
IN THE SUPREME COURT OF OHIO

CASE NO. 2011-0438

KENNETH SCHWERING, et al.,

Plaintiffs-Respondents,

v.

TRW VEHICLE SAFETY SYSTEMS INC., et al.,

Defendants-Petitioners.

**REPLY BRIEF OF PETITIONER-DEFENDANT TRW VEHICLE SAFETY
SYSTEMS INC. ON CERTIFIED QUESTION**

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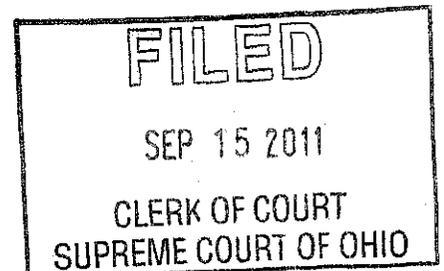
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I. INTRODUCTION

Rather than addressing the plain language of Ohio Civil Rule 41(A)(1)(a), which compels that the certified question be answered “no,” Respondents spend most of their brief discussing extraneous topics, like sound bites on the general effect of a mistrial in various other contexts. In their abbreviated Statement of Facts, however, Respondents have admitted the key fact that is determinative for the pending certified question: “Th[e] action went to trial on May 18, 2009.” Respondents’ Brief at 1 (citing Supp. 2, ¶ 6). While the additional, subsequent factual background provided by Defendants is helpful to illustrate the significant policy concerns at issue, which also compel the certified question to be answered “no,” the fact that the trial commenced prior to Respondents’ attempted unilateral, voluntary dismissal is determinative.

Under the plain language of Ohio Civil Rule 41, the Respondents lost their ability to unilaterally, voluntarily dismiss their claims once trial commenced. After that point, Respondents could still voluntarily dismiss, but only through a stipulation signed by all parties or by a motion, which would have allowed the trial court to impose appropriate conditions. Just as there is no means to reset the clock under the analogous federal civil rule, nowhere in the language of Ohio’s Civil Rule 41(A)(1)(a) or the cases that have interpreted it is there any exception for mistrials, or for any other event that could somehow reverse or “undo” the commencement of a trial.

Contrary to the Respondents’ rhetoric, a plaintiff’s absolute right to one unilateral, voluntarily dismissal prior to commencement of trial is not at issue. The drafters of Rule 41(A)(1)(a) clearly intended for the commencement of trial to be a bright line, absolute deadline for unilateral voluntary dismissal. The rule’s unequivocal language furthers several critically important policy objectives which have previously been recognized and

approved by this Court: not wasting the significant resources the trial court and jurors have invested in the case after trial has begun; avoiding prejudice to other parties; preventing parties from unilaterally dismissing their claims after trial has begun in order to avoid a trial judge or a jury perceived to be unreceptive and getting a “second bite at the apple” in jury selection and judge assignment; and not allowing parties to evade the proper process of taking an appeal to challenge perceived incorrect legal rulings. In the context of these fundamental policy concerns, Respondents’ discussion of the double dismissal rule and the effects of mistrials in unrelated contexts is inapposite and offers no guidance.

In fact, a closer examination of some of the out-of-state rules and decisions upon which Respondents rely actually supports the plain-language interpretation of Ohio Civil Rule 41(A)(1)(a) proposed by Defendants. Like Ohio, the law in several other states is also that the commencement of trial extinguishes a plaintiff’s right to unilaterally dismiss, but a plaintiff may still move the court for dismissal anytime after the commencement of trial. By requiring motions for post-commencement-of-trial dismissal, these foreign authorities and Ohio’s Rule 41(A)(2) preserve a trial court’s ability to set the terms of the dismissal, protect important rights of non-moving parties, conserve judicial resources, and ensure the efficient resolution of any outstanding motions pending at the time of the requested dismissal.

Respondents ignore that Ohio Rule 41(A)(2) provides a ready mechanism for plaintiffs to dismiss their claims after trial has commenced—the filing of a motion—which is designed to insert the trial court’s wisdom and discretion to prevent the abuses that could result from unilateral dismissals after the commencement of trial.

