1)(a) provides, in pertinent part, as follows:

{ ¶ 69} " * * * Voluntary dismissal: effect thereof

{ ¶ 70} " * * * By plaintiff * * *. Subject to the provisions of Civ.R. 23(E), Civ.R. 23.1, and Civ.R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

{ ¶ 71} " * * * [F]iling a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant [.]” (Emphasis sic.)

{ ¶ 72} Relators cite *Frazee v. Ellis Bros., Inc.* (1996), 113 Ohio App.3d 828, 682 N.E.2d 676, in support of their position. In *Frazee*, the case was set for trial on September 26, 1995. That morning, the trial court

assembled a pool of jurors and prepared to call the case for trial. At 9:00 a.m., the time scheduled for trial, counsel advised the trial court that he was unable to contact his clients and that counsel wished to file a voluntary dismissal without prejudice pursuant to Civ.R. 41(A). The trial court opined that the trial had commenced at 9:00 a.m. when the court, the jury, and the defense were ready to proceed. As such, the court concluded that appellants were not permitted under the rule to voluntarily dismiss their action, and advised counsel that the court would grant the motion to dismiss with prejudice. That same day, appellants filed the motion to dismiss without prejudice pursuant to Civ.R. 41(A). The trial court journalized its dismissal entry several days later on October 10, 1995.

{ ¶ 73} On appeal, appellants argued that the trial court erred in entering judgment in favor of appellees after appellants had voluntarily dismissed their action without prejudice. The appellate court agreed and stated as follows:

{ ¶ 74} “In *Std. Oil Co. v. Grice* (1975), 46 Ohio App.2d 97, 345 N.E.2d 458, 75 O.O.2d 81, * * * the Court of Appeals for Darke County discussed the term ‘commencement of trial.’ Citing the minutes and personal notes of the Rules Committee in drafting the original version of Civ.R. 41, the court of appeals noted that the committee discussed the adoption of a time limitation described as ‘before the case is called for trial.’ That language actually appeared in a working draft in 1969. The Darke County Court of Appeals noted, however, that the version of Civ.R. 41 approved by the Supreme Court amended the language of the rule to ‘before the commencement of trial.’ The *Grice* court found that Ohio’s policy was traditionally one of encouraging voluntary terminations, even though that policy might be subject to inconvenience or even abuse. We agree, and find that cases should be determined on their merits whenever possible.

{ ¶ 75} “ * * * We find that a civil trial commences when the jury is empaneled and sworn, or, in a bench trial, at opening statements. The trial court was incorrect in stating that the jury was prepared to proceed, because jury selection had not yet begun.” *Id.* at 831, 682 N.E.2d 676.

*11 { ¶ 76} By relying on the holding in *Frazee*, relators ignore the particular circumstances in the present case. In the present case, the probate court was asked to analyze certain provisions of the will and trust of Cianflona. One of the fundamental tenants for the construction of a will or trust is to ascertain, within the bounds of the law, the intent of the testator, grantor, or settlor. *Domo v. McCarthy* (1993), 66 Ohio St.3d 312, 612 N.E.2d 706. Generally, when the language of the instrument is not

ambiguous, intent can be ascertained from the express terms of the trust or will itself. *Id.* The court may consider extrinsic evidence to determine the testator's intention only when the language used in the will creates doubt as to the meaning of the will. *Oliver v. Bank One, Dayton, N.A.* (1991), 60 Ohio St.3d 32, 573 N.E.2d 55.

{ ¶ 77 } Respondent contends that the probate court matter commenced when the parties had submitted their briefs prior to the magistrate's original decision of June 5, 2000. A review of the record indicates that relators were well aware that the magistrate was going to be determining both the interpretation of the will and trust as well as whether or not extrinsic evidence would be permitted to show Cianflona's intent with regards to the disposition made to the Salvation Army. In their brief before the probate court, relators first explained why extrinsic evidence would not be necessary to show that Cianflona orally modified her trust as well as their reasons why extrinsic evidence should be admitted to show that Cianflona had intended to reduce the amount payable to the Salvation Army to the \$5,000 provided for in the will.

{ ¶ 78 } Pursuant to the law regarding the interpretation of wills and trusts, the magistrate determined that both the will and trust of Cianflona were clear and unambiguous and that extrinsic evidence would not be permitted to demonstrate that Cianflona had a different intent than that provided for in the will and trust. Unfortunately, when the magistrate issued his decision on June 5, 2000, no mention was made as to relators' other claims which would have, by necessity, been pursued only if the court had determined that extrinsic evidence was permitted. The probate court adopted the magistrate's decision; however, when relators' appealed the matter to this court, this court dismissed the appeal because the probate court's entry was not a final appealable order. This court found the trial court had failed to dispose of all the issues.

{ ¶ 79 } Upon remand by this court, the probate court set the matter for hearing to determine the remaining issues. Thereafter, relators sought to dismiss their action by filing a voluntary notice of dismissal pursuant to Civ.R. 41, but the probate court found that the matter had commenced earlier.

Footnotes

- 1 We further note that the probate court's adverse ruling on relators' motion for summary judgment did not moot the effect of relators' Civ.R. 41(A)(1)(a) notice of dismissal, as this court previously determined that such ruling did not constitute a final appealable order. No other order has been issued by the court on relators' summary judgment motion.

{ ¶ 80 } Upon review, this magistrate finds that the probate court matter had commenced back in March 2000 when the briefs were filed in the present case. Relators were given the opportunity to demonstrate to the probate court that Cianflona's will and trust were ambiguous, and that extrinsic evidence was necessary to determine Cianflona's actual intent. Once the probate court found that the will and trust were unambiguous and that Cianflona's intent could be determined from the words of the will and trust, the matter was over. Pursuant to the case law, once the probate court determined that the will and trust were unambiguous and that Cianflona's intent could be derived from the documents themselves, extrinsic evidence was not permitted. The fact that the probate court neglected to dispose of all of relators' arguments led this court to conclude that the original entry did not constitute a final appealable order. However, that finding did not determine that the matter had not commenced in the probate court as relators now contend.

*12 { ¶ 81 } Based on the foregoing, it is this magistrate's decision that relators have not demonstrated that they are entitled to summary judgment and this court should deny relators' motion for summary judgment. However, this magistrate finds that respondent has demonstrated that he is entitled to summary judgment. Although the probate court's December 27, 2000 entry failed to dispose of all relators' claims as raised in their declaratory judgment action, the probate court matter had commenced and relators did not divest the probate court of jurisdiction when they filed their voluntary notice of dismissal as such was not effective to divest the probate court of jurisdiction after the proceedings had commenced. Because this magistrate finds that the proceedings had commenced and that relators' notice of dismissal was not effective to divest the probate court of jurisdiction, respondent is entitled to judgment and this court should grant summary judgment in favor of respondent.

Parallel Citations

2002 -Ohio- 6497

2009 WL 1244090

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

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

Joseph N. WHEELER, Plaintiff-Appellant

v.

BEST EMPLOYEE FEDERAL CREDIT UNION, et
al., Defendants-Appellees.

No. 92159. Decided May 7, 2009.

Civil Appeal from the Cuyahoga County Common Pleas
Court, Case No. CV-479471.

Attorneys and Law Firms

Joseph Vincent Pagano, Cleveland, OH, for appellant.

Chris Bator Baker & Hostetler, L.L.P., Cleveland, OH,
for appellee, Madison National Life Insurance Company.
Timothy T. Brick, Gallagher Sharp, Cleveland, OH, for
Best Employee Federal Credit Union.
Joseph N. Wheeler, Bedford, OH, pro se.

Before: SWEENEY, J., DYKE, P.J., and BOYLE, J.

Opinion

JAMES J. SWEENEY, J.

*1 N.B. This entry is an announcement of the court's
decision. See App.R. 22(B) and 26(A); Loc.App.R. 22.
This decision will be journalized and will become the
judgment and order of the court pursuant to App.R. 22(C)
unless a motion for reconsideration with supporting brief,
per App.R. 26(A), is filed within ten (10) days of the
announcement of the court's decision. The time period for
review by the Supreme Court of Ohio shall begin to run
upon the journalization of this court's announcement of
decision by the clerk per App.R. 22(C). See, also, S.Ct.
Prac.R. II, Section 2(A)(1).

{ ¶ 1 } Plaintiff-appellant, Joseph N. Wheeler
("Plaintiff"), appeals the court's order imposing sanctions
against him for frivolous conduct. After reviewing the
facts of the case and pertinent law, we reverse.

{ ¶ 2 } In October 1996, Plaintiff bought a new Chevrolet
Suburban ("the SUV"), which was financed through

Defendant, Best Employees Federal Credit Union
("Best"), and included disability insurance through
Defendant-appellee, Madison National Life Insurance
Company ("Madison"). Once in 1997 and twice in 1998,
Plaintiff was injured rendering him disabled, which
triggered Madison to take over the SUV payments.
Plaintiff submitted the required monthly paperwork to
Madison, and Madison made payments to Best through
January 2001. According to Plaintiff, at that time it was
his understanding that the SUV loan was paid in full, and
he stopped submitting the claim forms to Madison. In
turn, Madison stopped making payments to Best.

{ ¶ 3 } According to the record, there is a dispute over the
monthly payment terms of the loan. Plaintiff alleges that
Best sent him a payment booklet with 48 monthly
payment slips for \$757.75 each. Best does not dispute
this; however, Best alleges it made a mistake in the pay-
off terms of the loan, and a balance of \$6,028.50 was due
after the January 2001 payment was made. According to
the record, Madison sent letters to Plaintiff on March 7,
2001 and April 10, 2001, stating that it was ceasing its
payments to Best and closing Plaintiff's file. Additionally,
Best sent a letter to Plaintiff on August 31, 2001, stating
as follows: "This letter is to inform you that our insurance
company, Madison National Life, has not received your
completed claim form as requested several times. At this
time you have 7 days to respond to this letter or the car in
your possession must be turned in to the credit union. In
the event this does not happen we will have the car picked
up. This important matter needs your immediate
attention."

{ ¶ 4 } On February 1, 2002, Best repossessed the SUV.
On August 22, 2002, Plaintiff filed a complaint against
Best and Madison, alleging deceptive trade practices,
breach of duty of good faith and fair dealing, equitable
estoppel, conversion, breach of contract, and damage to
his credit history.¹ Discovery, including depositions, and
settlement negotiations ensued, and in July 2003,
Madison paid Best \$6,028.50 "as a gesture of goodwill
and in an attempt to settle Plaintiff's claims * * *."
Further attempts to settle the case with Plaintiff were
unsuccessful.

*2 { ¶ 5 } Over the next few years, Plaintiff was
represented by three different attorneys in the ongoing
litigation. Present counsel entered an appearance in
August 2007-five years after the original complaint was
filed.

{ ¶ 6 } Trial was set for August 4, 2008, and that same
day, the court addressed various motions in limine filed
by Best and Madison (collectively, "Defendants") that
had not been ruled upon. It was established that
documents identified at Plaintiff's deposition, which was

held May 15, 2003, had never been produced to Defendants. Defendants claimed to have never seen the documents, which dealt with Plaintiff's compensatory damages, before the day of trial, and moved to exclude them from the proceedings. The court granted this motion. In addition, the court granted Defendants' motion to exclude evidence of emotional or psychological damages and Defendants' motion to exclude mention of punitive damages during the proceedings.

{ ¶ 7 } The day after these rulings, on August 5, 2008, Plaintiff voluntarily dismissed his case without prejudice pursuant to Civ.R. 41(A)(1).

{ ¶ 8 } On August 14, 2008, Madison moved the court for sanctions against Plaintiff. On September 3, 2008, the court granted the motion for sanctions, stating as follows: "Judgment in amount of \$1,708.16 for deft. Madison National Life Ins. Co. Inc. as reimbursement awarded to deft. necessitated by pltf's. frivolous conduct."

{ ¶ 9 } It is from this order that Plaintiff now appeals.2 Plaintiff assigns three errors for our review. We first address Plaintiff's third assignment of error, which states as follows:

{ ¶ 10 } "III. The trial court lacked jurisdiction to impose costs as a sanction against Appellant after Appellant had voluntarily dismissed his claims without prejudice and had not re-filed them."

{ ¶ 11 } We first note that we apply a mixed standard of review to appeals concerning sanction awards pursuant to R.C. 2323.51. *Riston v. Butler* (2002), 149 Ohio App.3d 390, 397 (holding that "'the inquiry necessarily must be one of mixed questions of fact and law.' Accordingly, purely legal issues require no deference to the trial court's determination, while some deference must be given to the trial court's factual determinations").

