ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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I. INTRODUCTION

Respondent Schwering asks this Court to rewrite Civ. R. 41(A)(1)(a) so that instead of limiting voluntary dismissals to any time "before the commencement of trial", the rule would merely prohibit voluntary dismissals at any time "during trial". Neither the clear language of the rule, the rules as a whole, nor Ohio law supports that revision.

II. FACTUAL REBUTTAL

Ford Motor Company ("Ford") agrees that neither the facts of this case nor the cause of the mistrial provide the answer to the certified question of law. The answer will govern the availability of voluntary dismissals in all circumstances in which a trial has commenced and the court subsequently declares a mistrial. But because the facts underlying this case illustrate the type of mischief that can accompany Schwering's interpretation of Civ. R. 41(A)(1)(a), Ford will briefly clarify the record. So there is no doubt regarding the basis of the trial court's mistrial declaration, Ford refers the Court again to the following orders in the record:

- June 5, 2009 Opinion (Ex. C to Ford's Initial Brief) – Trial court excluded Meyer at trial because he and counsel failed to disclose opinions about his ABTS tests under Civil Rule 26(E).
- July 23, 2009 Entry – (Ex. E to Ford's Initial Brief) – Trial court decided to conduct voir dire of Meyer during retrial because counsel and Meyer violated Evidence Rules 702, 705, and Civil Rule 26(E) by not disclosing the ABTS opinions in discovery or at trial.
- July 28, 2009 Letter and Entry (Exhs. F and G to Ford's Initial Brief) – Trial court sua sponte decided to forego voir dire of Meyer and excluded all opinions about his ABTS testing under Rule 26(E) because he and counsel did not disclose these opinions in discovery or at trial.

And, at page 11 of his brief, Schwering states that the trial judge's comment, "[t]he testimony that [Meyer] gave made me sit here and go, what are we trying this case for?", demonstrates that the trial court found Meyer's testimony "compelling." To the contrary, the

court's continued comments on the next page show that the judge found it hard to believe anything the witness had to say:

> My point is, if you can't tell the truth, why should I believe your testing? It had to do with 26(D), yes. It had to do with the way it was presented; absolutely improper under Ohio Rules of Evidence under 702. No witness is allowed to testify without foundation. There was absolutely no foundation admitted into evidence before he made those statements. I still don't know what the evidence is. Just his word?

Transcript of Proceedings, June 8, 2009, Doc. 33-1, pp. 145-146, attached as Exhibit A.[1]

Schwering also fails to address the post-trial rulings the Court made with regard to Meyer after Schwering's counsel pressed the court to start "anew" and "fresh" with Meyer – as if nothing improper happened in discovery or at trial. *See* Ex. B to Ford's Initial Brief, Doc. 33-2, pp. 36-42. The trial court rejected counsel's request and made it clear that sanctions would be imposed in the second trial based upon what happened at the first trial:

> MR. SCHLEMER (Plaintiff's Counsel): Why would the court be unwilling to strike the opinion [it issued on Meyer] and start anew?
>
> THE COURT: Because there are certain things that remain true about his testimony. He forgot something he did a short period of time before. I find that -- I was going to give him some voir dire to explain how that could happen, because, if it is true, he is either incompetent or he's being deceptive. I am not changing my mind about [that].
>
> Then, we have him in here asking about this and let's get on counsel, too. It is obvious to me if we want to get into this, it is obvious to me that Denney [Schwering's counsel] knew exactly what was going to happen, he knew right after voir dire, within a day, he was going to ask him a question based on that which he did not disclose, and he did it by not asking a foundational question which caused a mistrial because the bell was rung and the court couldn't do anything about it.
>
> Take it where it goes. That's a fact. Those are the facts. I am willing to give him a chance to explain how that happened.
>
> * * *

[1] Notably, Schwering omitted this page from his Supplement.

> MR. SCHLEMER: No, I am simply saying we should start fresh without the court's preconceived ideas of what the testimony may or may not be.
>
> THE COURT: The violation of 26(E) exists.

Ex. B to Ford's Initial Brief, Doc. 33-2, pp. 41-42.