Accordingly, this Honorable Court should reject Respondents' unsupported request to create an unwritten mistrial exception to Ohio Rule 41(A)(1)(a) and should answer the certified question in the negative.¹

II. ARGUMENT

A. **Important Policy Considerations Compel the Application of Rule 41(A)(1)(a) in Accordance with Its Plain Language**

Contrary to Respondents' assertion, preserving a plaintiff's right to one unilateral, voluntary dismissal prior to the commencement of trial is not the only policy consideration underlying Rule 41(A)(1)(a). Indeed, this Court and others have previously noted and explained several other, significant policy considerations underlying Rule 41(A)(1)(a) and the cutoff date for unilateral voluntary dismissals. Moreover, the right to one unilateral dismissal is adequately protected under Ohio's already liberal standard. After trial has commenced, a plaintiff may still voluntarily dismiss, but is simply required to obtain either the consent of the other parties or the approval of the trial court, which can then establish appropriate conditions for the belated dismissal to ensure that the resources that have been expended by the trial court are not wasted, and to protect the interests of all parties.

1. **Important Policies Underlying Ohio Rule 41(A)(1)(a)'s "Commencement of Trial" Limitation Include: Preventing Waste of Judicial Resources, Protecting Opposing Parties From Prejudice, and Preventing Plaintiffs from Using Unilateral Dismissals to Retry Their Cases and Evade the Proper Appeals Process for Challenging Legal Rulings at Trial**

First, requiring dismissal by motion under Rule 41(A)(2) after the commencement of trial provides trial judges the opportunity to prevent waste and protect both the court

¹ TRW also incorporates the briefs of Ford, which further support a response in the negative to the pending certified question.

and all parties from the severe prejudice that could result from a belated dismissal after the commencement of trial. This prevents a waste of judicial resources, as illustrated by the facts here. Judge Niehaus was forced to spend weeks of time and effort resolving literally more than 100 trial related motions and also had several important and potentially dispositive motions pending at the time that plaintiffs attempted to unilaterally dismiss. Requiring a motion after the commencement of trial allows the trial court to set conditions to any re-filing, such as specifying which rulings made at trial will apply to any re-filed action, and an ability to rule on any pending motions which may be dispositive. For example, TRW had filed a motion to exclude all design testimony of Respondents' main expert, Meyer, which, if granted, would have likely been dispositive of all of Respondents' claims against TRW. See TRW's Merit Brief Ex. D at 60-61 (Respondents' counsel: "[W]ithout the witness we cannot put on a prima facie case. ..."). Instead of filing an opposition brief, Plaintiffs attempted to unilaterally dismiss. This further highlights the impropriety and unfairness of Respondents' dismissal, and further supports requiring dismissal by motion in such post-commencement-of-trial circumstances. A party should not be able to unilaterally "pull the rug out" from under the trial judge, and waste all of the significant time and effort the trial judge has invested once trial has commenced.

Similarly, requiring a party to move rather than unilaterally dismiss after commencement of trial allows the trial court to avoid prejudice to the other parties. Here, TRW incurred significant expenses to defend itself at trial, and Plaintiffs' improper unilateral dismissal—if allowed by this Court—will force TRW to re-incur thousands of dollars in duplicative costs, with no opportunity to recoup the amounts already

expended.² Indeed, this was pointed out by TRW's counsel at trial. See TRW's Merit Brief Ex. D at 179-180 ("My client has been forced to get ready for trial. We have been sitting here for a month and now on something that doesn't involve me, [and Respondents] want us to get reprepared again for hundreds of thousands of dollars."). If Respondents had properly moved to dismiss under Rule 41(A)(2), the trial court would have had the opportunity to impose conditions to limit or prevent such prejudice. See Ohio R. Civ. P. 41(A)(2); Douthitt v. Garrison, 44 N.E.2d 1068, 1070-71 (Summit Co. 1981).

A dismissal by motion under Rule 41(A)(2) affords the trial court an opportunity to set and impose conditions (which may include a fee award), while a unilateral, voluntary dismissal poses a threat of significant financial prejudice to the non-dismissing parties who have expended significant sums to try a case and argue and resolve trial related motions. In short, allowing plaintiffs to unilaterally dismiss after a trial has commenced in order to retry their cases would result in significant duplication and a waste of valuable judicial resources, as well as prejudicing the other parties.