{ ¶ 12 } In *State ex rel. Hummel v. Sadler* (2002), 96 Ohio St.3d 84, 88, the Ohio Supreme Court held that "despite a voluntary dismissal under Civ.R. 41(A)(1), a trial court may consider certain collateral issues not related to the merits of the action." Sanctioning a party for frivolous conduct is considered a collateral proceeding, and trial courts retain jurisdiction to make this determination under R.C. 2323.51 subsequent to a case being voluntarily dismissed. See *Dyson v. Adrenaline Dreams Adventures* (2001), 143 Ohio App.3d 69, 72.

{ ¶ 13 } Accordingly, the court in the instant case retained jurisdiction to rule on Madison's motion for sanctions after Plaintiff dismissed his case without prejudice under Civ.R. 41(A)(1).

*3 { ¶ 14 } Plaintiff's third assignment of error is overruled.

{ ¶ 15 } We next address Plaintiff's second assignment of error, which states:

{ ¶ 16 } "II. The trial court erred by imposing sanctions against Appellant under R.C. 2323.51 without conducting an evidentiary hearing."

{ ¶ 17 } R.C. 2323.51(B)(2) states that a court may award sanctions against a party to a civil action "only after the court does all of the following:

{ ¶ 18 } "(a) Sets a date for a hearing * * * to determine whether particular conduct was frivolous, * * * [if so], whether any party was adversely affected by it, and * * * if an award is to be made, the amount of that award;

{ ¶ 19 } "(b) Gives notice of the date of the hearing * * *; [and]

{ ¶ 20 } "(c) Conducts the hearing described in division (B)(2)(a) of this section in accordance with this division, [and] allows the parties and counsel of record involved to present any relevant evidence at the hearing * * *."

{ ¶ 21 } In *Pisani v. Pisani* (1995), 101 Ohio App.3d 83, 87, this Court held that the "plain meaning of this language is that *an award of * * * sanctions for frivolous conduct may only be made after a hearing.*" (Emphasis in original.) Additionally, in *Pisani*, supra, this Court agreed with the analysis of the Fifth District Court of Appeals of Ohio in *McKinney v. Aultman Hosp.* (Apr. 27, 1992), Stark App. No. CA-8603, quoting *Annexation of 18.23 Acres of Land v. Bath Twp. Bd. of Trustee* (Jan. 11, 1989), Summit App. No. 13669 (George, J. concurring):

{ ¶ 22 } "When a frivolous conduct motion is filed, pursuant to R.C. 2323.51, the party against whom the motion is directed should be given an opportunity to respond, as with any motion. If the motion has merit, whether the party against whom it is directed responds or not, then the trial court must set a hearing date as provided in R.C. 2323.51(B)(2)(a). Such a hearing date provides an opportunity for each party to submit briefs and evidentiary material which may support their respective positions. The hearing is not required to be an oral hearing. Whether the hearing is to be conducted on the submitted matters or orally remains discretionary with the trial court. If the motion lacks merit, whether the party against whom it is directed responds or not, then no hearing date need be set in order for the trial court to deny the motion." (Internal citations omitted.)

{ ¶ 23 } In the instant case, it is undisputed that the court did not hold an R.C. 2323.51 hearing before it awarded sanctions against Plaintiff. While Plaintiff argues this was an abuse of the court's discretion, Madison argues that the court was not required to hold an oral hearing under the circumstances of this case.

{ ¶ 24} Madison first argues that Plaintiff waived his right to appeal the sanction award because he did not oppose the motion for sanctions at the trial court level. This argument lacks merit because the court did not comply with the requirement of R.C. 2323.51 regarding a hearing before awarding sanctions. As is clearly stated in R.C. 2323.51(B)(2)(c), the hearing “allows the parties and counsel of record involved to present any relevant evidence * * *”

*4 { ¶ 25} Madison next cites to *Shields v. Englewood*, 172 Ohio App.3d 620, 2007-Ohio-3165, to support its argument that the court was not required to hold a hearing in the instant case. However, *Shields* can be distinguished from the case-at-hand. In *Shields*, the Plaintiff’s attorneys admitted to the court “that they had misrepresented the reason for the witnesses’ failure to attend the prior hearing, conceding that his failure to appear was due to their failure to serve the subpoena at his proper address.” *Id.* at ¶ 8. In response, the Defendant moved for sanctions for frivolous conduct. Nine days later, the court issued the following order:

{ ¶ 26} “[T]he Motion for Sanctions filed herein by the Defendant on June 21, 2005 will be submitted for decision on July 15, 2005 as of 1:00 p.m. No oral hearing will be conducted unless requested by any party and approved by the Court in which event a definite date and time will be set.

{ ¶ 27} “All memoranda and/or affidavits either in support of or in opposition to the motion must be filed by July 7, 2005, with Replies due on or before July 14, 2005, with a copy delivered to the Court not later than twenty-four hours prior to the aforesaid date and time for submission unless the Court, upon oral or written request, grants an extension.”

{ ¶ 28} Neither party in *Shields* requested an evidentiary hearing within the court’s time frame on the issue of frivolity. The court granted the Defendant’s motion for sanctions, and after holding a subsequent hearing to determine the sanction amount, awarded the Defendant \$4,392.50. *Id.* at ¶ 9.

{ ¶ 29} The Second District Court of Appeals of Ohio found that under the limited circumstances of the facts in the *Shields* case, the court conducted a non-oral hearing on the matters submitted regarding “the issue of whether there was a prima facie showing of frivolous conduct warranting a subsequent hearing on the sanction to be imposed,” thus satisfying R.C. 2323.51(B)(2)(a),(b) and (c). *Shields* at ¶ 631. See, also, *Dreger v. Bundas* (Nov. 15, 1990), Cuyahoga App. No. 57389 (holding that “the trial court may award [sanctions] only after conducting a hearing that allows the parties to present evidence in support or opposition to such award. It is essential that the

trial court conduct a hearing in order to make a factual determination of whether there existed frivolous conduct and whether the party bringing the motion was adversely affected by such conduct”); *Rogers v. Goodyear Tire & Rubber Co.*, Union App. No. 14-05-34, 2006-Ohio-6854 (holding that the court erred when it sua sponte imposed sanctions during a hearing on a motion to enforce a settlement agreement because no “separate hearing date or advance notice of the hearing as required under R.C. 2323.51(B)(2) was provided”).

{ ¶ 30} In the instant case, however, the court did not issue an order before ruling on Madison’s motion for sanctions. Thus, no hearing date was set, and the parties had no notice of when the court would rule on the motion or the deadlines for submitting evidence in support of or opposition to the motion. Furthermore, the court did not “remind” the parties that they could request an oral hearing nor did the court hold a subsequent hearing to determine the amount of the sanction award. Therefore, the court did not “conduct” a hearing as contemplated by the statute. Rather, the court issued a conclusory order granting Madison’s motion for sanctions 20 days after the motion was filed and awarding \$1,708.16 “as reimbursement awarded to deft. necessitated by pltf’s. frivolous conduct.” Accordingly, the court erred by not complying with R.C. 2323.51(B)(2).

*5 { ¶ 31} Plaintiff’s second assignment of error is sustained.

{ ¶ 32} In Plaintiff’s first assignment of error, he argues:

{ ¶ 33} “I. The trial court erred by granting Appellee’s motion for travel costs as a sanction against Appellant for voluntarily dismissing his claims without prejudice pursuant to Ohio Civ. R. 41(A)(1)(a) where such conduct is not properly considered ‘frivolous’ under Ohio Rev.Code Section 2323.51.”

{ ¶ 34} In the instant case, a review of Madison’s motion for sanctions shows that it was based on R.C. 2323.51(A)(2)(a)(i), which states that “frivolous conduct” is “[c]onduct of [a] * * * party to a civil action * * * that * * * obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.” Specifically, Madison stated that “Plaintiff’s actions during the two days the parties were in Court for trial were nothing short of frivolous and served to harass both the credit union and Madison.”

{ ¶ 35} Madison’s motion for sanctions identifies three instances of conduct on Plaintiff’s part alleged to be frivolous: 1) Plaintiff threatened to bring in new counsel at the last minute; 2) Plaintiff increased his settlement

demands as the case progressed; and 3) Plaintiff voluntarily dismissed his case under Civ.R. 41(A). Madison alleges that it was adversely affected by Plaintiff's conduct because its witness traveled from Madison, Wisconsin to Cleveland, Ohio, incurring expenses in anticipation of testifying at trial, which was cancelled because Plaintiff dismissed his case.

{ ¶ 36} Madison also argues that it was "invited" by the trial court to file the motion for sanctions, stating that the "Court even admonished Mr. Wheeler concerning his conduct and stated that the Court would order him to pay Madison's travel expenses associated with the trial."

{ ¶ 37} A careful review of the transcript shows that Madison's assertion takes the court's statements out of context. The instant case was called for trial on August 4, 2008. The court began by hearing arguments regarding various motions in limine. The court ruled against Plaintiff, excluding his claim for emotional and psychological damages and excluding his documentary evidence concerning economic damages. The court also prohibited Plaintiff from discussing punitive damages during trial. Then, at 3:25 p.m., Plaintiff advised his counsel, who in turn informed the court, that he wished to retain an additional lawyer to serve as co-counsel for trial the next day. The court questioned Plaintiff, who ultimately stated that he would discuss the matter with his current counsel. The conversation between the court and Plaintiff digressed to the merits of Plaintiff's case, with the court concluding that Plaintiff may be "misguiding" himself, and that "the trial is going to reveal the true outcome of all of this." The court then adjourned for the day.

*6 { ¶ 38} The next day, August 5, 2008, Plaintiff filed a notice of voluntary dismissal pursuant to Civ.R. 41(A), in light of the court's adverse rulings on the first day of trial and Plaintiff's concern over potentially retaining additional counsel. At this point, a jury had been brought to the courtroom, but had not been impaneled, and the court made the following comments on the record:

{ ¶ 39} "[Plaintiff] has his own opinion of what he is entitled to and has been something of an obstruction to our proceeding here. The most recent thing is that he has filed a voluntary dismissal. So the case is dismissed now. The dismissal under the rules gives him an opportunity to refile, I suppose, once again, but we don't know exactly what he is going to do, but suffice it to say at this time the case is over-this case is over and your services here won't be needed. We were prepared, I was prepared to bring this case to trial, select the jury and proceed to a verdict, but there have been so many road blocks thrown before us by the plaintiff himself who for some reason is unable to accept the rules and the procedure, and the facts as they occur that govern trials of this sort, so that's where we

stand at this point. And I can say to you that I have been a judge, a lawyer and then a judge for many, many, many years here. This is the first and only time this has ever happened, so it's a unique situation. I would be glad to see if we can answer any questions you may have. Other than that, you're excused and free to leave.

{ ¶ 40} "The plaintiff will be responsible for all the costs that have been assessed so far, the costs to the county of our presence here for two days in this case. For example, the costs-we have a man here that had to come down-who was an employee and who is actually an executive with the Madison National Life Insurance, one of the Defendants which is up in Madison, Wisconsin. He came all the way down here for this trial, and yet the plaintiff has elected to dismiss the case and refile it a little later in accordance with the rules. I have attempted in part of the time that we have been asking for you to wait for us, I have attempted to explain the financial significance and consequence of his actions here, but he seems to want to ignore that as well, so there are some other matters or aspects of this case that ought to be heard."

{ ¶ 41} Nine days after Plaintiff dismissed his case, Madison filed its motion for sanctions, requesting Plaintiff "to pay the travel expenses of Madison's trial witness, totaling \$1,708.16, as a sanction." In *Orbit Electronics, Inc. v. Helm Instrument Co.*, 167 Ohio App.3d 301, 316, 2006-Ohio-2317, this Court held that to "determine whether there was frivolous conduct, a trial court must initially determine whether an action taken by the party against whom sanctions are sought constituted frivolous conduct. If the conduct is found to be frivolous, the trial court must determine the amount of [sanctions] to be awarded to the aggrieved party." We add that pursuant to R.C. 2323.51(B)(2), if the court found the conduct frivolous, it must also determine that it adversely affected another party.

*7 { ¶ 42} While the "ultimate decision whether to impose sanctions for frivolous conduct * * * remains wholly within the trial court's discretion," the question of whether the conduct was frivolous may be subjected to an abuse of discretion or a de novo standard of review. If the conduct allegedly "serves merely to harass or maliciously injure another party," pursuant to R.C. 2323.51(A)(2)(a)(i), as is the case here, the trial court's factual determinations are given substantial deference and are reviewed for an abuse of discretion. *Cleveland Indus. Square, Inc. v. Dzina*, Cuyahoga App. Nos. 85336, 85337, 85422, 85423, 85441, 2006-Ohio-1095.