The trial court then excluded Meyer's undisclosed testing and his related opinions, as well as testimony on scientifically unreliable seatbelt retractor tests, and limited his trial testimony to opinions concerning marks on the seat belt. *See* Ford's Initial Brief, Exhs. E, F, and G. Then, after TRW filed a motion in limine to exclude Meyer's testimony entirely (Doc. 34-7), Schwering filed his notice of voluntary dismissal, hoping to start "fresh" and "anew" as if the first trial and rulings never happened.

III. ARGUMENT

A. Rule 41(A)(1)(a) allows a plaintiff to unilaterally and voluntarily dismiss without prejudice *only* before trial commences and should be enforced as written.

At no point does Schwering address the clear and unambiguous language of Ohio Civil Rule 41(A)(1) that a plaintiff may dismiss an action without prejudice voluntarily only by

> (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 had appeared in the action. *** (emphasis added).

There is no qualifier; no exception. By its plain language, the Rule extinguished Schwering's right of unilateral dismissal upon the commencement of trial. As this Court has stated: "[a]fter commencement of trial the plaintiff must have the concurrence to the withdrawal of all other parties (dismissal by stipulation), or subject himself to the court's discretion by moving for a court-ordered dismissal pursuant to Civ. R. 41(A)(2)," *Chadwick v. Barba Lou, Inc.* (1982), 69 Ohio St. 2d 222, 229, 431 N.E.2d 660.

The language of Civ.R. 41(A)(2) supports this requirement: **"Except as provided in division (A)(1) of this rule,** a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper." Civ. R. 41(A)(2)(emphasis added). Schwering offers no basis not to enforce the Rule as written.

Schwering does not (and cannot) dispute that a trial "commences" **for the purposes of Civ.R. 41(A)(1)(a)** at the time a jury is empanelled and sworn. *Frazee v. Ellis Bros* (1996), 113 Ohio App. 3d 828, 831, 682 N.E.2d 676; *see also Douthitt v. Garrison* (1981), 3 Ohio App. 3d 254, 256, 444 N.E.2d 1068; *ComDoc v. Advance Print Copy Ship Ctr.*, Ninth Dist. App. No. 24212, 2009-Ohio-2998, ¶ 12; *Great Seneca Financial Corp. v. Emler*, Fifth Dist. App. No. 05CA000030, 2005-Ohio 6465, ¶¶ 26-31; *Standard Oil Co. v. Grice* (1975), 46 Ohio App. 2d 97, 101, 345 N.E.2d 458. Nor does Schwering offer any authority for inserting a "mistrial exception" into Civ.R. 41(A)(1)(a) that is not present in the text. This would expressly violate this Court's mandate "to enforce a statute as written and to not add or subtract language from the statute." *In re Adoption of Holcomb* (1985), 18 Ohio St. 3d 361, 366, 481 N.E.2d 613. Nor does Schwering provide any reasoned basis for when and under what circumstances a mistrial "revives" the extinguished right to dismiss. Instead, he simply asks for a rule that fits the particular facts of his counsel's error – a case can be voluntarily dismissed so long as the dismissal is not sought "during" a commenced or recommenced trial.

The cases cited by Schwering in his brief for the proposition that a plaintiff enjoys an "absolute" right to one unilateral dismissal do not apply to this case. Schwering Brief, 5-6. In each of those cases, plaintiffs were allowed to voluntarily dismiss without prejudice under Rule 41(A)(1)(a) because the dismissals occurred before **any** trial had commenced. Ohio authority, which Schwering does not address, clearly holds that the right to voluntarily dismiss without

prejudice is limited. In *Frysinger v. Leech* (1987), 32 Ohio St. 3d 38, 42, 512 N.E.2d 337, the Court acknowledged the limitations behind Civ. R. 41(A)(1)(a) are to prevent a scenario where "plaintiffs could try and retry their causes indefinitely until the most favorable circumstances for submission were finally achieved." (quoting *Beckner v. Stover* (1969), 18 Ohio St. 2d 36, 40, 247 N.E.2d 300). Similarly, in *Chadwick,* this Court acknowledged that with the restrictions in Civ.R. 41(A)(1)(a) "the possibility of plaintiff abuse is almost entirely mitigated . . . ." *Id.* at 69 Ohio St. 2d at 229. Here, of course, trial did commence, so Schwering's unilateral right to dismiss without prejudice was extinguished.

B. The out-of-state cases cited by Schwering do not support his argument that the declaration of a mistrial affects the definition of "commenced" in Civ.R. 41(A)(1)(a).