Second, as noted by this Court in Frynsinger v. Leech (1987), 32 Ohio St. 3d 38, 42, a principal policy concern behind the drafting and adoption of Rule 41(A)(1)(a) was to prevent abuse by plaintiffs who could otherwise unilaterally dismiss their claims after trial had commenced in order to "try and retry their causes indefinitely until the most favorable circumstances for submission were finally achieved." Frynsinger, 32 Ohio St.

² Although Rule 41(D) allows the court in which a unilaterally-dismissed action is refiled to award costs, such relief is extremely limited, as this Court has previously held that "costs" under Rule 41(D) is very narrow, and does not include attorneys' fees or many other expenses. See Sturm v. Sturm (1992), 63 Ohio St.3d 671, 674-675, 677 (citing Muze v. Mayfield (1991), 61 Ohio St.3d 173, 175); see also Skaggs v. Lima Memorial Hosp. (1991), 62 Ohio St. 3d 296, 1085; Champion Mall Corp. v. Bilbo Freight Lines, Inc. (Trumbull 1992), 81 Ohio App. 3d 611, 615.

3d at 42 (quoting Beckner v. Stover (1969), 18 Ohio St. 2d at 36, 40). These same concerns were echoed in Olynyk v. Andrish, 2005 Ohio 6632, ¶ 14 (Cuyahoga Co.), where the court stated "that Civ. R. 41 was written to abolish the broad liberty given to plaintiffs under R.C. 2323.05(A), which allowed plaintiffs to dismiss any number of times so long as the statute of limitations had not run." Indeed, the United States Supreme Court has provided a similar explanation for the passage of Ohio Rule 41's federal analogue, noting that Federal Civil Rule 41 was "designed to limit a plaintiff's ability to dismiss an action [and] ... to curb abuses of [prior state and federal] nonsuit rules." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397 (1990).³

Third, Rule 41(A) should be enforced as written because of the related policy concern over parties using post-commencement-of-trial, unilateral dismissals as a means of evading the proper appeals process. In Beckner, the trial court refused to permit recall of a witness and made other evidentiary rulings unfavorable to the plaintiff. Feeling aggrieved by the trial court's rulings, the plaintiff sought a voluntary dismissal without prejudice and refiled. In holding that the refiled case was barred by the statute of limitations, this Court noted:

In this regard, the plaintiff has had the opportunity to present his cause upon such merits as he chooses and may appeal any errors resulting from a judicial mishandling of the manner or extent of such presentation.

* * *

To hold otherwise would be to establish a rule whereby litigants could substitute a voluntary dismissal without prejudice for an appeal from claimed errors occurring during a trial.

³ Respondents claim that they can not get an unlimited number of "do-overs" because they only get one unilateral dismissal under the two dismissal rule. However, this ignores the fact that Rule 41 is explicit that they do not get any "do-overs" after the commencement of trial. Moreover, by procuring mistrials (like the mistrial Respondents procured here), they could repeatedly waste the resources of the court and the opposing parties.

Beckner, 18 Ohio St.2d at 40; see also Chadwick v. Barbae Lou, Inc., 69 Ohio St. 2d 222, 229 (1982); Brookman v. Northern Trading Co. (Franklin Co. 1972), 33 Ohio App. 250, 253.

2. A Plaintiff's Right to Unilaterally Dismiss Is Adequately Protected Under the Plain Language of Rule 41(A)(1)(a)

The policy referenced by Respondents—the right of a litigant to unilaterally, voluntarily dismiss his or her claims—is already afforded far more protection under Ohio's Civil Rule 41(A) than under its federal counterpart, which is the version of the rule most prevalent in the courts throughout the 50 states. Federal Rule 41(A) permits a plaintiff to unilaterally, voluntarily dismiss only prior to the filing of an answer or motion for summary judgment. See Fed. R. Civ. P. 41(a) (2011). Thus, in federal court (and in most other states),⁴ a plaintiff's right to unilaterally dismiss is cut off very early in the litigation process. By contrast, Ohio Civil Rule 41(A)(1)(a) grants a plaintiff until the commencement of trial to unilaterally dismiss.