{ ¶ 43} We first analyze whether Plaintiff's voluntary dismissal constituted frivolous conduct. It is well established law that "the right to one dismissal without prejudice is absolute under Civ.R. 41(A)(1)(a)," and exercising this right cannot be properly considered

“frivolous conduct” pursuant to R.C. 2323.51. See *Sturm v. Sturm* (1992), 63 Ohio St.3d 671; *Gammons v. O’Neill* (Aug. 18, 1994), Cuyahoga App. No. 66232; *Indus. Risk Insurers v. Lorenz Equip. Co.* (1994), 69 Ohio St.3d 576, 579 (holding that “a trial court may not take any action that allows prejudice to flow from the plaintiff’s first voluntary dismissal”);³ *Frazer v. Ellis Bros., Inc.* (1996), 113 Ohio App.3d 828, 831 (holding that the court erred when it determined a party was not entitled to voluntarily dismiss the action pursuant to Civ.R. 41(A) after the court called the case for trial, because “a civil trial commences when the jury is empaneled and sworn, or, in a bench trial, at opening statements”).

{ ¶ 44} We next turn to Madison’s allegations that Plaintiff threatened to bring in new counsel at the last minute and increased his settlement demands, rather than engaging in good faith settlement negotiations, amounted to frivolous conduct. Madison cites no law to support these propositions. A thorough search of Ohio law reveals no cases directly on point with the issue before us. However, Ohio courts have recognized, albeit in a different context, “an individual’s freedom to retain counsel of his choice.” See *Bigham v. Bigham* (Sep. 24, 1992), Cuyahoga App. No. 61086, citing *City of Cleveland v. Cleveland Elec. Illum. Co.* (N.D. Ohio 1977), 440 F.Supp. 193; *Kala v. Aluminum Smelting & Refining Co., Inc.* (1997), 81 Ohio St.3d 1 (opining that there is a public policy interest in permitting a party to be represented by counsel of his or her choice). See, also, Ohio Code of Professional Responsibility Canons 4 and 5 (specifically EC 5-7, recognizing that “a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice”).

{ ¶ 45} Additionally, there is no Ohio case law directly on point with the issue of whether a Plaintiff’s increased settlement demands and alleged refusal to engage in good faith settlement negotiations amount to frivolous conduct. In fact, while settlements are generally encouraged in the litigation arena, we can find no case law requiring a Plaintiff to engage in settlement discussions at all. In *Wolfe v. Cooper* (May 27, 1993), Cuyahoga App. No. 62372, we held that the trial court erred when it took into consideration the Plaintiff’s refusal to accept a settlement offer, in the context of awarding attorney fees under the Consumer Sales Practices Act. “Such a course of action would, in our judgment, lead to incalculable mischief.” *Id.* This Court explained its ruling as follows:

*8 { ¶ 46} “Trial judges are obliged by the rules to take an active role as a catalyst for settlement. Civ.R. 16; Local Rule 21. Most practicing attorneys believe that settlement discussions, negotiations and attempts at pre-trial compromise between and among the court and counsel, will not be held against their clients if all efforts

fail and trial ensues. Indeed, some trial judges consistently encourage that belief by words and actions. Ohio Rule of Evid. 408 provides that ‘evidence of conduct or statements made in compromise negotiations is likewise not admissible.’ This is elementary. Whether or not parties accepted the final offer of compromise, however reasonable the court may in hindsight view the offer, cannot be a factor in the determination of attorney fees. See, e.g., cases enumerating the factors to be considered by the court in fixing reasonable attorney fees. *Bitner v. Tri-County Toyota* [(1991), 58 Ohio St.3d 143], 145-146; *James v. Thermal Master, Inc.* (1988), 55 Ohio App.3d 51, 53-54, 562 N.E.2d 917. The factors enumerated do not include settlement or compromise considerations.

{ ¶ 47} “If positions taken by the parties in pre-trial compromise discussions with the court are going to be used later on as grounds for awarding or not awarding attorney’s fees when the case is litigated, counsel are going to be extremely reluctant to participate candidly in such ‘off the record’ discussions. The good offices of the trial court in such activities will be severely compromised or diminished.”

{ ¶ 48} See, also, *Shular v. Daimler Chrysler Corp.* (Apr. 12, 2001), Cuyahoga App. No. 78856 (holding that an “offer of settlement should not be considered in determining whether or not a party is the prevailing party” for the purpose of awarding costs).

{ ¶ 49} Accordingly, Madison’s allegations, and thus the basis for the trial court’s awarding sanctions under R.C. 2323.51, are not supported by Ohio law. Clearly, Plaintiff’s Civ.R. 41(A) dismissal cannot be considered frivolous conduct and, by implication and analogy, we conclude that neither choice of counsel nor failure to reach a settlement are exercises in frivolity. The trial court abused its discretion by granting Madison’s motion for sanctions based on frivolous conduct.

{ ¶ 50} Plaintiff’s first assignment of error is sustained.

Judgment reversed.

It is ordered that appellant recover of said appellee his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Parallel Citations

Footnotes

- 1 These allegations are taken from Plaintiff's original complaint filed August 22, 2002 and his amended complaint filed September 9, 2002.
- 2 As Madison was the only Defendant to be awarded sanctions, Best is not a party to this appeal.
- 3 We note that the sole exception to this rule is found in Civ.R. 41(D), which provides that if a Plaintiff refiles claims that were previously dismissed under Civ.R. 41(A)(1), "the court may make such order for the payment of *costs* of the claim previously dismissed as it may deem proper * * *." (Emphasis added.) "Costs" is defined as "the statutory fees to which officers, witnesses, jurors and others are entitled for their services on an action or prosecution and which the statutes authorize to be taxed and included in the judgment or sentence." *State ex rel. Franklin Cty. v. Guilbert* (1907), 77 Ohio St. 333, 338. Litigation expenses, such as travel expenses for a witness, are not included within the ambit of "costs." See *Krivacic v. Trautman* (July 15, 1993), Cuyahoga App. No. 63127 (holding that "[c]ompensating the [Defendants] for litigation expenses [such as court reporter and deposition expenses] which will be useful in the subsequent action is not provided for under the award of costs * * *"); *Renner v. Groscost* (Jan. 10, 2000), Richland App. No. 99CA25, (holding that "[n]o statutory authority exists for the reimbursement of travel expenses").

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2005 WL 3494988

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

Court of Appeals of Ohio,
Tenth District, Franklin County.

Kelly J. SWEARINGEN, Plaintiff-Appellant,

v.

John D. SWEARINGEN, Jr., Defendant-Appellee.

No. 05AP-657. Decided Dec. 22, 2005.

Synopsis

Background: After wife filed divorce action in original county and entered mediation settling all claims with husband, she filed divorce action in the Court of Common Pleas, Franklin County. Husband obtained an ex parte, interlocutory order in original county case, granting him custody of children. Wife subsequently filed a voluntary dismissal of divorce action filed in original county. Husband filed divorce complaint in original county but was unable to obtain service of process on wife. Husband filed motion to dismiss and/or transfer venue in the Court of Common Pleas, Franklin County. The Court of Common Pleas granted motion to dismiss. Wife appealed.

Holding: The Court of Appeals, Travis J., held that wife's voluntary dismissal of original divorce action divested original court of its priority jurisdiction.

Judgment reversed and cause remanded.

West Headnotes (1)

- 1 **Courts**
Loss or Divestiture of Jurisdiction
Divorce
Voluntary

Wife's voluntary dismissal of divorce action filed in original county court divested such court of its priority jurisdiction, allowing wife to re-file divorce action in a second county, even if wife was engaging in forum shopping to avoid an unfavorable mediated settlement in original county; no final decree had been issued in

original court before wife noticed her voluntary dismissal, wife had absolute right to dismiss her divorce action in original county, regardless of motive, and rule requiring that cases filed, dismissed and re-filed be heard by original judge did not apply to actions re-filed in a different county. Rules Civ.Proc., Rule 41(A)(1); Sup.R. 36(D).

Wife's voluntary dismissal of divorce action filed in original county court divested such court of its priority jurisdiction, allowing wife to re-file divorce action in a second county, even if wife was engaging in forum shopping to avoid an unfavorable mediated settlement in original county; no final decree had been issued in original court before wife noticed her voluntary dismissal, wife had absolute right to dismiss her divorce action in original county, regardless of motive, and rule requiring that cases filed, dismissed and re-filed be heard by original judge did not apply to actions re-filed in a different county. Rules Civ.Proc., Rule 41(A)(1); Sup.R. 36(D).

Appeal from the Franklin County Court of Common Pleas, Division of Domestic Relations.

Attorneys and Law Firms

Joseph D. Reed, for appellant.

Mark D. Schmitkey, for appellee.

Opinion

(ACCELERATED CALENDAR)

TRAVIS, J.

*1 { ¶ 1 } Appellant, Kelly J. Swearingen, appeals from a decision of the Franklin County Court of Common Pleas, Division of Domestic Relations, rendered on July 8, 2005, that dismissed her complaint for divorce for want of jurisdiction. The facts and procedural history are gleaned from the decision of the trial court and the briefs and oral arguments of the parties.

{ ¶ 2 } On April 9, 2003, appellant filed a complaint in

the Henry County Court of Common Pleas, seeking a divorce from John D. Swearingen, Jr., appellee herein. Both parties lived in Henry County with their two minor children.

{ ¶ 3} On August 16, 2004, the parties to the Henry County case entered into mediation with the court's mediation department and reached an agreement that settled all claims in the divorce action. Although the parties mediated the case to settlement, it appears that no final decree of divorce was issued by the Henry County Court of Common Pleas.

{ ¶ 4} On August 18, 2004, two days after the Henry County case was mediated to resolution, appellant asked appellee's permission to take the two minor children on vacation before school started. Appellant took the children and, without the knowledge or consent of appellee, removed the children from their school and never returned.

{ ¶ 5} On August 24, 2004, six days after taking the children and while the Henry County divorce case was still pending, appellant filed a complaint for divorce in the Domestic Relations Division of the Franklin County Court of Common Pleas. In this second filing, appellant alleged she had been a resident of Franklin County for more than 90 days.

{ ¶ 6} On August 27, 2004, when appellant failed to return the children, appellee sought and obtained an ex parte, interlocutory order in the original Henry County divorce case, granting him custody of the minor children of the parties.¹

{ ¶ 7} On August 27, 2004, some hours after appellee obtained the Henry County custody order, appellant filed a voluntary dismissal of the Henry County divorce case.

{ ¶ 8} On August 30, 2004, after appellant dismissed the Henry County case, appellee filed his own complaint for divorce in that county, but has been unable to obtain service of process on appellant.²

{ ¶ 9} On September 12, 2004, appellee was served with a copy of appellant's complaint for divorce that had been filed in Franklin County on August 24, 2004.

{ ¶ 10} On September 28, 2004, in the Franklin County Court of Common Pleas, appellee filed a motion to dismiss and/or transfer venue. Appellee argued that the court lacked jurisdiction to proceed because previously, jurisdiction had been invoked by the Henry County Domestic Relations Court. In addition, appellee alleged that appellant had falsely claimed to be a resident of Franklin County when she filed her second complaint for divorce in Franklin County.

{ ¶ 11} On May 25, 2005, the trial court granted appellee's motion to dismiss. The court applied the

jurisdictional priority rule and found it lacked subject matter jurisdiction to entertain appellant's second divorce action. The court also found that appellant had engaged in impermissible forum shopping. Appellant filed a timely notice of appeal to this court from that judgment of dismissal.

*2 { ¶ 12} Appellant raises the following assignment of error:

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING DEFENDANT-APPELLEE'S MOTION TO DISMISS FOR LACK OF PROPER JURISDICTION.

{ ¶ 13} This case involves the interplay between the jurisdictional priority rule and the right of a plaintiff to voluntarily dismiss an action pursuant to Civ.R. 41(A)(1).

{ ¶ 14} The jurisdictional priority rule provides a straightforward method to determine which of two courts of concurrent jurisdiction has primary authority to proceed with litigation between parties. Where litigation involving the same parties and issues is commenced in two courts of concurrent and coextensive jurisdiction, the court whose power is first invoked by the institution of proper proceedings and service of process acquires the authority to adjudicate and settle the rights of the parties to the exclusion of all other tribunals. *Miller v. Court of Common Pleas of Cuyahoga Cty.* (1944), 143 Ohio St. 68, 70, 54 N.E.2d 130.