At pages 3-5 of his brief, Schwering cites a litany of cases from other jurisdictions regarding the effect of a mistrial. Those cases are irrelevant to the question presented because they arise in different legal contexts. Further, Schwering also fails to address several important factual distinctions, any one of which renders the cases inapplicable to the issues presented in this case.

First, criminal cases in which mistrials raise double jeopardy and constitutional issues are not relevant to the construction of a civil rule in a civil context. Plus, under Ohio Crim. R. 48(A), there is no unilateral right to dismissal; the state must obtain leave of court to dismiss in all instances.

Second, none of the out of state civil cases cited by Schwering involves a trial actually commencing, followed by a mistrial, unilateral dismissal, and then a retrial. The plaintiffs in *Kilpatrick v. First Church of the Nazarene* (Ill. App. 1988), 177 Ill. App. 3d 83, 531 N.E.2d 1135, did not, as Schwering attempted to do in this case, unilaterally dismiss their case; they

successfully moved the court, **as the Illinois statute required**, in order to dismiss without prejudice. *Id.* at 84. Furthermore, under Illinois Supreme Court Rule 219(e), a plaintiff cannot unilaterally dismiss to avoid complying with orders on discovery or barring witnesses or evidence. And, the Rule expressly allows courts to award costs and expenses in the previously dismissed action and to limit discovery, witnesses, and evidence upon refiling. *See* Committee Comments to Rule 219(e). This "curtails the plaintiff's use of the voluntarily dismissal as a dilatory tactic;" "prevents voluntary dismissals from being used as an artifice for evading discovery requirements;" and "maintain[s] the integrity of our court system." *Jones v. Chicago Cycle Center* (Ill. App. 2009), 391 Ill. App. 3d 101, 111, 908 N.E. 2d 150; *Morrison v. C.G. Wagner* (Ill. 2000), 191 Ill. 2d 162, 164-66, 729 N.E. 2d 486; *Smith v. P.A.C.E.* (Ill. App. 2001), 323 Ill. App. 3d 1067, 1075-76, 753 N.E. 2d 353. By contrast, Ohio has no other rules to mitigate the prejudice to the defendants upon dismissal and refiling. That is another reason why, under Ohio Civil Rules 41(A)(1)(a) and 41(A)(2), Schwering was required to get a court order if he wanted to dismiss without prejudice after trial commenced.

Another case Schwering cited was decided under a former Georgia rule that is much different than Ohio Civil Rule 41(A). The Georgia rule at issue in *Delta Air Lines, Inc. v. Van Diviere* (Ga. Ct. App. 1989), 192 Ga. App. 207, 384 S.E.2d 272, held that a plaintiff did not lose the ability to voluntarily dismiss **until she rested her case in chief at trial**. *Id.* at 208 (emphasis added) (citing O.C.G.A. § 9-11-41(a), which provided, in pertinent part, "an action may be dismissed by the plaintiff, without order or permission of court, by filing a written notice of dismissal at any time **before the plaintiff rests his case**") (emphasis added). That is not the law of Ohio.

Finally, Schwering cites two cases from Minnesota, one from 1943 and one from 1887, that were decided under old Minnesota statutes and civil rules that arise from different factual circumstances. *See Bolstad v. Paul Bunyan Oil Co* (Minn. 1943), 215 Minn. 166, 9 N.W.2d 346 (under former Minn. St. §§ 546.39 and 605.06, a plaintiff could voluntarily dismiss his case without prejudice after a mistrial if the court denied the defendant's motion for judgment notwithstanding the verdict), and *Phelps v. Winona & St. Peter R.R. Co.* (Minn. 1887), 37 Minn. 485, 35 N.W. 273 (after the defendant moved successfully to set aside verdict for the plaintiff and a new trial was ordered, the plaintiff was allowed to dismiss her case without prejudice). Neither of these Minnesota decisions are good law because Minnesota has since adopted rules of civil procedure, and its version of Rule 41 is similar to Federal Rule of Civil Procedure 41. *See* Minn. Civ. R. 41(a) (a plaintiff may dismiss without prejudice only if she does so before the defendant responds to the complaint or with the stipulation of all parties or a court order). In sum, there is no case law supporting the proposition that a mistrial affects the "commencement of trial" language in Rule 41(A)(1)(a), which identifies the precise moment in time when a plaintiff's ability to dismiss unilaterally without prejudice expires.