However, although the deadline under the Ohio rule is later in the progression of the lawsuit, once the deadline passes, the language is equally unequivocal as the federal rule. Just as there is no mechanism by which a litigant in federal court can “undo” the filing of an answer or motion for summary judgment, Ohio Civil Rule 41 does not provide any means by which the commencement of trial can be “undone” or “reset.” See Rule 41(A)(1)(a); see also Standard Oil Co. v. Grice (Darke Co. 1975), 46 Ohio

⁴ This is the rule in the Federal Courts across the United States, and in thirty states and the District of Columbia.

App. 2d 97, 101. In essence, Respondents' position pretends that the "commencement of trial" limitation does not even appear in the Ohio Rule's wording.

B. The Proper Mechanism for Voluntary Dismissal After the Commencement of Trial Is by Stipulation or Motion Under Rule 41(A)(1)(b) or 41(A)(2)

Respondents' argument also ignores the fact that Rule 41 already provides a ready means for voluntary dismissal after the commencement of trial—either by stipulation or by motion. The reasons for requiring a plaintiff to either obtain a stipulation or file a motion after trial has commenced is to afford the trial court an opportunity to control the terms of such belated dismissals, to prevent prejudice to the other parties, and to prevent waste of the court's resources.

Respondents' assertion that the "double dismissal rule" is the only limitation on unilateral, voluntary dismissals under Rule 41(A) is mistaken. By its plain language, Ohio Civil Rule 41(A) clearly imposes two restrictions on a plaintiff's otherwise absolute right to unilaterally and voluntarily dismiss his or her claims: (1) the "double dismissal rule"; and (2) the commencement of trial. With regard to the latter, in order to voluntarily dismiss his or her claims after trial has commenced, Ohio law clearly provides that a "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, 69 Ohio St. 2d at 229. As this Court has explained, this requirement that post-commencement-of-trial dismissals be obtained by motion ensures that "the possibility for plaintiff abuse is almost entirely mitigated" because such dismissals are "subject totally to the control of the court, acting within its sole discretion." Id.

This important role of the trial court has been explained by several Ohio state and federal courts interpreting post-commencement of trial dismissals. For example, as the court explained in Douthitt, “[w]here dismissal is not possible pursuant to *Civ. R. 41(A)(1)*, an action may not be dismissed ‘at the plaintiff’s instance and request except upon order of the court and upon such terms and conditions as the court deems proper.’” Douthitt, 44 N.E.2d at 1070-71 (quoting Ohio R. Civ. P. 41(A)(2)). Interpreting identical language in Federal Civil Rule 41(A)(2), the Sixth Circuit has further explained that “[t]he primary purpose of the rule in interposing the requirement of court approval is to protect the nonmovant from unfair treatment.” Grover v. Eli Lilly and Co., 33 F.3d 716, 718 (6th Cir. 1994).

In assessing the potential prejudice a dismissal may cause to the nonmoving defendant, Grover explained that “a court should consider such factors as 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. Here, of course, the trial court was deprived of the opportunity to make this analysis due to Respondents’ improper unilateral post-commencement of trial dismissal.

C. Like Ohio’s Civil Rule 41(A), the Principal Out-of-State Authorities Relied Upon by Respondents Permit Post-Commencement-of-Trial Dismissals Only by Motion, Allowing the Trial Court to Control the Terms of Dismissal and Protect the Interests of All Parties

A closer examination of the out-of-state authorities relied upon by Respondents further reinforces the requirement that post-commencement-of-trial voluntary dismissals must be made *via* motion rather than by unilateral notice. For instance, the case

principally relied upon by Respondents, Kilpatrick v. First Church of the Nazarene, 531 N.E.2d 1135 (Ill. App. 1988), dealt with a dismissal by motion, rather than a unilateral notice of dismissal like that under Rule 41(A)(1)(a). See id. at 1136 (“Plaintiffs ... moved for a voluntary dismissal. ... The motion was granted over defendant’s objection.”).⁵ Requiring motions affords Illinois trial courts the opportunity to ensure that plaintiffs are not attempting “to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit,” which Illinois procedural rules expressly prohibit. See Illinois Supreme Court Rule 219(e), 166 Ill. 2d R. 219(e); see also Morrison v. Wagner, 729 N.E.2d 486, 488 (Ill. 2000) (citing 735 ILCS § 5/2-1009(b)).