{ ¶ 15} Priority of jurisdiction is not based on which lawsuit was filed first. Instead, priority is given to the court where service of process is first successfully accomplished. "Service of process is thus made a condition precedent to vesting of jurisdiction in determining which of two courts has the exclusive right to adjudicate the whole case." *State ex rel. Balson v. Harnishfeger, Judge* (1978), 55 Ohio St.2d 38, 39-40, 377 N.E.2d 750. See, also, *Gehelo v. Gehelo* (1953), 160 Ohio St. 243, 116 N.E.2d 7. The rule applies equally in domestic relations cases. *State ex rel. Largent v. Fisher, Judge* (1989), 43 Ohio St.3d 160, 162, 540 N.E.2d 239, citing *Miller*, supra.

{ ¶ 16} The rule that the first successful service of process vests a court with priority to proceed is not absolute. Despite the fact that service is obtained in one case before another, a court may still lack jurisdiction where a party to both cases is found to have deliberately avoided service of process. See the companion decisions of the Second District Court of Appeals in *Kronenthal v. B-Dry System, Inc.* (June 30, 1999), Greene App. No. 99-CA-1, and *B-Dry System, Inc. v. Kronenthal* (June 30, 1999), Montgomery App. No. 17130. The general rule, however, is that the court in which process is first

obtained has jurisdiction over the subject matter and the parties to the exclusion of all other courts of concurrent jurisdiction. *Balson*, supra.

{ ¶ 17} It is undisputed that appellant first brought her action for divorce and obtained service of process upon appellee in Henry County where both parties and their minor children lived. Under the jurisdictional priority rule, the Henry County Court of Common Pleas had jurisdiction to determine the rights of the parties to the exclusion of all other tribunals. E.g. *Balson*, supra. Therefore, on August 24, 2004, when appellant filed her second complaint for divorce in Franklin County, the Franklin County Court of Common Pleas lacked jurisdiction to proceed. Although the Franklin County court lacked jurisdiction when appellant filed her second complaint for divorce, that fact does not end our inquiry.

*3 { ¶ 18} Appellant does not dispute that the Franklin County court lacked jurisdiction when she filed her second divorce complaint. Appellant concedes that, on that date, the Henry County Court of Common Pleas had exclusive jurisdiction to determine the rights of the parties. However, appellant argues that while jurisdiction was lacking in Franklin County on August 24, 2004, jurisdiction developed based on two events that took place after the complaint was filed.

{ ¶ 19} First, appellant states that her voluntary dismissal of her Henry County divorce case divested the Henry County Court of Common Pleas jurisdiction. Thereafter, appellant reasons she was free to re-file her divorce action, either in Henry County or in any other county in which she had been a resident for the previous 90 days. Second, after she dismissed the Henry County divorce case, appellant obtained service on appellee in the Franklin County case before appellee could serve appellant in the newly filed divorce action he had brought in Henry County. Therefore, appellant believes that the Franklin County court acquired both subject matter and in personam jurisdiction to proceed when appellee was served in the Franklin County case on September 12, 2004.

{ ¶ 20} Appellee contends that jurisdiction was lacking in Franklin County on August 24, 2004, when appellant filed her second divorce complaint because priority jurisdiction lay in Henry County. In appellee's view, appellant's complaint filed on August 24, 2004 in Franklin County was a nullity and jurisdiction in Franklin County could not be created thereafter by plaintiff's subsequent dismissal of the Henry County case.

{ ¶ 21} Rule 41 of the Ohio Rules of Civil Procedure provides for both voluntary and involuntary dismissal of litigation. Pertinent to this case, is Civ.R. 41(A)(1), which provides as follows:

(1) * * * Subject to the provisions of Civ. R. 23(E), Civ. R. 23 .1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

{ ¶ 22} Pursuant to Civ.R. 41(A)(1)(a), a plaintiff has an absolute right, regardless of motive, to one voluntary, unilateral termination of the plaintiff's case without prejudice at any time prior to the commencement of trial, unless a counterclaim which cannot remain pending for independent adjudication has been served by the defendant. Voluntary dismissal requires neither notice to the opposing party nor leave of court. *Clay Hyder Trucking Lines, Inc. v. Riley* (1984), 16 Ohio App.3d 224, 475 N.E.2d 183; *Holly v. Osleisek* (1988), 40 Ohio App.3d 90, 531 N.E.2d 766.

*4 { ¶ 23} Civ.R. 41 differs from its federal counterpart. Under the federal rule, a party has the right to dismiss only until an opponent files an answer or motion for summary judgment. In federal civil litigation, the court assumes responsibility for and control over the case at a much earlier point in the proceedings than under the Ohio rule.

{ ¶ 24} In Ohio, voluntary dismissal in compliance with Civ.R. 41(A)(1) divests the trial court of jurisdiction to proceed to determine the case. *State ex rel. Hunt v. Thompson* (1992), 63 Ohio St.3d 182, 586 N.E.2d 107. Where a notice of dismissal in compliance with Civ.R. 41(A)(1)(a) has been filed, an action is treated as if it had never been commenced. *Sturm v. Sturm* (1991), 61 Ohio St.3d 298, 302, 574 N.E.2d 522. Once jurisdiction in the Henry County Domestic Relations Court ended, appellant was free to re-file her divorce case, either in that court or in any other court of competent jurisdiction where appellant met residency requirements.³

{ ¶ 25} Appellee relies upon several appellate decisions to support his position. However, unlike the present case, appellee's cited cases all appear to involve application of the jurisdictional priority rule where the case deemed to have priority remained pending throughout the

jurisdictional controversy.

{ ¶ 26} In *Robinson v. Robinson* (1946), 79 Ohio App. 149, 72 N.E.2d 466, the wife filed for divorce in Cuyahoga County and obtained service of process upon the husband. While that case was pending, the wife filed a second action for divorce in Ashtabula County, attempted service by publication and, thereafter, obtained a decree of divorce in that county. This second divorce complaint did not divulge that an earlier complaint was pending and service of process had been obtained in Cuyahoga County. At the time of the Ashtabula County final decree of divorce, the earlier commenced Cuyahoga County divorce case remained pending. That is not the case here.

{ ¶ 27} In *Stuber v. Stuber* (Sept. 28, 1990), Allen App. No. 1-89-36, both husband and wife filed for divorce in the Allen County Court of Common Pleas. The wife's action was filed on February 24, 1989, and she obtained service of process upon the husband on March 23, 1989. The husband filed his complaint for divorce on March 24, 1989, and the wife was served on March 29, 1989. Appellant notes that the Allen County Court of Appeals ruled that "[t]he pendency of the prior proceeding works as an abatement of the subsequent divorce action filed by plaintiff-appellant on March 24, 1989." *Stuber*, at 3. However, as in *Robinson*, the case in which service was first obtained remained pending at the time that the second complaint was filed and was pending until erroneously dismissed by the trial court. Therefore, we find that neither *Robinson* nor *Stuber* are helpful to the determination of this appeal.

{ ¶ 28} No final decree of divorce was issued by the Henry County Court of Common Pleas before appellant filed her notice of voluntary dismissal of that case. Had there been a final decree of divorce, continuing jurisdiction to review and modify that decree would remain in the Henry County Court of Common Pleas. *In re Poling* (1992), 64 Ohio St.3d 211, 594 N.E.2d 589. "[A] court which renders a custody decision in a divorce case has continuing jurisdiction to modify that decision." *Id.* at 215, 594 N.E.2d 589.

*5 { ¶ 29} Based upon the foregoing, we conclude that, while the Henry County Court of Common Pleas had priority of jurisdiction to determine the rights and responsibilities of the parties, that court was divested of jurisdiction when appellant filed her notice of voluntary dismissal. Thereafter, appellant was free to proceed with the divorce action filed in Franklin County. When service of process was made upon appellee, the Franklin County Court of Common Pleas had exclusive jurisdiction to proceed.

{ ¶ 30} What makes this case troublesome, is that appellant and appellee litigated the issues in their divorce

case for some 16 months in a court with unquestioned jurisdiction before appellant chose to dismiss that action. The trial court suggested that appellant was dissatisfied with the mediated settlement that had been achieved in the Henry County divorce, and filed her second complaint in Franklin County "in an effort to obtain a more favorable result." (Trial court decision, at 4.) The court found that appellant had engaged in "impermissible forum shopping." (Trial court decision, at 2.)

{ ¶ 31} Sup.R. 36(D) provides that a case that has been filed, dismissed and refiled shall be assigned to the same judge assigned to the original filing. Sup.R. 36 was "designed to prevent judge-shopping." *Brickman & Sons, Inc. v. National City Bank*, 106 Ohio St.3d 30, 830 N.E.2d 1151, 2005-Ohio-3559. Judge shopping is to be condemned. However, Sup.R. 36 does not apply when the re-filing takes place in a different county. See *Lang v. Trimble-Weber* (Dec. 11, 1997), Cuyahoga App. No. 72516, construing former Common Pleas Superintendence Rule 4. The language of former Sup.R. 4 is now contained in Sup.R. 36.

{ ¶ 32} Courts have expressed misgivings over the potential for abuse of Civ.R. 41(A)(1) when a plaintiff exercises the right to dismiss an action at any time, even where the trial court has indicated that it is prepared to rule against the plaintiff's claim:

* * * We agree with Allstate and the trial court that to permit the Jacksons-or any plaintiff-to dismiss an action after it has received an adverse ruling on the merits violates a sense of fair play. However, we have likewise recognized that Civ. R. 41 grants broad authority to the plaintiff to dismiss an action without prejudice at any point prior to the commencement of trial. * * *

* * * In light of the potential for abuse, the Rules Advisory Committee of the Supreme Court of Ohio may wish to reconsider the wisdom of allowing voluntary dismissals, without prejudice, at this late stage of a litigation. * * *

Jackson v. Allstate Ins. Co., Montgomery App. No. 20443, 2004-Ohio-5775. See, also, *Lovins v. Kroger Co.* (2002), 150 Ohio App.3d 656, fn. 7, 782 N.E.2d 1171.

{ ¶ 33} A plaintiff's motives for dismissing a case, even at the penultimate stage of the proceedings, are not relevant to our inquiry:

The language of Civil Rule 41(A)(1) and (C) requires no construction. It gives either party an absolute right, regardless of motives, to voluntarily terminate its cause of action at any time prior to the actual commencement of the trial. There is no exception in the rule for any

possible circumstance that would justify a court in refusing to permit the withdrawal of a cause prior to the commencement of trial. This is the traditional Ohio policy of encouraging voluntary terminations. While such a rule may be subject to abuse, as was recognized by the civil rules committee, the only limitation imposed is that a notice of dismissal operates as an adjudication upon the merits when filed by a party who once previously dismissed an action based on the same claim.

*6 *Standard Oil Co. v. Grice* (1975), 46 Ohio App.2d 97, 100-101, 345 N.E.2d 458. See, also, *State ex rel. Mogavero v. Belskis, Judge*, Franklin App. No. 02AP-164, 2002-Ohio-6497, ¶ 35; *Kracht v. Kracht* (Feb. 27, 1994), Cuyahoga App. No. 70005.

{ ¶ 34} While we share the concern of the trial court that appellant appears to have engaged in forum shopping, we are compelled to recognize that Civ.R. 41(A)(1)(a) gave appellant the absolute right to dismiss her divorce action in Henry County. Once appellant dismissed the Henry County proceedings, the jurisdiction of that court ended. With no other court exercising both subject matter and personal jurisdiction, appellant was free to proceed with service of process upon appellee in her new divorce action in Franklin County. When appellee was served with process in the trial court before appellee was able to obtain service upon appellant in the new Henry County case, jurisdiction lay in the Franklin County Court of Common Pleas, Division of Domestic Relations.

{ ¶ 35} Of course, had appellee been able to obtain service upon appellant in the divorce action that appellee filed in Henry County on August 30, 2004 before appellant was able to serve appellee in Franklin County, the Henry County court would have had jurisdictional priority over the Franklin County court. That, however,

does not appear to be the case.

{ ¶ 36} Appellee has raised other issues that go to the jurisdiction of the trial court. Appellee states that appellant was not a resident of Franklin County on August 24, 2004, when she filed her complaint for divorce. Appellee alleges that appellant intentionally evaded service of process in the second Henry County case that he filed on August 30, 2004 and therefore, cannot claim jurisdictional priority in Franklin County. (See *Kronenthal v. B-Dry System, Inc.* and *B-Dry System, Inc. v. Kronenthal*, supra .) The record on appeal is limited to the decision of the trial court and the pleadings of the parties. Therefore, these allegations are not properly before us. However, because the case must be remanded to the trial court for further proceedings, appellee will have the opportunity to present his claims for resolution by that court.

{ ¶ 37} Based on the foregoing, we sustain appellant's assignment of error. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations is reversed and this matter is remanded for further proceedings in accordance with law and this opinion.

Judgment reversed and cause remanded.

PETREE and SADLER, JJ., concur.

