ORIGINAL

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-Movants-Petitioners.

Preliminary Memorandum on Certified Question of Law from the United States District Court for the Southern District of Ohio

PRELIMINARY MEMORANDUM OF DEFENDANT-MOVANT-PETITIONER TRW VEHICLE SAFETY SYSTEMS INC.

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I. PRELIMINARY STATEMENT

The United States District Court for the Southern District of Ohio has certified the following question to this Court: "Where a jury has been empaneled and sworn and the trial has commenced for purposes of Ohio Civ. R. 41(A)(1)(a), and the trial court subsequently declares a mistrial, does Rule 41(A)(1)(a) permit the plaintiff to unilaterally voluntarily dismiss his or her claims without prejudice?" This is a question of Ohio law that may be determinative of the proceeding, and there is no controlling precedent from Ohio Supreme Court decisions—but it is one of great public interest for underlying policy reasons on which this Court has previously spoken.

Indeed, petitioner TRW Vehicle Safety Systems Inc. ("TRW") believes that under the plain and unequivocal language of Civil Rule 41(A)(1)(a) itself and this Court's prior clear articulation of the policy considerations behind it, the certified question should be answered in the negative. The rule provides no exceptions, and this Court has previously explained that its unconditional language was purposefully chosen, at least in part, to prevent litigants from forum shopping and repeatedly retrying cases in an effort to obtain the most favorable trial setting.

This case implicates the exact policy concerns previously noted by this Court, as plaintiff's counsel in this case is engaged in the very type of judge and jury shopping that Rule 41(A)(1)(a) was designed to prevent. After more than five years of litigation, after a jury was empanelled and sworn, and after weeks of testimony, the plaintiff's counsel, who was clearly displeased with the trial court and its rulings, procured a mistrial in order to move the trial to a different forum, rather than properly completing the trial and pursuing an appeal. Following plaintiff's unilateral filing of a purported voluntary dismissal, plaintiff refiled the exact same claims in a different forum—federal

court—in an attempt to avoid the original trial judge. TRW therefore respectfully requests that this Court accept this important certified question and reaffirm its previous policy statement by answering the certified question in the negative.

II. BACKGROUND

On October 17, 2003, plaintiff filed a complaint against Defendants TRW and Ford Motor Company (collectively, "Defendants") in the Hamilton County Court of Common Pleas, Case No. A0307981 (the "state court action").[1] More than five-and-a-half years later, the state court action came to trial following hearings on numerous motions in limine. Among its rulings at trial, after the jury was empaneled and sworn, the trial court granted several motions in limine filed by both TRW and co-defendant Ford Motor Company ("Ford") to exclude certain testing and demonstrations that had been conducted by plaintiff's occupant restraints expert, Steven Meyer. See, e.g., June 5, 2009 Order Excluding Testimony of Steven Meyer (the "June 5 Order"), a copy of which was attached to TRW's March 10, 2011 District Court Brief on the Issue of Certification (the "TRW Cert. Brief") at Tab B. The trial court's exclusion of these improper seat belt tests was based on its finding that the two-dimensional, static tests at issue did not relate to real-world accident conditions and were thus unreliable. See id.

Following several days of motion hearings and over a week of jury voir dire, trial commenced in the state court action on May 28, 2009, when a jury was impaneled and sworn. After almost a week of evidence, plaintiff called his expert Meyer to the stand on June 3, 2009. When asked in voir dire about his proposed alternative seat design,

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[1] Although the facts underlying Plaintiff's claims are not relevant or pertinent to the issue at bar, a brief procedural history is provided here to highlight and place in context the implication of the important policy considerations underlying the "commencement of trial" language of Rule 41(A)(1)(a).

Meyer testified that he was "not certain" about whether he had ever tested the proposed seat design and acknowledged that no such testing had been disclosed or discussed at his deposition. See June 3, 2009 Trial Transcript, a copy of which is attached to Ford's Certification Reply Brief to the District Court's Order of March 3, 2011 ("Ford Cert. Brief") as Exhibit B, at 93:4-16, 114:19-115:8. On the following day, however, without any foundation having been laid, plaintiff's counsel elicited testimony from Meyer that he had, in fact, tested the proposed seat design at issue and formed a resulting opinion about its viability. See June 4, 2009 Trial Transcript, Ford Cert. Brief Ex. C, at 82:17-83:12; see also July 13, 2009 Hearing Transcript at 5:22-6:8. The trial court would later remark that this line of questioning had "looked like a trial tactic to poison the jury." June 8, 2009 Trial Transcript, Ford Cert. Brief Ex. E at 52:1-2.

Citing this conduct, on June 5, 2009, the trial court excluded Meyer's testimony and opinions and instructed the jury to disregard his prior testimony. See June 5, 2009 Trial Transcript, TRW Cert. Brief Tab A, Ford Cert. Brief Ex. D at 4:25-7:8, 8:10-17; see also TRW Cert. Brief Tab B. Plaintiff's counsel subsequently moved for Meyer to be reinstated, moved in the alternative for a mistrial, and also moved for the recusal of the trial judge. See TRW Cert. Brief. Tab A, Ford Cert. Brief Ex. D at 18:10-13 ("We will be moving for mistrial on Monday with supporting documentation and we will ask the Court to remove himself as Judge in this matter.").