Like Ohio Civil Rule 41(A)(1)(b) and (A)(2), the Illinois statute at issue imposes no time limit on the post-commencement-of-trial right to dismiss by stipulation or by moving the court for an order. See 735 ILCS § 5/2-1009(c). That is not, however, what Respondents did here. The rationale behind the Ohio and Illinois rules is the same: filing a motion affords the trial court an opportunity to control the terms of such late-hour dismissals in order to ensure that other parties are not prejudiced, that evidentiary rulings are addressed, and that any potentially dispositive pending motions are resolved.

Indeed, the Illinois statute at issue in Kilpatrick, which is quoted on page 3 of Respondents’ brief, expressly supports the Petitioners’ arguments here, providing in pertinent part, that “[a]fter 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

⁵ See also Valdovinos v. Luna-Manalac Med. Ctr., 328 Ill. App. 3d 255, 268 (Ill. Ct. App. 2002) (“Pursuant to section 2-1009, three requirements must be met in order for a plaintiff to voluntarily dismiss her case without prejudice as of right: 1) the **plaintiff must move for the voluntary dismissal** prior to

(2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof.” 735 ILCS § 5/2-1009 (emphasis added). The Illinois statute at issue in Kilpatrick also expressly gives a trial court the discretion, “where a previously filed defense motion could result in a final disposition of the cause of action if ruled upon favorably by the court, . . . to hear and decide that motion before ruling on the plaintiff's motion for voluntary dismissal.” Morrison, 729 N.E.2d at 488 (citing 735 ILCS § 5/2-1009(b)). Moreover, Illinois Supreme Court Rule 219(e), which Illinois courts apply in conjunction with Section 2-1009, expressly ensures that voluntary dismissals are not used as an artifice to escape discovery obligations or evidentiary rulings:

A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. . . . The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, opinion witness fees, reproduction costs, travel expenses, postage, and phone charges.

166 Ill. 2d R. 219(e) (emphasis added); see also Morrison, 729 N.E.2d at 488. Thus, the Illinois authorities principally relied upon by Respondents expressly require post-commencement dismissals to be entered upon motion to the court. This way, the trial court may use its discretion and its intimate knowledge of the circumstances to control the terms of the dismissal and prevent prejudice to the other parties and prevent waste of judicial resources. See id.⁶

the beginning of trial or hearing; 2) the plaintiff must give proper notice; and 3) the plaintiff must pay costs.”) (citing 735 ILCS § 5/2-1009) (emphasis added).

⁶ Like Kilpatrick, the other cases relied upon by Respondents also fail to support their position. For instance, the 120-year-old case Phelps v. Winona & St. Peter R.R. Co., 35 N.W. 273, 274-75 (Minn. 1887), and pre-civil rules case Bolstad v. Paul Bunyan Oil Co., 9 N.W.2d 346, (Minn. 1943), dealt with a situation where a defendant had moved under a since-repealed Minnesota statute to have judgment set aside “notwithstanding a disagreement of the jury.” See Bolstad, 9 N.W.2d at 348 (explaining that “[a]ll that the statute [former Minn. St. § 605.06] intends is that the defendant should have an opportunity to move for judgment *non obstante*. When he has done that, he has exhausted the right which the statute