Parallel Citations

2005 -Ohio- 6809

Footnotes

- 1 During oral argument, counsel for appellee advised that the custody order was immediately transmitted by facsimile to the office of appellant's attorney.
- 2 In response to a question from the court during oral argument, counsel for appellee stated that appellant had been living in motels and in her vehicle to avoid service of process in the second Henry County action.
- 3 Appellee's motion to dismiss filed in the trial court asserts that appellant had not been a resident of Franklin County for 90 days when she filed her complaint for divorce on August 24, 2004. However, that issue was not decided by the trial court and is not before us.

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1 COURT OF COMMON PLEAS
2 HAMILTON COUNTY, OHIO

3
4 KENNETH M. SCHWERING, Personal
5 Representative of the Estate of
6 Beverly D. Schwering, Deceased, and
7 KENNETH M. SCHWERING, Individually,
8
9 Plaintiff,

10 vs. Case No. A-0307981

11 TRW VEHICLE SAFETY SYSTEMS, INC, et al,
12
13 Defendants.

14 COMPLETE TRANSCRIPT OF PROCEEDINGS

15 APPEARANCES:

16 Mr. Jason Robinson, Esq.,
17 Mr. Richard Denney, Esq.,
18 Ms. Lydia JoAnn Barrett, Esq.
19 Mr. Arthur H. Schlemmer, Esq.,
20 Mr. Richard S. Eynon, Esq.,
21 Mr. David M. Brinley, Esq.,
22 On behalf of Plaintiffs.

23
24 Mr. Kevin C. Schiferl, Esq.,
25 Mr. Gary Glass, Esq.,
26 Mr. Todd Croftchik, Esq.,
27 Mr. Clifford Mendelsohn, Esq.
28 On Behalf of Ford Motor Company.

29
30
31 Mr. Damond R. Mace, Esq.,
32 Mr. Aaron T. Brogdon, Esq.,
33 On Behalf of TRW Vehicle Safety Systems.

34 BE IT REMEMBERED that upon the jury trial in
35 this cause, heard on Friday, June 5, 2009,
36 before the Honorable Richard Niehaus, a said
37 Judge of the Court of Common Pleas, the
38 following proceedings were had, to wit:

1 whether it is designed for the litigation
2 or it is designed to -- actually for
3 scientific purposes.

4 I don't know how you could believe
5 in any test that this witness has
6 testified to because he has shown that,
7 when necessary, he will become an
8 advocate and not an expert witness.

9 Bring the jury in and we will
10 inform them.

11 MR. DENNEY: I need to make a
12 record.

13 THE COURT: Are you prepared to go
14 forward today?

15 MR. DENNEY: No, sir. I need to
16 make a record.

17 (Gestures made by Mr. Eynon.)

18 THE COURT: Ha, ha, ha. I don't
19 want to hear anymore. You can make a
20 record. If you are not ready to go
21 forward, I will discharge the jury.

22 Are you going forward today, sir?

23 MR. DENNEY: We can't. We don't
24 have a witness.

25 THE COURT: What is your position?

1 You didn't want a mistrial?

2 MR. DENNEY: I need to make a
3 record.

4 MR. MACE: My record is TRW is
5 ready, willing and able to move forward.
6 All claims against TRW to proceed. We
7 are ready to go.

8 THE COURT: Bring the jury in.

9 (Jury entered the courtroom.)

10 THE COURT: Good morning, ladies
11 and gentlemen of the jury.

12 Court has excluded the testimony of
13 Mr. Meyer in its entirety from your
14 consideration as members of the jury. As
15 a result, you may not, during your
16 deliberations, consider any of his
17 testimony.

18 Also, because you took notes, you
19 must take the notes out of your book that
20 are in regard to Mr. Meyer's testimony
21 and present them into the custody of the
22 Bailiff. We will destroy them. They are
23 no longer relevant to this case.

24 In addition, because of the Court's
25 ruling, we can't go forward today because

1 we don't have other witnesses to testify.

2 Come back Monday at 9 o'clock a.m.

3 Be mindful of the admonitions.

4 Do not discuss the case. Do not
5 allows others to discuss the case in your
6 presence and do not form an opinion on
7 the case until it is submitted to you.

8 You are excused until Monday at 9
9 o'clock.

10 Thank you very much.

11 THE BAILIFF: All rise.

12 (Jury left the courtroom.)

13 MR. DENNEY: Counsel for the
14 plaintiff will proffer for the record
15 that the Court, after having just made
16 the ruling that the Court made striking
17 the testimony of Steve Meyer walked out
18 of this proceeding after instructing the
19 jury to disregard his testimony, which is
20 an action by the Court that cannot be
21 recovered from by the plaintiff in this
22 matter.

23 The plaintiff filed yesterday
24 Plaintiffs' Submission In Response To
25 Ford Motor Company's Motion For Mistrial,

1 which sets out very clearly that when
2 Mr. Meyer was questioned about whether he
3 recalled a specific vehicle and a
4 specific vehicle; namely, the 2001 Ford
5 Explorer Sport, he answered truthfully he
6 did not recall whether it was the 2001
7 and when questioned on the record about
8 whether he did full body, full vehicle
9 tests, answered that he did not and made
10 it very clear that he had done spit
11 testing, both in his testimony in this
12 Court and in his deposition.

13 I am filing a record of his
14 deposition today. It is going to be
15 important that his deposition was taken
16 in this matter by Campbell, Campbell,
17 Edwards and Conroy, David Rogers, Esq.,
18 and it was taken on December 27, 2007 at
19 9:15.

20 Prior to that deposition, the
21 deposition of the witness was taken in
22 the Marroquin case on November 16, 2007
23 by National Defense Counsel for Ford
24 Motor Company, where he was questioned by
25 Ford Attorney Jeff Warren at great length

1 about the Marroquin tests and a 22 CD of
2 roll spit photos was filed and a depo
3 notebook was filed with the Exhibit 25,
4 the roll spit studies, and prior to that,
5 he was questioned by Huey, Fernview and
6 Stewart on behalf of Ford Motor Company,
7 Ford attorney Deanna Thomas on 1-8-2009
8 prior to this trial about the Marroquin
9 tests.

10 Same notebook was presented. In
11 that notebook were materials on a test
12 and he was questioned. By the way, the
13 record should reflect in the Marroquin
14 case, TRW was there by Pillsbury,
15 Winthrop, Shaw & Pittman, John Little
16 present on behalf of TRW.

17 Prior to this trial in the Jones
18 case on 1-23-2009, Snell & Wilmer took
19 his deposition on behalf of Ford as
20 National Defense Counsel, Timothy O'Neal,
21 Ford attorney questioned him and he was
22 questioned about these tests, and in
23 particular, in that deposition, he was
24 questioned about it and had the same
25 notebooks with him with six CDs presented

1 with report of these tests.

2 In the Meyer's case on 1-9-2008,
3 the witness was questioned about the
4 Marroquin test, by Jeff Warren with Ford
5 Motor Company.

6 Exhibit 37 in the notebook was
7 additional information since the prior
8 deposition, including some photographs
9 and materials.

10 In the Maddox case, 2-24-2009, he
11 was questioned about roll spit studies, a
12 variety of them, including Marroquin
13 Exhibit 40 to that deposition. It was a
14 GM vehicle.

15 Weinstein, Tippetts & Little
16 represented TRW. David Weinstein was
17 present.

18 In the Dalton case, 5-27-2009, he
19 was questioned about the subject test.
20 Interestingly so, national counsel for
21 Ford Motor Company, Brad Peterson, was
22 present. It was agreed retractors -- and
23 TRW was not present.

24 And in this case, Exhibit Number
25 114.49 of our exhibits, which were

1 delivered to Ford Motor Company with the
2 Plaintiffs' Second Amended list delivered
3 to Ford Motor Company in April of this
4 year as set out in Plaintiffs' Submission
5 And Response to Ford Motor Company on
6 April 23, 2009, put in the mail and the
7 receipt showing receipt by defendants'
8 counsel, Kevin Schifferl's office shortly
9 after that. The receipt speaks for
10 itself. It is an exhibit attached to the
11 submission.

12 Mr. Meyer was questioned about
13 specific spit tests in this deposition,
14 page 167 and 168 including references to
15 paragraph 10, Crown Victoria cinching
16 latch plate test. That exhibit that we
17 referred to a while ago that is in
18 plaintiffs' exhibits was copied again and
19 given to TRW's counsel and e-mails about
20 the problems or difficulties with
21 recopying specific plaintiffs' exhibits
22 for defense counsel are attached, which
23 amounts to a friendly but chiding
24 conversation back and forth between
25 counsel about making extra copies of

1 what's already been provided. And they
2 were submitted to counsel for Defendant
3 TRW and counsel for Ford Motor Company
4 was requested to tell us what they didn't
5 have and did not tell us they did not
6 have this exhibit.

7 On April 23, 2009 Federal Express
8 bill will show shipment was received.

9 Now notice was again provided to
10 Defendant Ford Motor Company of these
11 tests pursuant to the Court's order of
12 submission of Exhibits 48 hours in
13 advance attached our submission as
14 Exhibit E and Ford failed to timely
15 object to the introduction of this
16 evidence. The record will so reflect.

17 The case is Goldfus 79 Ohio
18 Statutes 3 and 121.

19 The record should also reflect
20 that I am filing with this Court a DVD
21 today with copies of those depositions I
22 referred to taken by Ford Motor Company
23 which contain the questioning about
24 these tests that the Court says were a
25 surprise, which are no surprise to the

1 Ford Motor Company or to these attorneys
2 for the Ford Motor Company because they
3 have been in the Plaintiffs exhibits
4 since April of this year.

5 Record should reflect that the
6 Court's conduct yesterday when this
7 matter came up raised by Ford Motor
8 Company was to take us immediately into
9 chambers, call my expert a liar, to
10 comment on the credibility of his
11 statement to the Court on a prior date,
12 didn't remember what date, the comment
13 that he could not be believed on
14 anything to show a severe bias against
15 this plaintiff and this plaintiffs'
16 counsel, which is a reflection of a bias
17 that has been going on in this case
18 since this case started.

19 We will stand on the record which
20 reflects comments by the Court that show
21 the Court lacks memory of what the Court
22 has been told. The Court gets confused
23 about what has been discussed and cannot
24 remember names or numbers of exhibits or
25 motions that have been argued. The

1 Court has, on numerous occasions, chosen
2 to lecture counsel about procedure
3 rather than reviewing the motions and
4 documents before the Court.

5 The Court yesterday took counsel
6 back in chambers without a record and
7 went on at some length about this
8 expert's credibility, meaning he is
9 weighing the expert's credibility
10 rather than weighing whether the expert
11 has foundation for the opinion under
12 Daubert.

13 It is obvious and the record will
14 stand that the Court's conduct is the
15 Court does not believe the plaintiffs'
16 case has merit and this ruling by the
17 Court directed to the jury is intended
18 to set the plaintiff up for a Motion For
19 Directed Verdict. It cannot prove a
20 prima facie case without this expert and
21 Ford Motor Company knows it.

22 Record should reflect TRW did not
23 join in this motion at any point. I
24 suspect, but I cannot prove at this
25 point, I will in the future, that that's

1 because TRW is very diligent and has
2 adequate and diligent counsel who
3 reviews exhibits and did, in fact,
4 review this exhibit and was prepared to
5 cross-examine about the spit testing and
6 whatever strengths and weaknesses it
7 might have. I suspect that's the
8 situation because of his comments.

9 The record should also reflect I
10 will make Exhibit 1 to this submission
11 the depositions of Steven Meyer taken by Ford
12 Motor Company so it is clear there was
13 no surprise and that I will attach to
14 that DVD plaintiffs' submission in
15 response to Ford Motor Company's Motion
16 For Mistrial, which clearly shows the
17 facts I have set out.

18 There was no surprise whatsoever
19 in this evidence and that defendant had
20 the report which shows the F150 spit
21 test clearly referenced in the report
22 specifically in writing in the report
23 and referred to specifically in Item No.
24 11 of that submission on the report
25 Steven Meyer, November 8, 2007, in

1 Guerrero Marroquin, M-A-R-R-O-Q-U-I-N.

2 This counsel does not believe it
3 can go forward with this jury prejudiced
4 after the very prejudicial comments of
5 Ford just now or with this Court, whom I
6 do not believe we are receiving a fair
7 trial with and my client has so
8 expressed to me that he does not believe
9 he is receiving a fair trial.

10 We will be moving for mistrial on
11 Monday with supporting documentation and
12 we will ask the Court to remove himself
13 as Judge in this matter.