Most importantly, Schwering's argument that a mistrial is a "procedural nullity," is unsupported by any Ohio authority, and is in direct conflict with Ohio law, which describes a mistrial as a *continuation* of a commenced trial. *See Kauffman v. Schauer* (1929), 121 Ohio St. 478, 169 N.E. 566, syllabus at para. 3 (emphasis added) ("When in the progress of a trial the court has determined that such error has intervened as would vitiate any verdict that they jury might return and that the error cannot be cured in that trial, it is not error for the court to withdraw a juror, declare a mistrial, and continue the case upon the trial docket.")

Characterization of a mistrial as a continuation of a commenced trial is also consistent with the Ohio cases Ford cited at page 9-10 of its Initial Brief, in which, after mistrials, the trial courts applied factual determinations and evidentiary rulings made during the first trial in the second trial. Similarly, in this case, the trial court did not consider the first trial a "nullity." To the contrary, it refused to vacate its orders regarding Meyer after declaring a mistrial and entered several orders concerning Meyer to govern the retrial based on what happened **at the first trial that commenced**. Thus, under longstanding Ohio law, a mistrial **is not** a simple procedural nullity. *See* Ford's Initial Brief, 9-10. There is simply no authority for Schwering's contention that a mistrial affects the application of Civ.R. 41(A)(1)(a).

C. Prejudice to other parties is the underlying policy reason for the rule.

Schwering also does not address the relationship between Rules 41(A)(1)(a) and 41(A)(2), or the policy implications underlying them. Civil Rule 41(A)(1)(a) was designed to work in tandem with Civ.R. 41(A)(2) to vest dismissal authority in the trial court after the commencement of trial. Michael Solimine and Amy Lippert, *Deregulating Voluntary Dismissals*, 36 U. Mich. L. Reform 367, 379 (2003) (Rule 41(A)(2) is designed "primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.").

Once trial has commenced, a plaintiff can dismiss without prejudice only by stipulation of all parties (Civ.R. 41(A)(1)(b)) **or** by order of the trial court (Civ.R. 41(A)(2)). *Chadwick*, 69 Ohio St. 2d at 229. This gives the trial court, as the gatekeeper responsible for the orderly administration of justice, the authority to determine whether it will allow a dismissal without prejudice, and, if so, to condition the dismissal "upon such terms and conditions as the court deems proper." Ohio Civ. R. 41(A)(2). This Court described the combination of Civ.R. 41(A)(1)

and (A)(2) as creating conditions in which "the possibility of plaintiff abuse is almost entirely mitigated . . . ." *Chadwick*, 69 Ohio St. 2d at 229.

Case law recognizes the policy reason for transferring dismissal authority to the trial court after trial commences. This is the point in a case when the probability of prejudice to other parties becomes unavoidable if a plaintiff retains the right to unilaterally dismiss and start over. Consequently, after trial commences, the trial court has the discretion to permit a voluntary dismissal after weighing the "prejudice to the defendant." *Douthitt v. Garrison* (1981), 3 Ohio App. 3d 254, 256, 444 N.E.2d 1068. The identical federal rule, which provides the same transfer of authority to the trial court (although at a different time point in the case), also has been described as "protect[ing] the nonmovant from unfair treatment." *Grover v. Eli Lilly & Co.* (Sixth Cir. 1994), 33 F.3d 716, 718. As one commentator has noted:

> The usual situation where the court's approval will be requested for dismissal without prejudice is after commencement of the trial. At that point, defendant undoubtedly has incurred substantial expense in defending the action ....
>
> * * *
>
> Unless plaintiff's request for dismissal at that late stage is based upon reasons that are unavoidable, the court probably should attach conditions to a dismissal without prejudice. The court is authorized to structure the dismissal to prevent prejudice to the non-moving party.

Anderson's Ohio Civil Rules Practice With Forms (2011) at §13.06.

In *Grover*, the Sixth Circuit described the following factors for the trial court to consider in determining whether dismissal without prejudice is appropriate under Fed. Civ. R. 41(A)(2): "the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant." *Id.* at 718.

In this case, many of those factors are present. The case had been litigated for several years before trial commenced. The trial judge, as a result of the conduct of Schwering's counsel and expert Steven Meyer at trial, had declared a mistrial. The trial judge had indicated that his rulings regarding Meyer were going to be followed and applied in the subsequent trial. Rather than appropriately subject themselves to the discretion of the trial court in moving for a dismissal without prejudice as required by Rule 41 (where proper "terms and conditions" could be imposed), Schwering unilaterally dismissed.