D. Respondents' General Discussion of the Effects of Mistrials in Other Contexts Is Irrelevant

The plain language of Rule 41(A)(1)(a) and (A)(2) requires no further interpretation and 41(A)(1)(a) contains no "mistrial" exception. Respondents' lengthy discussion of the effect of a mistrial in various disparate contexts is thus irrelevant and offers no guidance here. Indeed, none of Respondents' mistrial cases support the assertion that a mistrial renders the commencement of trial a nullity in the context of a plaintiff's right to unilaterally dismiss without prejudice under Ohio Civil Rule 41(A)(1)(a). None of the cases was rendered by an Ohio court, none of them interpreted Ohio Civil Rule 41 or any rule with identical language, and, most importantly, none involved an attempted unilateral, voluntary dismissal following a mistrial. Instead, Respondents' cited cases address vastly different issues, such as the effect of a mistrial on a criminal defendant's right to a speedy trial or on certain evidentiary or procedural rulings.⁷

To support their broad assertion that "a mistrial wipes the procedural slate clean," Respondents cite a litany of cases from other jurisdictions, apparently hoping to cast the appearance of overwhelming authority. Even a cursory review of the numerous criminal

affords him."). In each case, the defendant was granted a new trial. See id. Of course, the statute and scenario there are not at issue here, and Minnesota has since adopted its own Rule 41 (in 1951), which mirrors the federal rule's language, only allowing a unilateral dismissal without prejudice prior to "service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs" Minn. R. Civ. P. 41.01 (2010).

Similarly, Delta Air Lines, Inc. v. Van Diviere, 384 S.E.2d 272, 273 (Ga. App. 1989), was decided under Georgia's wholly dissimilar version of Rule 41, which at the time expressly allowed for voluntary dismissal without prejudice "at any time before the plaintiff rests his case." O.C.G.A. § 9-11-41(a) (1986). Georgia now requires any unilateral notice of dismissal to be filed "before the first witness is sworn." Civil Practice Act § 9-11-41(a)(1).

⁷ Interestingly, Respondents appear to acknowledge and concede that evidentiary rulings do in fact survive a mistrial and carry their application forward to the retrial, as Respondents make no effort to refute the authorities cited by Ford for this proposition. See Respondents' Brief at 5 ("[I]t is immaterial to the question at hand whether *evidentiary* rulings survive a mistrial.").

cases and handful of civil cases cited by Respondents reveals, however, that most have been quoted out of context and none support the stated proposition.

For example, Respondents cite Zemunski v. Kenney, 808 F. Supp. 703 (D. Neb. 1992) (“Kenney”), but the language incorrectly attributed to Kenney is actually from another case, U.S. v. Mischlich, 310 F. Supp. 669 (D.N.J. 1970). In Mischlich, the court held that a criminal defendant who had waived a venue defense in a first trial that had ended in a mistrial could raise the defense in the retrial. See Mischlich, 310 F. Supp. at 673. There was no discussion regarding the availability or effect of a unilateral voluntary dismissal in a civil case, nor was the effect of a mistrial on the prosecution’s ability to dismiss at issue.⁸

In short, the cases cited by Respondents stand for a number of wholly unrelated and inapposite propositions, including the following:

- Following a mistrial, the prosecution may assert new theories upon retrial and is not limited to pursuing the theories set forth in the initial trial. People v. Bowman, 194 N.W.2d 36, 40 (Mich. App. 1971);
- A mistrial does not bar re-prosecution or implicate double jeopardy. See Commonwealth v. Mulholland, 702 A.2d 1027, 1035-36 (Pa. 1997); People v. Cummings, 362 N.E.2d 415, 416-17 (Ill. App. 1977) (retrial “neither places the defendants in double jeopardy nor violates due process”).
- In a criminal case, evidentiary and procedural rulings made by the court prior to a mistrial are not binding and may be reopened on retrial. See People v. Sons, 78 Cal. Rptr. 3d 679, 687 (Cal. App. 2008); State v. Garrison, 860

⁸ The same is true of all of the other criminal law decisions Respondents claim were “virtually identical” to Kenney. See U.S. v. Mauskar, 557 F.3d 219, 225 (5th Cir. 2009) (holding that the failure to raise a defense prior to mistrial did not bar the defendant under Federal Rule of Criminal Procedure 12 from raising the defense in the retrial); U.S. v. Pappas, 445 F.2d 1194, 1201 (3rd Cir. 1971) (relied upon by the Mauskar court) (same); U.S. v. Didier, 401 F. Supp. 4, 6 (S.D.N.Y. 1975) (mistrial revived defendant’s right to a speedy trial); U.S. v. Gladding, 265 F. Supp. 850 (S.D.N.Y. 1966) (cited in Didier) (same).