14 It should be noted of record that
15 in addition to commenting on the
16 credibility of a witness, which is
17 improper for the Court, particularly on
18 the record of a witness in this case
19 which is particularly truthful, that the
20 Court commented on the credibility of
21 counsel making the insinuation and
22 accusation counsel set these defense
23 counsel up in some manner. And this
24 counsel does not believe that counsel
25 for plaintiffs, any counsel for

1 plaintiffs, can get a fair trial in this
2 matter from this point Ford.

3 MR. MACE: Damond Mace on behalf of
4 TRW. Let me strenuously object to
5 Mr. Denney's attack on the Court. Judge
6 Niehaus has shown extreme patience over
7 the past four weeks. He has been very
8 patient and tried to properly and
9 carefully follow his gate keeper roll
10 with respect to experts. If anything, he
11 has erred on the side of allowing things
12 into the record that should not have been
13 allowed in the first place. He has
14 carefully followed the proper law in
15 Ohio.

16 MR. SCHIFERL: On behalf of Ford
17 Motor Company, Kevin Schiferl. I would
18 adopt and incorporate every statement Mr.
19 Mace just made.

20 For the record, I would tender on
21 this proffer Ford Exhibit A, which is a
22 copy of the CD that Ford does acknowledge
23 receiving under the Way Bill Exhibit D
24 that was attached to plaintiffs'
25 submission, which exhibit will show it

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

KENNETH M. SCHWERING, Personal)
Representative of the Estate of)
Beverly D. Schwering, Deceased, And)
KENNETH M. SCHWERING,)
Individually,)
)
Plaintiff,)
)
)
v.)
)
TRW VEHICLE SAFETY SYSTEMS,)
INC., And)
FORD MOTOR COMPANY,)
)
Defendants.)

CASE NO. 1:10-CV-679

District Judge Sandra S. Beckwith

Magistrate Judge Stephanie K. Bowman

PLAINTIFF'S MOTION TO LIFT STAY

Plaintiff asks that the Court lift the stay imposed by its Order of March 14, 2011 (Doc. #35) long enough for him to file his *Supplemental Response with Regard to Certifying the Question of Rule 41(A)(1)(a) Refiling to the Ohio Supreme Court* (incorporated as the attached Memorandum in Support). As the following Memorandum in Support sets forth, the purpose of this supplement is to set the record straight regarding the mistrial in the former proceeding.

Respectfully submitted,
DENNEY & BARRETT, P.C.

By: s/Richard L. Denney
Richard L. Denney (OBA #2297) *Pro Hac Vice*
Lydia JoAnn Barrett (OBA #11670) *Pro Hac Vice*
Jason Eric Robinson (OBA #22289) *Pro Hac Vice*
Denney & Barrett, P.C.
870 Copperfield Drive
Norman, OK 73072
Tel: (405) 364-8600
Fax: (405) 364-3980

E-Mail: rdenney@dennbarr.com
lbarrett@dennbarr.com
jrobinson@dennbarr.com

AND

Arthur H. Schlemmer, SCR# 0018256
Michael S. Barron, SCR# 0062591
Charles L. Hinegardner, SCR# 0064944
3074 Madison Road
Cincinnati, Ohio 45209
Tel: (513) 721-1350
Fax: (513) 721-8311

AND

Richard S. Eynon – *Pro Hac Vice*
Indiana Attorney No. 6766-98
David M. Brinley – *Pro Hac Vice*
Indiana Attorney No. 14198-49
Eynon Law Group, P.C.
555 First Street, P.O. Box 1212
Columbus, IN 47202-1212
Tel: (812) 372-2508
Fax: (812) 372-4992

COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of March, 2011, I filed this instrument electronically with the Court Clerk via the CM/ECF system, requesting that notification be forwarded to the following defense counsel:

For Defendant TRW Vehicle Safety Systems, Inc.:

Damond R. Mace
Squire, Sanders & Dempsey, L.L.P.
4900 Key Tower, 127 Public Square
Cleveland, OH 44114
Email: dmace@ssd.com

Aaron T. Brogdon
Squire, Sanders & Dempsey, L.L.P.
2000 Huntington Ctr., 41 South High St.
Columbus, OH 43215
Email: abrogdon@ssd.com

For Ford Motor Company:

Gary M. Glass
Thompson Hine, LLP
312 Walnut St., 14th Fl.
Cincinnati, OH 45202
Email: gary.glass@thompashine.com

Elizabeth B. Wright
Conor A. McLaughlin
Thompson Hine, LLP
3900 Key Center, 127 Public Square
Cleveland, OH 44114
Email: elizabeth.wright@thompsonhine.com
conor.mclaughlin@thompsonhine.com

Kevin C. Schiferl
Frost Brown Todd, LLC
201 N. Illinois St., Ste. 1900
Indianapolis, IN 46244
Email: kschiferl@fbtlaw.com

s/Richard L. Denney
Richard L. Denney

MEMORANDUM IN SUPPORT

Combined With

**PLAINTIFF'S SUPPLEMENTAL RESPONSE WITH REGARD TO
CERTIFYING THE QUESTION OF RULE 41(A)(1)(a) REFILEING
TO THE OHIO SUPREME COURT**

Despite the innuendo Defendants have hurled regarding the events that led to the mistrial in the previous case, Plaintiff has remained diplomatic and withheld comment. The plain fact is that the reason for the mistrial is utterly immaterial to the issues at hand. This Court's March 3, 2011 order was concise, well reasoned and clear. Defendants have, unfortunately, taken advantage of the Court's invitation for input on the question of certifying a novel procedural issue, using it instead as (a) an opportunity to inundate the record with collateral material in hopes of diverting the Ohio Supreme Court's attention from the matter at hand and (b) an attempt at prejudicing this Court against Plaintiff. Equity, therefore, dictates that Plaintiff be permitted to set the record straight.

Plaintiff therefore attaches the following as documentary proof that Defendant Ford Motor Company (with the eager assistance of its codefendant) engineered the very mistrial it now complains of, which mistrial was premised solely on an alleged discovery violation its defense counsel contrived out of thin air:

- Exhibit A (*Plaintiff's Motion to Reinstate the Testimony of Expert Meyer*), detailing the pertinent events and exposing the written admission by counsel for Ford Motor Company that he had indeed received the documents he charged Plaintiff with hiding;
- Exhibit B (February 21, 2008 Report of Defendant Ford Motor Company's Expert Andrew E. Levitt addressed to Defendant's counsel), in which Mr. Levitt discusses the testing and alternative design defense counsel would feign ignorance of 15 months later; and

- Exhibit C (Trial Transcript Excerpt from June 4, 2009), in which counsel for Defendant Ford Motor Company moves for mistrial based on his fabricated surprise occasioned by that very testing and alternative design.

Begging the Court's kind indulgence, Plaintiff therefore requests that this pleading and exhibits be included in the record on appeal.

Respectfully submitted,
DENNEY & BARRETT, P.C.

By: s/Richard L. Denney

Richard L. Denney (OBA #2297) *Pro Hac Vice*
Lydia JoAnn Barrett (OBA #11670) *Pro Hac Vice*
Jason Eric Robinson (OBA #22289) *Pro Hac Vice*
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AND

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Michael S. Barron, SCR# 0062591
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Fax: (513) 721-8311

AND

Richard S. Eynon – *Pro Hac Vice*
Indiana Attorney No. 6766-98
David M. Brinley – *Pro Hac Vice*
Indiana Attorney No. 14198-49
Eynon Law Group, P.C.
555 First Street, P.O. Box 1212
Columbus, IN 47202-1212
Tel: (812) 372-2508
Fax: (812) 372-4992

COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of March, 2011, I filed this instrument electronically with the Court Clerk via the CM/ECF system, requesting that notification be forwarded to the following defense counsel:

For Defendant TRW Vehicle Safety Systems, Inc.:

Damond R. Mace
Squire, Sanders & Dempsey, L.L.P.
4900 Key Tower, 127 Public Square
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Aaron T. Brogdon
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Email: abrogdon@ssd.com

For Ford Motor Company:

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Kevin C. Schiferl
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s/Richard L. Denney
Richard L. Denney

DENNEY & BARRETT

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e-mail: jrobinson@dennbarr.com

Richard L. Denney
Lydia JoAnn Barrett
Russell T. Bowlan
Jason E. Robinson

April 23, 2009
[Dictated Not Read]

Via Federal Express

Aaron T. Brogdon, Esq.
Squire, Sanders & Dempsey
1300 Huntington Center
41 South High Street
Columbus, OH 43215

Kevin C. Schiferl, Esq.
FROST BROWN TODD, LLC
201 N. Illinois St., Suite 1900
Indianapolis, IN 46244-0961

Thomas L. Eagen, Jr., Esq.
Eagen, Wykoff & Healy Co.
2337 Victory Parkway
Cincinnati, OH 45206-2803

Re: Schwering v. Ford Motor Company, et al.

Dear Counsel:

In accordance with the agreement between trial counsel, I have enclosed *Plaintiff's Second Amended Exhibit List* with multiple CD and DVDs containing Plaintiff's exhibits. The DVD with the hyperlinked exhibit list does not contain all the exhibits as some were too large to contain on one DVD. We did not, however, include all experts' deposition exhibits as all counsel received copies at the time of the respective depositions. The following is a list of CDs and DVDs enclosed:

1. Plaintiff's Hyperlinked Exhibit List
2. Exhibits # 21, 22, 23, 24, 1071- Part 1, 1071-Part 2, 958-A
3. Exhibits to Designated Depositions Nos. 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2073, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083
4. Set of 3 DVDs - Containing Steve Meyers' exhibits: 114.1 - 114.71
5. 381
6. 439
7. 440
8. 441
9. 442
10. 443
11. 707
12. 958- A.3
13. 958 - A.16
14. 979
15. 989
16. 991
17. 1067
18. 1113

Schwering v. FMC
Docket No. A0307981
Common Pleas
Hamilton County, OH
Plaintiff's Exhibit
J

DENNEY & BARRETT

Trial Counsel of Record

Page 2

April 23, 2009

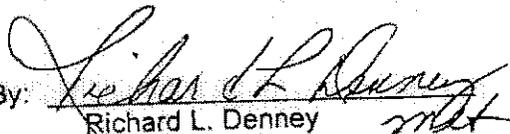
- 19. 1118
- 20. 1121
- 21. 1133
- 22. 1167 (set of 3)
- 23. 1168
- 24. 1169
- 25. 1195
- 26. 1196
- 27. 1197
- 28. 1198
- 29. 1199
- 30. 1200
- 31. 1201
- 32. 1203
- 33. 1204
- 34. 1205
- 35. 1206
- 36. 1207
- 37. 1208
- 38. 1209
- 39. 1210
- 40. 1211
- 41. 1212
- 42. 1213
- 43. 1214
- 44. 1215
- 45. 1336
- 46. 1352
- 47. 1650
- 48. 1759 -1763 (set of 5)

We look forward to receipt of each of your exhibits – preferably in a searchable electronic format.

Sincerely,

DENNEY & BARRETT, P.C.

By:


Richard L. Denney

RLD/mlt
Encls.

cc: Richard S. Eynon, Esq./David M. Brinley, Esq. (w/o encls.)
Michael S. Barron, Esq. (w/o encls.)