On June 8, 2009, after the court limited its exclusion of Meyer, plaintiff withdrew his motion for recusal but renewed his motion for a mistrial, and the trial court acceded to plaintiff's request, declaring a mistrial over TRW's strenuous objection. See TRW Cert. Brief Tab B; see also Ford Cert. Brief Ex. E at 69:11-70:3; July 23, 2009 Order

Vacating the Exclusion of Steven Meyer, TRW Cert. Brief Tab C; July 28, 2009 Order Allowing Testimony in Part and Disallowing Testimony in Part, TRW Cert. Brief Tab D. Expressing continuing concerns about Meyer's veracity and forthrightness, the trial court subsequently scheduled additional hearings. See June 8, 2009 Trial Transcript, Ford Cert. Brief Ex. E, at 2:12-20, 60:24-61:1 ("I still believe the witness is very evasive."), 79:6-7 (expressing belief that Meyer had perpetrated a "fraud on the Court"); see also TRW Cert. Brief Tab A, Ford Cert. Brief Ex. D at 56:13-14 (stating belief that Meyer had "misled the Court purposefully"), 33:18-34:8 (finding that plaintiff's counsel knew "he was going to ask [Meyer] 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."). At a hearing on July 13, 2009, the trial court established a schedule that included detailed expert disclosures and several days of hearings on Rules 702 and 703, among other issues, that were to begin on October 19, 2009.

On September 30, 2009, with Meyer's seat belt testing still excluded and his alternative seat design testimony having been limited, TRW filed a motion to exclude all of Meyer's automotive design testimony based on his lack of any automotive design experience. See September 30, 2009 Motion to Exclude Automotive Design Testimony by Steven Meyer, TRW Cert. Brief Tab G; see also TRW Cert. Brief Tab B. Roughly a week later, and just a few weeks before the scheduled hearings were to be held, plaintiff filed a purported unilateral, voluntary dismissal of all claims against Defendants. See October 8, 2009 Notice of Dismissal, TRW Cert. Brief Tab E. Both Defendants promptly filed responses to plaintiff's unilateral notice of dismissal, noting that the time period for

voluntary dismissal without prejudice had expired upon the commencement of trial. Although TRW's response pointed out the procedural error and the dispositive nature of plaintiff's filing, plaintiff chose to file no reply. See TRW's Response to October 8 Filing, TRW Cert. Brief Tab F.

Instead, on or about September 30, 2010, plaintiff refiled his complaint in a different forum, the United States District Court for the Southern District of Ohio. There, plaintiff asserted the same claims against Defendants that he had previously asserted and pursued well beyond the commencement of trial in the state court action.

III. SUMMARY OF ARGUMENT ADDRESSING THE CERTIFIED QUESTION OF LAW

THE CLEAR AND UNEQUIVOCAL LANGUAGE OF RULE 41(A)(1)(a) DOES NOT ALLOW A PLAINTIFF TO UNILATERALLY, VOLUNTARILY DISMISS HIS OR HER CLAIMS WITHOUT PREJUDICE AFTER TRIAL HAS COMMENCED

The certified question presented to this Court, which is potentially dispositive of the refiled District Court action, implicates an important policy consideration previously noted by this Court—namely, preventing litigants faced with unfavorable rulings from unilaterally, voluntarily dismissing their claims following the commencement of trial in order to move the trial to a different forum rather than completing the trial and pursuing an appeal. Under Ohio Rule of Civil Procedure Rule 41(A)(1)(a), the only way a plaintiff may unilaterally, voluntarily dismiss his or her claims without prejudice is by "filing a notice of dismissal at any time before the commencement of trial." Ohio R. Civ. P. 41(A)(1)(a) (2010) (emphasis supplied). For purposes of Rule 41(A)(1)(a), "a civil trial commences when the jury is empaneled and sworn." Frazee v. Ellis Bros., Inc. (Knox Co. 1996), 113 Ohio App. 3d 828, 831. As numerous Ohio courts have recognized, the language of Rule 41(A)(1)(a) is clear and unambiguous:

> The language of Civil Rule 41(A)(1)(a) 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 trial.

Standard Oil Co. v. Grice (Darke Co. 1975), 46 Ohio App. 2d 97, 101. By allowing plaintiffs to voluntarily dismiss without prejudice at any point prior to the commencement of trial, the rule is more liberal than its federal analogue, which allows plaintiffs to unilaterally, voluntarily dismiss without prejudice only by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." See FRCP 41(a)(1)(A)(i).

As this Court has previously explained, Rule 41(A)(1)(a)'s clear and unequivocal "commencement of trial" language was adopted, at least in part, to prevent a scenario in which "plaintiffs could 'try and retry their causes indefinitely until the most favorable circumstances for submission were finally achieved.'" Frysinger v. Leech (1987), 32 Ohio St. 3d 38, 42 (quoting Beckner v. Stover (1969), 18 Ohio St. 2d 36, 40). By setting a more liberal deadline than the "answer or motion for summary judgment" language of its federal analogue, the Ohio rule provides a significant accommodation for plaintiffs and satisfies the policy of encouraging voluntary dismissals, while also upholding its central purpose—to prevent litigants from repeatedly retrying cases.