Another cited case, City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F. Supp. 1328 (N.D. Ohio 1981), actually distinguished and limited Mischlich, holding that dispositive rulings survived a mistrial. This holding clearly cuts against Respondents’ overbroad assertion that a mistrial “wipes the slate clean.”

P.2d 610, 615 (Hawaii App. 1993); State v. Smith, 518 S.E.2d 294, 296 (S.C. App. 1999); State v. Harris, 679 S.E.2d 464, 468 (N.C. App. 2009).

- A jury's findings prior to mistrial do not govern upon retrial. Powers v. State, 401 A.2d 1031, 1040 (Md. 1979) (A "jury's failure to agree, which results in a mistrial, does not establish any facts, and thus cannot establish facts inconsistent with those established by its verdicts of acquittal.").
- The prosecution may use evidence in the retrial that it did not present prior to mistrial. State v. VanDyken, 791 P.2d 1350, 1358 (Mont. 1990).
- A criminal defendant's right to a speedy trial survives a mistrial. Pickle v. Bliss, 418 P.2d 69, 74 (Okla. Cr. 1966).⁹

Moreover, like the City of Cleveland case, several of Respondents' cited cases note that a mistrial does not, in fact, "wipe the slate clean." See Mulholland, 702 A.2d at 1035-36 ("not all of the original trial court's pretrial rulings are subject to relitigation. ... [R]ulings relating to legal questions determinative of the 'law of the case' should not be reopened."); Smith, 518 S.E.2d at 296; Harris, 679 S.E.2d at 468; see also City of Cleveland, 538 F. Supp. at 1331 (explaining that the holding in Mischlich is limited to evidentiary issues and that "dispositive rulings by the trial court" survive mistrial).¹⁰

Respondents have cited no authority for the proposition that a "mistrial" exception should be written into Ohio Civil Rule 41(A)(1)(a). Rules 41(A)(1)(b) and 41(A)(2) already provide a ready means for voluntary post-commencement dismissals—either by stipulation signed by all parties or by a motion and controlled by the trial court. Moreover, such an exception would conflict with the important policies underlying Ohio

⁹ The quoted language from State v. Meyer, 953 S.W.2d 822, 825 (Tex. App. 1997), was taken from dicta discussing the issue of whether a trial court may rescind an order of mistrial.

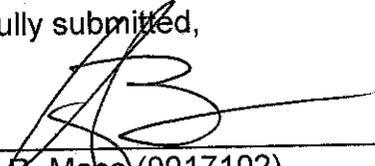
¹⁰ This is consistent with numerous Ohio criminal cases that have similarly held that evidentiary rulings and procedural decisions actually survive mistrial, and that in the event of a mistrial, "[t]he principles governing the continuance of an action after commencement of a trial are applicable." State v. Clemons, 1988 Ohio App. LEXIS 1256, *18 (Allen Co.); see also State v. Harris, 1984 Ohio App. LEXIS 9033 (Lucas Co.); State v. Anderson, 2006 Ohio 4618 (Mahoning Co.); State v. West, 1999 Ohio App. LEXIS 5516 (Franklin Co.).

Civil Rule 41. For all of these reasons, this Court should answer the certified question in the negative.

III. CONCLUSION

As this Court has previously explained, the plain and unequivocal language of Ohio Civil Rule 41(A)(1)(a) is intended to prevent litigants from unilaterally voluntarily dismissing after the commencement of trial in order to judge shop, jury shop, and retry their claims in what they perceive to be more favorable trial settings. The rule prevents the waste of judicial resources and prejudice to opposing parties, and the rule should not be applied in a way that would allow a party to unilaterally dismiss to avoid an appeal after trial has begun. This Honorable Court should reinforce its previous policy declarations and answer the certified question from the District Court in the negative, in accordance with the plain language of Rule 41(A)(1)(a).

Respectfully submitted,



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PROOF OF SERVICE

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