Supplement 82

From: Origin ID: OKCA (405) 364-8600
Margaret Taylor
Denney & Barrett, P.C.
870 Copperfield Drive
Norman, OK 73072



Ship Date: 23APR09
ActWgt: 6.0 LB
CAD: 2284531/INET9011
Account#: S *****

Delivery Address Bar Code

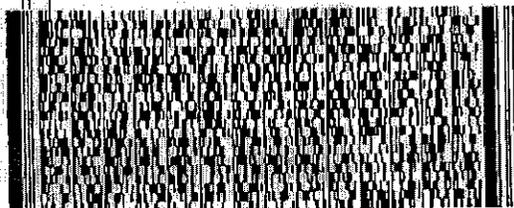


SHIP TO: (317) 238-3800 BILL SENDER
Kevin C. Schiferl, Esq.
Frost Brown Todd, LLC
201 N ILLINOIS ST STE 1900
INDIANAPOLIS, IN 46204

Ref # Schwering
Invoice #
PO #
Dept #

FRI - 24APR A1
PRIORITY OVERNIGHT

TRK# 7965 4708 7135
0201



XH GSHA

46204
IN-US
IND

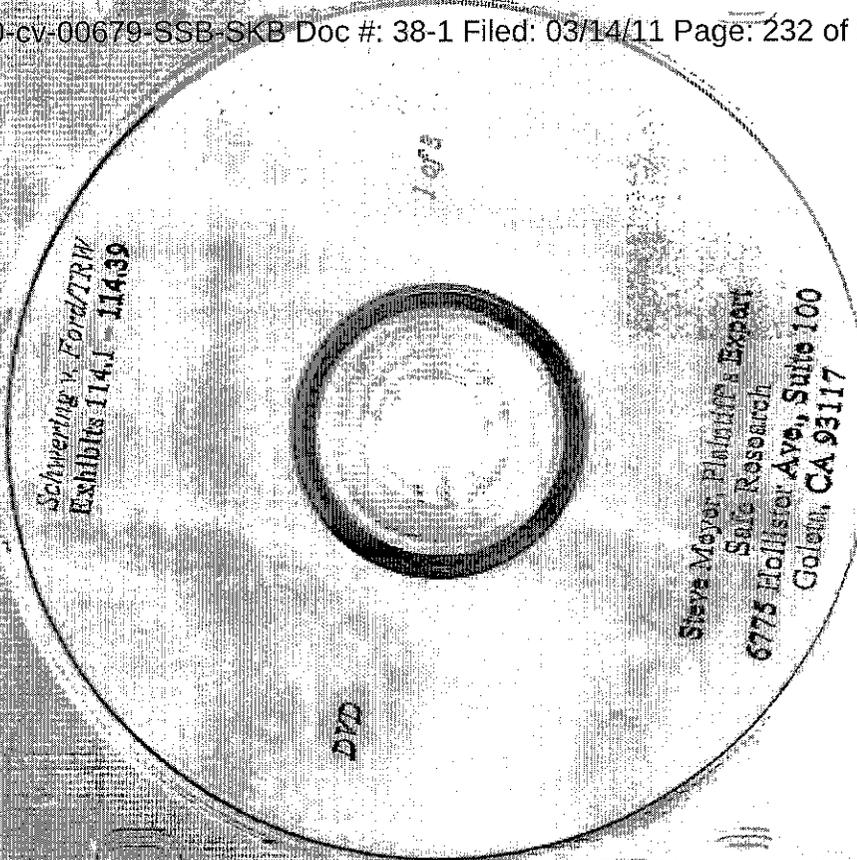


After printing this label:

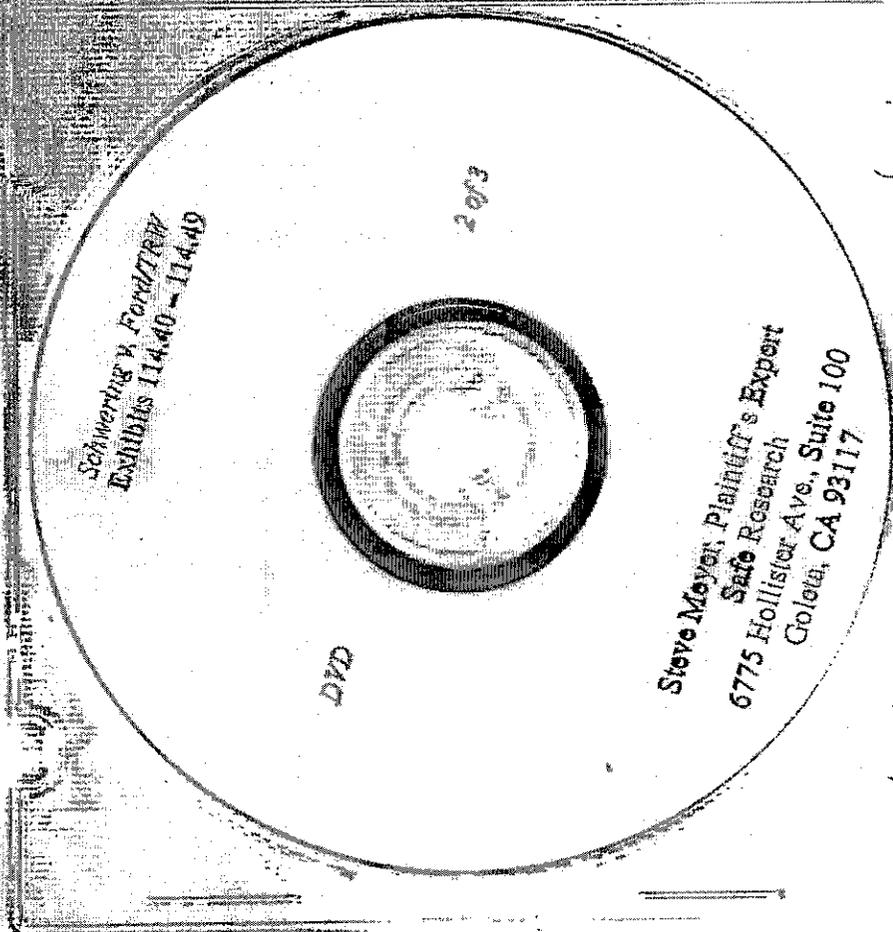
1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

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Schwering v. FMC
Docket No. A0307981
Common Pleas
Hamilton County, OH
Plaintiff's Exhibit
K

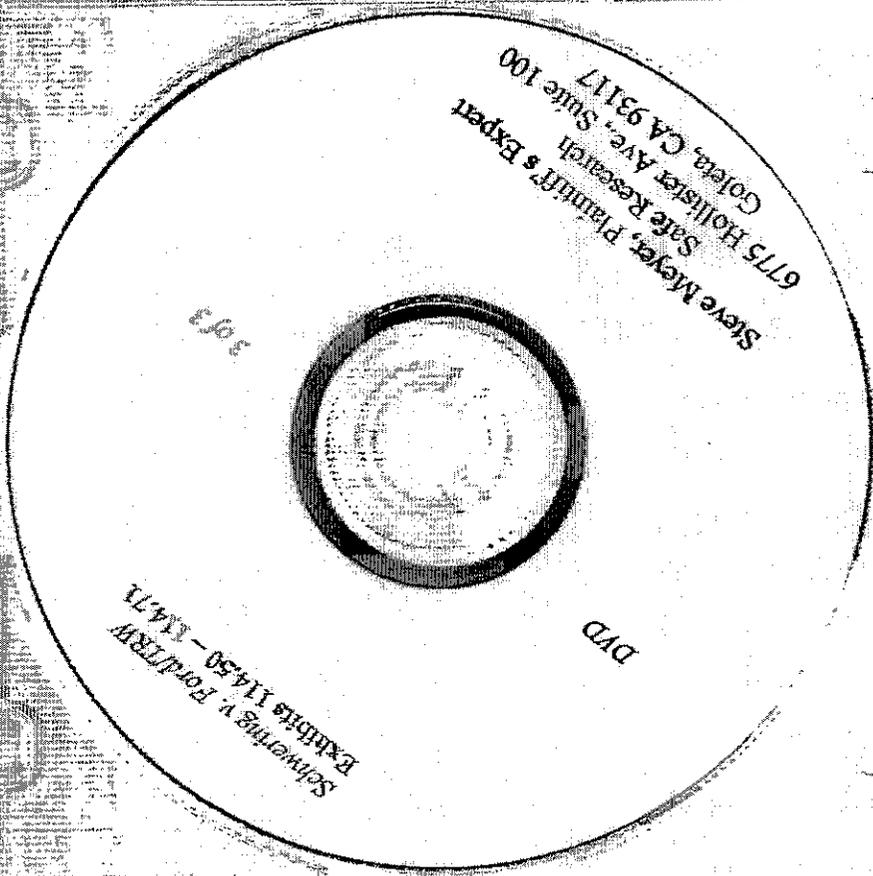


Schwering v. Ford/FRW
Exhibits 114.40 - 114.49

2003

DVD

Steve Meyer, Plaintiff's Expert
Safe Research
6775 Hollister Ave., Suite 100
Colton, CA 93117



Lydia Barrett

From: Kevin C. Schiwek [kschiwek@blaw.com]
Sent: Monday, June 01, 2009 8:01 PM
To: Lydia Barrett, Margaret Taylor, Richard D. Derney, DRINILEY@LAWCOLUMBUS.COM, REYNOL@LAWCOLUMBUS.COM, DMACE@SSD.COM
Cc: Kevin C. Schiwek, David Conkank, ABERGDDON@SSSO.COM, CLIFFEN@DELSCHINE@THOMSONSONLINE.COM
Subject: Re: Schwering v. TRW VSSI, Hamilton County Common Pleas Court Case No. A0307981

Lydia,

From the list of exhibits for Meyer, we do NOT have exhibits numbers 115, 116 or 2088. We are able to find the rest of your list for Meyer. Please provide these asap - after my name at front desk of Hilton. Thanks

(This message was sent from a RIM wireless device)
-----Original Message-----

From: Lydia Barrett
Cc: <Cofatal@LAWCOLUMBUS.COM>
Cc: <Schik@LAWCOLUMBUS.COM>
Cc: <AFTA@LAWCOLUMBUS.COM>
Cc: <ADENNE@LAWCOLUMBUS.COM>
Cc: <DRINILEY@LAWCOLUMBUS.COM>
Cc: <REYNOL@LAWCOLUMBUS.COM>
Cc: <ABERGDDON@SSSO.COM>
Cc: <DMACE@SSD.COM>
Cc: <CLIFFEN@DELSCHINE@THOMSONSONLINE.COM>
Cc: <GARY.GLASS@THOMSONSONLINE.COM>

Sent: 6/1/2009 4:42:34 PM
Subject: RE: Schwering v. TRW VSSI, Hamilton County Common Pleas Court Case No. A0307981

May I interrupt Mr. Eng's exam tomorrow morning to put on the Blightings? They are short and have been on hold for two weeks. Simply advise yes or no

Lydia JoAnn Barrett, Esq.
Derney & Barrett, P.C.
870 Copperfield Dr
Norman, OK 73072
(405) 364-8800 Office
(405) 364-3980 Facsimile

(405) 640-5349 Cell

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Schwering v. FMC
Docket No. A0307981
Common Pleas
Hamilton County, OH
Plaintiff's Exhibit

9

Lydia Barrett

From: Kevin C. Schifert [kschifert@tblaw.com]
Sent: Sunday, May 31, 2009 5:46 PM
To: Lydia Barrett; Margaret Taylor; Richard Denny; Kevin C. Schifert; DERRINLEY@LAWCOLUMBUS.COM; REYNON@LAWCOLUMBUS.COM; CLIFF MENDEL; SOHN@THOMPSONHINE.COM; Todd Croftick; DMACE@SSD.COM; GARY GLASS@THOMPSONHINE.COM
Subject: Re: Schwering v. TRW VSSI, Hamilton County Common Pleas Court, Case No. A0307981

Lydia

No omission of Darnold or Aaron meant, as I simply was responding to the original email chain

Please read my earlier response on the "edit" -not our issue as the offering party must do with all edits (as with every trial I have ever been involved with)
(This Message was sent from a RIM wireless device)

-----Original Message-----
From: Richard Denny
Cc: <CROFT@LAWCOLUMBUS.COM>
To: Schifert, Kevin C. <KSCHIFERT@LAWCOLUMBUS.COM>
To: <DERRINLEY@LAWCOLUMBUS.COM>
To: <REYNON@LAWCOLUMBUS.COM>
Cc: <DMACE@SSD.COM>
To: <CLIFFMENDEL.SOHN@THOMPSONHINE.COM>
Cc: <GARYGLASS@THOMPSONHINE.COM>

Sent: 5/31/2009 6:25:22 PM
Subject: RE: Schwering v. TRW VSSI, Hamilton County Common Pleas Court, Case No. A0307981

Kevin, in further response, I have decided to just provide our current witness order, to avoid more frustration, w/ the caveat that delays may, obviously change things and we will let you know. After Butler, Biz, Nielsen, Buehling, and Meyer, we will likely go to Dr. Ziegewski, the EXETS (likely Schan, Morgan, Chertwood, Dr. Batzer, Dr. Renfro and Dr. Rosen. I have previously advised that we will be filing in w/ videos, including Johnson, Ford, Lytle, Ramanujan, Wegner, Smith, White, Mason, and Rightman. We may also play previously designated Richard Bond and damage witnesses. Where are you w/ regard to Mr. Nielsen's "outs"? I obviously need to review in enough time to catch any accidental "boo-boos." Mr. Meyer's exhibits will include: 114, 114.1 thru 114.72, 115, 115.1, 116, 113, 113.1 thru 113.17, 2888 (which is the Ford 1991 Explorer seat back test, to which you objected before opening.) As per previous, I assume as an ABOA member you are sensitive enough to the environment that you don't want new copies of that which you've previously received. If however, there is a specific item which you need or cannot locate let me know. BTW, I just noticed that you didn't copy TRW, in your earlier e-mail, so I am copying this to Mr. Mace, as well as forwarding my previous response. Also, Darnold has asked for the final slides used in the opening. I am willing to give you mine, if you give me yours, let me know if you will be printing me a copy and I will print you one as well. Again, my cell phone is 405-640-5349, please call if you need more information. Lydia

From: Kevin C. Schifert [mailto:kschifert@tblaw.com]

1

Sent: Sunday, May 31, 2009 7:03 PM
To: Lydia Barrett; Margaret Taylor; Richard Denny; Kevin C. Schifert; DERRINLEY@LAWCOLUMBUS.COM; REYNON@LAWCOLUMBUS.COM; CLIFF MENDEL; SOHN@THOMPSONHINE.COM
Cc: Todd Croftick; GARY GLASS@THOMPSONHINE.COM
Subject: Re: Schwering v. TRW VSSI, Hamilton County Common Pleas Court, Case No. A0307981

Lydia

Hope you had have safe travels back to Ohio on this beautiful Sunday!