Schwering's entire argument is predicated on the legal conclusion that the declaration of a mistrial completely undoes the definition of "commencement of trial" in Civ.R. 41(A)(1)(a). In addition to his failure to address the method of interpretation of the plain rule, his failure to address the policy concerns created by such a holding is telling.

D. Plaintiff's dismissal operates as an adjudication on the merits.

Since Schwering could not unilaterally dismiss without prejudice, his dismissal is tantamount to a dismissal "not provided for in the rule" under Rule 41(B)(3) and "operates as an adjudication on the merits." Schwering's remedy for errors made by his counsel must be brought elsewhere and do not justify rewriting Ohio's civil rules. As Schwering was the party who chose to unilaterally dismiss in violation of the Rule, he must bear the consequences.

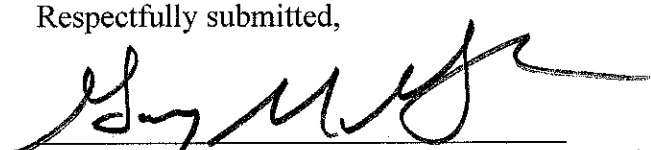
IV. CONCLUSION

Civil Rule 41(A)(1)(a) does not permit a unilateral voluntary dismissal without prejudice after the commencement of trial. There is no express or implied exception for mistrials. Because the language of the rule is unequivocal, the Court should apply it as written. The policy reasons for this are vast. Allowing a plaintiff to cause a mistrial and then attempt to walk away

from a series of evidentiary and other rulings he disagrees with, creates the potential for tactical abuse such as the introduction of undisclosed witness testimony and forum shopping.

The certified question should be answered in the negative. This Court should reaffirm the principle that a trial has commenced when a jury has been empanelled, sworn, and has begun receiving evidence and testimony, and, therefore, that a unilateral voluntary dismissal without prejudice is not available under Civ.R. 41(A)(1)(a) even if a mistrial later occurs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 15th day of September, 2011.

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Gary M. Glass

Exhibit A

1 COURT OF COMMON PLEAS

2 HAMILTON COUNTY, OHIO

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

6 Plaintiff,

7 vs. Case No. A-0307981

8 TRW VEHICLE SAFETY SYSTEMS, INC, et al,

9 Defendants.

10 COMPLETE TRANSCRIPT OF PROCEEDINGS

11 APPEARANCES:
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12 Mr. Richard Denney, Esq.,
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Mr. Richard S. Eynon, Esq.,
14 Mr. David M. Brinley, Esq.,
On behalf of Plaintiffs.
15
Mr. Kevin C. Schiferl, Esq.,
16 Mr. Gary Glass, Esq.,
Mr. Todd Croftchik, Esq.,
17 Mr. Clifford Mendelsohn, Esq.
On Behalf of Ford Motor Company.
18

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

21 BE IT REMEMBERED that upon the jury trial of

22 this cause, heard on Monday, June 8, 2009,

23 before the Honorable Richard Niehaus, a said

24 Judge of the Court of Common Pleas, the

25 following proceedings were had, to wit:

1 Morning Session, Monday, June 8, 2009

2 (Outside the presence of the

3 jury.)

4 MR. SCHLEMMER: We filed two

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

31

1 follow a scientific principle that is
2 pretty accurate, unless you don't really
3 follow the scientific principle. Then it
4 isn't.
5 They actually have ethics about how
6 you perform a test. You don't back test

7 You don't test from what you want to
8 prove forward. You test strictly
9 empirically, you follow the laws of
10 science and make a decision.
11 My point is, if you can't tell the
12 truth, why should I believe your testing?
13 It had to do with 26D, yes. It had to do
14 with the way it was presented; absolutely
15 improper under Ohio Rules of Evidence
16 under 702. No witness is allowed to
17 testify without foundation. There was no
18 absolutely no foundation admitted into
19 evidence before he made those statements.
20 I still don't know what the evidence is.
21 Just his word?
22 MR. SCHLEMMER: Whenever that
23 happened in the past, there was an
24 objection and the foundation was laid.
25 THE COURT: I am telling you what

32

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