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, there is no provision in Ohio Rule 41 by which a mistrial or any other event "undoes" or "resets" the clock on the

commencement of trial. See Rule 41(A)(1)(a); see also Standard Oil, 46 Ohio App. 2d at 101.[2]

This case presents an ideal opportunity for the Court to reinforce the policy concerns expressed in Frysinger and stop parties from procuring and then using mistrials as a way to escape judges, juries, or rulings they do not like and shopping for what they perceive to be more favorable fora and/or trial settings. Although the language of the rule provides no exceptions, plaintiff would have this Court carve one out in the case of a mistrial. As this case clearly demonstrates, however, doing so would allow parties to do precisely what the Frysinger Court explained that Rule 41(A)(1)(a) is intended to prevent.

Here, as the trial court clearly recognized, it was the conduct of plaintiff's counsel that precipitated the mistrial, and plaintiff's reason for unilaterally, voluntarily dismissing is demonstrated by his decision to refile in a different court. Faced with the exclusion of

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[2] As the Standard Oil court explained, the decision by the civil rules committee and Ohio Supreme Court to depart from the federal rule and incorporate the phrase "before the commencement of trial" was purposeful and deliberate:

> The original draft of *Rule 41*, prepared by a subcommittee, contained the language of the federal rule. Objections were expressed by attorney members to the proposed time limitation upon the right of a claimant to voluntarily dismiss his action without prejudice at least once. The reasons for voluntary dismissals as well as the policy of the courts to encourage terminations were discussed and resulted in the adoption of a time limitation described as "before the case is called for trial," which appears in the committee's working draft released in early 1969. A "call" for trial apparently contained local implications subject to varied interpretations; however, it appears it was intended to mean before voir dire if before a jury. The version approved by the Supreme Court amended the language to "before the commencement of trial."

Id. at 100. Thus, the "commencement of trial" was carefully chosen as an absolute cutoff to prevent parties from taking advantage of this already lenient rule. See Frysinger, 32 Ohio St. 3d at 42.

Meyer's unreliable testing, the limitation of his testimony, the prospect of a formal Rule 702/703 hearing, a pending motion to exclude all of Meyer's automotive design testimony, a schedule that required detailed expert disclosures, and a judge plaintiff's counsel had filed a motion to have removed from the case, plaintiff filed a notice of dismissal in the state court action in an effort to evade the original trial court and shop for what plaintiff's counsel considered a more favorable forum. This is precisely the type of forum shopping, tactics, and gamesmanship that this Court warned of in Frysinger. Plaintiff should have continued through verdict, and if he thought that any of the trial court's rulings were improper, then he could have taken an appeal.

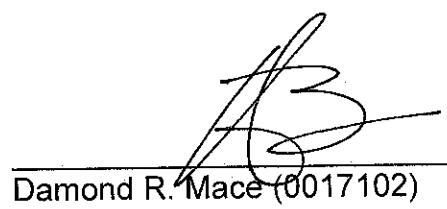
In short, Ohio Rule 41(B)(3) provides that "any dismissal not provided for in this rule . . . operates as an adjudication upon the merits." Ohio R. Civ. P. 41(B)(3) (2010). The dismissal in this case, which fell outside of the plain, unequivocal language of Rule 41(A)(1)(a), is thus a dismissal on the merits, and a ruling on the certified question in accordance with this Court's previous policy declarations would be dispositive of the refiled District Court action. Accordingly, this Court should accept the certified question and answer it in the negative, reaffirming the policy articulated in Frysinger, and direct the District Court to enforce Rule 41(A)(1)(a) in accordance with its plain language.[3]

[3] Although plaintiff relied at the District Court level on a handful of civil and criminal cases from other jurisdictions in an attempt to counter the above plain-language interpretation of Rule 41(A)(1)(a), none of those extra-jurisdictional decisions applied or interpreted the Ohio rule or any rule with similar "commencement of trial" language in the context of a unilateral, voluntary dismissal. Indeed, no court has inferred or created a mistrial exception to any rule precluding the unilateral, voluntary dismissal of a plaintiff's claims after the commencement of trial.

IV. CONCLUSION

The question certified by the District Court is one of great public importance that beckons a further declaration by this Court. As this Court has previously explained, Rule 41(A)(1)(a) is intended to prevent litigants from unilaterally, voluntarily dismissing after the commencement of trial in order to retry their claims in what they perceive to be more favorable trial settings. That is precisely what plaintiff seeks to do here, and this Court should therefore accept the certified question from the District Court, reinforce its previous policy declaration by answering the certified question in the negative, and instruct the District Court to apply Ohio Rule 41(A)(1)(a) in accordance with its plain language, which will result in the District Court granting TRW's motion to dismiss.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of April, 2011, a true and accurate copy of the foregoing Preliminary Memorandum of Defendant-Movant-Petitioner TRW Vehicle Safety Systems Inc. was served by regular U.S. mail, postage prepaid, upon the following:

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