As to your email response to Cliff, a generic identification of "all exhibits brought to or used at deposition" and provision of witnesses by category (ie "fact witnesses") IS NOT what either the judge or common courtesy (my reference is the ABOA standard of conduct for trial counsel) requires. The judge specifically indicated that each party should provide the other with the exhibits intended to be offered during direct exam by exhibit number in this case, as well, subsequent to Richards Wednesday request, these are to be in hard copy! And, they are to be, and I quote his honor, provided "24 hours" ahead of time in that we are now less than that time from tomorrow's trial day, your cooperation with Judge Niehaus' direction would be appreciated.

In closing, I really don't understand the issue/problem with the simple candor of telling us who will be called in what order and which exhibits will be used

Have a good day and look forward to your anticipated courtesy Peace...

(This Message was sent from a RIM wireless device)

-----Original Message-----
From: Lydia Barrett
Cc: <CROFT@LAWCOLUMBUS.COM>
To: <SCHIFERT@LAWCOLUMBUS.COM>
To: <DERRINLEY@LAWCOLUMBUS.COM>
To: <REYNON@LAWCOLUMBUS.COM>
Cc: <DMACE@SSD.COM>
To: <CLIFFMENDEL.SOHN@THOMPSONHINE.COM>
Cc: <GARYGLASS@THOMPSONHINE.COM>

Sent: 5/31/2009 2:31:04 PM
Subject: RE: Schwering v. TRW VSSI, Hamilton County Common Pleas Court, Case No. A0307981

2

Collision Research & Analysis, Inc.
Accident Reconstruction Specialists

David Blaisdell
Andrew Levitt
Ernest Klein
Gregory Stephens

Susan Levitt
David Michalski
Philip Wang
Angelo Toglia
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February 21, 2008

Kevin Schiferl
Locke Reynolds
201 North Illinois
Suite 1000
Indianapolis, Indiana 46204

Re: Schwering vs. Ford Motor Company
Preliminary Report

Dear Mr. Schiferl:

The referenced matter concerns a collision that took place on December 28, 2002 in Harrison, Ohio at approximately 2:26 pm. Based on the Ohio Traffic Crash Report, a 2001 Ford Explorer, driven by Ms. Beverly Schwering and a 1990 Nissan Maxima, driven by Mr. Peter Karountzos were traveling westbound on Interstate 74. Ms. Schwering was in the number two lane of travel and Mr. Karountzos was in the number one lane of travel. The Traffic Crash Report stated that Ms. Schwering made a lane change into lane number one and contacted Mr. Karountzos' Nissan.

It is my understanding that defense reconstructionist David Mercaldi's opinion is that after the initial contact between the subject vehicles, the Ford Explorer was steered to the right and yawed clockwise until initiation of an on-road driver side leading roll. Dr. Mercaldi testified that the right front of the subject Ford contacted the guardrail along the north edge of the road after it had rolled "a little beyond upside down". It is my understanding that during the rollover phase of the accident, the Ford Explorer's rear bumper and right rear suspension impacted the guardrail and an adjacent guardrail post. It is my understanding that Dr. Mercaldi has calculated a rear end delta-V to the Ford Explorer of approximately 10 mph.

As a research engineer with experience in the area of automotive collision safety and vehicle crash performance, which includes extensive background in collision analysis, accident reconstruction, vehicle crash testing, seat testing and related research, I have been asked to review material related to the subject accident, then evaluate the crash performance of the Ford Explorer occupant seating system as it relates to this accident. Additionally, I have been asked to evaluate the design performance of the driver's seat of

the subject 2001 Ford Explorer compared to other contemporaneous vehicle seating systems.

In preparation for my analysis of this accident, I have been provided with the following material:

- 1) Ohio Traffic Crash Report
- 2) Police photographs
- 3) Photographs taken by
 - David Mercaldi
 - Tandy Engineering
 - Catherine Corrigan
 - Steven Meyer
 - B33 Consulting
 - Gerry Bahling
 - Richard Morrison
 - Collision Safety Engineering
 - Maria Ziejewski
- 4) Various medical records
- 5) Coroner's Report and Certificate of Death
- 6) Records from Harrison Fire Department
- 7) Various legal documents
- 8) Accident Scene Layout by The Engineering Institute
- 9) File materials of Maria Ziejewski
- 10) File materials of Steve Batzer
- 11) File materials of Eddie Cooper
- 12) Seat back strength test on 2002 Ford Explorer by SAFE Laboratories
- 13) Exponent Surrogate Study and Inversion, 2002 Ford Explorer Sport
- 14) FMVSS 207 test reports for:
 - 1995 to 1999 Ford Explorer
 - 2000 to 2003 Ford Explorer Sport
- 15) Depositions and deposition exhibits of:
 - a. Bruce Enz
 - b. Catherine Corrigan
 - c. David Mercaldi
 - d. Steven Meyer
 - e. David Renfroe
 - f. Kenneth Schwering
 - g. Jeffrey Pennington
 - h. Patrick Morgan
 - i. Tom Butler
 - j. Paul Montavon
 - k. Peter Karountzes
 - l. Linda Croley
 - m. Stephanie Buening

- n. Scott Buening
- o. Greg Schano
- p. Darren Mooney
- q. Joseph Willig
- r. Gregory Chetwood
- s. Gavin Hinds
- t. James Miller
- u. Eddie Cooper

In addition to reviewing the provided material, I conducted an inspection of the detrimmed Ford Explorer driver's seat on January 31, 2008. At that time, detailed notes, photographs and measurements were taken of the subject detrimmed driver's seat. Additionally, I conducted a quasi-static rearward loading test on an exemplar Ford Explorer driver's seat on February 11, 2008.

The subject Ford Explorer was equipped with front bucket seats with adjustable head restraints. The driver's seat had a motorized fore/aft/tilt adjustment. The right front passenger seat had a manual fore/aft adjustment bar. Both front seats have manual seat back recliner mechanisms and a manual lumbar adjustment. Photographs of the subject Ford Explorer taken at the accident scene depict both front seat backs yielded rearward.

The Ford Explorer driver's seat is equipped with a dual linear recliner design. At the time of my inspection of the detrimmed driver's seat, the inboard angle of the seat back was measured at 33.8 degrees relative to the seat cushion frame. The outboard angle of the seat back was measured at 36.7 degrees. Plaintiff's representative denied permission to adjust the seat back through the recliner release handle. Deformation was observed to both inboard and outboard lower backrest vertical frame members between the backrest pivots and the linear recliner attachments. The upper runner bracket was slightly bent near the fore/aft/tilt adjustment. 16

As part of my analysis, I have conducted a quasi-static yield strength test on an exemplar Ford Explorer driver's seat back. The test was conducted utilizing a modified FMVSS 207 protocol. A body block was pulled horizontally at a height of 14 inches above the seat cushion. The exemplar Ford Explorer seat reached a maximum static load of 1,217 lbs. The overall backrest moment was calculated to be 17,038 in-lbs. This yield strength places the subject 2001 Ford Explorer seat in the upper level of all seats tested by my organization and others using a similar test protocol. The rearward yield strength of the 2001 Ford Explorer exemplar seat far exceeds the 3,300 in-lbs. static moment requirement mandated by FMVSS 207 by a five fold margin. }

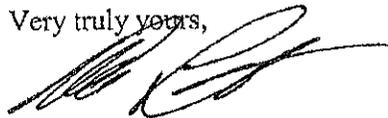
In analyzing the provided file material and examining the subject detrimmed driver's seat, certain preliminary opinions can be rendered regarding the performance of the 2001 Ford Explorer driver's seat and alternative seat designs proposed by plaintiff's expert, Steven Meyer.

- The 2001 Ford Explorer front seats are designed to absorb energy by yielding rearward under sufficient occupant loading.
- Plaintiff is contending that the subject seat "failed" to properly stay in position during the rollover phase of the accident. The subject driver's seat yielded under rearward loading. All cantilever backrests will 'yield' when sufficient rearward collision forces are applied. 11
- Rearward yielding of a seat backrest is an accepted manner of absorbing collision energy that would otherwise be absorbed by the occupant. Backrest yield is also a function of not just the structural characteristics of the seating system, but also the weight and size of the occupant, location of the occupant load application and the impact severity. }
- Perimeter backrest frame designs are common with various automotive manufacturers.
- Seat designs are a system of integrated components. Strengthening a portion of the system may simply cause yield, or deformation to occur in another part of the system without measurably increasing the ultimate yield strength of the seating system.
- Mr. Meyer suggests an All-Belts-to-Seat (ABTS) design as an alternative to the 2001 Ford Explorer driver's seat. Further, Mr. Meyer opines that an ABTS design seat would have prevented Ms. Schwering's ejection and injuries. Testing by myself and others in the scientific community have proven that one of the negative design trade-offs of highly rigidified backrest designs occurs when an occupant is voluntarily, or forcibly moved out of position relative to the seat head restraint. Moderate to severe rearward loading of a rigidified seat of an occupant with an unsupported head can cause severe to life threatening cervical injuries brought about by the unsupported head rotating about the head restraint or upper backrest. } X
- Rearward loading of a backrest may occur as a result of forced occupant movement that is initiated by other than 6 o'clock principle direction of force (PDOF) events. Seat backrests may be loaded by occupants who are exposed to collisions such as oblique rear end impacts, high rotational intersection-type collisions and rollovers. These three environments can forcibly move the occupant's upper body outside the confines of the backrest/head restraint prior to significant rearward engagement with the seat back.
- Many ABTS seats are single recliner designs. Unlike more conventional yielding seats, single recliner ABTS (or any highly rigidified bucket seat) designs tend to 'twist' under moderate to severe rearward loads. It is this byproduct of the ABTS design that tends to pull the driver inboard and away from the integrated torso belt. This design byproduct is particularly troubling in a multi-vehicle event. The stored energy of the seat back in the initial rear end collision may place the front seated occupants in a dangerous pre-impact position for a potential subsequent frontal collision.

- Rigid or rigidified seats only offer the possibility of reduced injury exposure in certain ranges of rear end collision severity if the occupant's upper torso and head are contained within the confines of the backrest/head restraint. A pre-impact out-of-position occupant, forced out-of-position occupant movement or impact induced ramping relative to the backrest may expose the occupant to potentially catastrophic hyperextension injuries with more rigid backrest structures. The mechanism by which the Ford seat structure yields manages energy that otherwise can produce more severe injury exposure under many collision environments.
- Statistical data indicates that only 1% of all rear end collisions result in AIS 3+ (serious to fatal) injuries. Some of that 1% population sustained injuries resulting from causes other than seat back yield. Approximately 99% of occupants involved in rear end collisions sustain minor or no injuries with current yielding seat designs. It is because of the effectiveness of current yielding seat designs that careful analytical consideration must be taken prior to addressing any possible benefits associated with major conceptual seat design alterations. The statistical data support the fact that current yielding seat structures are performing well and that severe injury exposure in rear end collisions is extremely rare. H
- An ABTS design is not required to create a stronger or more rigid seat backrest. The scientific community has studied the risk-benefits of more rigid seats since the mid-1960s. In 1989, NHTSA opened a docket (Docket 89-20) with a proposed increase of the required static yield strength of FMVSS 207 (3300 in-lbs.). For approximately 15 years, analysis has been conducted by automobile manufacturers, the federal government, and the independent scientific community relating to the increase of the static seat requirement proposed in NHTSA Docket 89-20. In November 2004, NHTSA issued a Termination of Rulemaking with regard to increasing seat back yield strength by stating, "Improving seating system performance is more complex than simply increasing the strength of the seat back." }
- The design of the subject Ford Explorer seat back was generically similar to most seat backs on the market in the model year 2001. As the accident seat yielded properly, I find no defect with the overall performance of the 2001 Ford Explorer seat or with the concept of yielding seat in general. The 2001 Ford Explorer seatback performs well with a wide range of occupants, across a wide range of impact severities. } X

Please contact me if I can provide any further information regarding this matter.

Very truly yours,



Andrew E. Levitt