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The Effect of a Mistrial on Dispositive Rulings

You represent the defendant in an action involving contract and tort claims. At trial, you move for a directed verdict on the tort claims. The court grants your motion and dismisses the plaintiff's tort claims. The court then declares a mistrial because the jury cannot reach a verdict on the contract claims.

At the retrial, can the plaintiff litigate the previously dismissed tort claims? This article examines the state of the law on this issue and proposes that a mistrial should not affect dispositive rulings made by the court in civil actions.

Initially, it should be noted that the New Jersey Supreme Court has not addressed the effect of a mistrial on dispositive rulings made during a trial.

In fact, the only substantive discussion on the effect of a mistrial is found in the Appellate Division decisions of *State v. Hale*, 127 N.J. Super. 407 (App. Div. 1974) and, to a lesser extent, *Wilkins v. Hudson County Jail*, 217 N.J. Super. 39, 44 (App. Div. 1987), certif. denied, 109 N.J. 520 (1987).

In *State v. Hale*, the defendant was being tried on charges of robbery and pos-

session of a firearm. Subsequent to a *Miranda* hearing in the first trial, the court barred the defendant's confession from being admitted in evidence.

The trial later ended in a mistrial when the jury was unable to reach a verdict. At the second trial, after another *Miranda* hearing, the court permitted the defendant's confession to be admitted in evidence. The defendant was found guilty and, on appeal, challenged the admissibility of his confession.

The Appellate Division, in upholding the trial court's decision to admit the defendant's previously excluded confession in evidence, stated that the parties were not bound by the evidentiary rulings made during the first trial:

The effect of a jury disagreement mandating the declaration of a mistrial and a subsequent trial negates the finality of any decision or ruling reached in the first trial. A mistrial is not a judgment or order in favor of any of the parties. It lacks the finality of a judgment, and means that the trial itself was a nullity. ... The declaration of mistrial rendered nugatory all of the proceedings during the first trial. The [parties] were returned to their original positions as if there had not been a trial. Each was entitled to offer evidence and to make motions and objections without limitation to that which had

been offered or made at the trial, and without being bound by the prior rulings of the court with respect thereto. *Hale*, 127 N.J. Super. at 412-13.

Similarly, in *Wilkins v. Hudson County Jail*, the trial court entered a pretrial order restricting the plaintiff's right to present expert testimony at trial due to repeated discovery violations. During the trial, the plaintiff's counsel sought to elicit expert testimony from a witness despite admonitions from the court that the witness was testifying solely as a fact witness.

The court declared a mistrial when the plaintiff's counsel continued to elicit opinion testimony from the witness. At a second trial before a different judge, the court refused to allow the plaintiff to present expert testimony based upon the pretrial order entered prior to the first trial. The Appellate Division — briefly noting *Hale* in its decision — held that it was within the second court's discretion whether or not to adhere to the first court's ruling. *Wilkins*, 217 N.J. Super. at 44.

Evidentiary vs. Dispositive Rulings

Both *Hale* and *Wilkins* focused on the effect of a mistrial on *evidentiary* rulings made during a trial and concluded that the court in the second trial is not bound by the *evidentiary* rulings made by the court

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in the first trial. Neither case addressed the effect of a mistrial on dispositive rulings; that is, on claims adjudicated on the merits and dismissed at trial after a full and fair opportunity to be heard.

This article proposes that *Hale* and *Wilkins* do not extend to dispositive rulings made after a full and fair hearing. This is true especially when the event causing or leading to the mistrial in no way taints or effects the presentation of the evidence or the court's dispositive ruling. Dispositive rulings, such as directed verdicts, should survive the declaration of a mistrial and preclude a party from asserting the dismissed claims at a subsequent trial.

This proposition is buttressed by the *Hale* court's reliance on *United States v. Mischlich*, 310 F. Supp. 669 (D.N.J. 1970), aff'd sub. nom., *United States v. Pappas*, 445 F.2d 1194 (3d Cir.), cert. denied, 404 U.S. 984 (1971). In *Mischlich*, the defendant was charged with making false representations. The first trial in the federal court in New Jersey ended in a mistrial.

At the second trial, the defendant for the first time asserted improper venue as a defense and argued that the trial should be held in a federal court in Pennsylvania. The prosecution claimed that the defendant had waived the defense because it had not been raised at the first trial.

Analyzing the effect of the mistrial on the defendant's ability to assert a defense not raised during the first trial, the court concluded that the defendant could assert improper venue as a defense at the second trial. In so holding, the court stated:

"The declaration of a mistrial renders nugatory all trial proceedings with the same result as if there had been no trial at all. The situation which exists is analogous to that which results from an appellate reversal and remand for new trial. The parties are returned to their original positions and, at the new trial, can introduce new evidence and assert new defenses not raised in the first trial. *Mischlich*, 310 F. Supp. at 672 (citations omitted).

The *Mischlich* court did not address whether a party could re-assert claims that had been disposed of on the merits during the first trial.

Principles supporting the author's proposition are also set forth in *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1328 (N.D. Ohio 1980),

where the court held that a directed verdict entered during a trial which later ended in a mistrial was binding upon the parties in a subsequent trial; and *Remco Inc. v. Faber Brothers Inc.*, 34 F.R.D. 259 (N.D. Ill. 1964), where the court held that an involuntary dismissal granted during a trial survives a mistrial of the case.

City of Cleveland interpreted and clarified *Mischlich*. *Mischlich*, as noted, was relied on by the Appellate Division in *Hale*. In *City of Cleveland*, the court, concluding that the plaintiff had failed to pro-

A strong argument can be made that a party should be precluded from reasserting any claim that was adjudicated on the merits and dismissed at trial after a full and fair opportunity to be heard.

duce sufficient evidence to sustain various claims, granted a directed verdict to the defendant on those claims.

Thereafter, the court declared a mistrial when the jury could not reach a verdict on the plaintiff's remaining claims. Prior to the retrial, the defendant moved to have the court recognize the dismissal of the plaintiff's claims as binding on the parties in any retrial.

In opposition to the defendant's motion, the plaintiff argued that a mistrial was the equivalent of no trial and that the parties remained free to relitigate even matters which were the subject of dispositive rulings during the first trial. *City of Cleveland*, 538 F. Supp. at 1330.

Observing that the plaintiff was "sim-

ply petitioning the Court for an opportunity to accomplish at the retrial that which it was unable to accomplish in the course of the earlier proceeding," the court unequivocally rejected the plaintiff's position. *Id.* The opinion reasoned that the function of the second trial was to allow a jury to determine only those claims that were not resolved during the original trial:

"[T]he fundamental purpose of a retrial is to afford a new jury an opportunity to reach a final disposition of only those issues which were left unresolved by the failure of the original jury to agree upon a verdict. That is to say, a mistrial occasioned by the jury's inability to arrive at a verdict does not convert those matters which were previously the subject of dispositive rulings by the trial court to matters the litigants are free to relitigate de novo in the second trial." *Id.* at 1330-31.

The court, therefore, found that "a retrial following a mistrial is a trial de novo only as to those issues actually remaining in controversy, i.e., those matters which were not the subject of a dispositive ruling by the trial court during the course of the earlier proceeding." *Id.* at 1331. In other words, a party having a full and fair opportunity to present its claim at the first trial should not be afforded another opportunity to do so.

"[A] contrary result would ignore the established principle that a litigant is generally entitled to but a single opportunity to present and prevail upon his claim; a principle which is fundamental to our justice system." *Id.*

In reaching its decision, the *City of Cleveland* court stressed that *Mischlich* was not as broad as its language might suggest because that case "does not address itself to instances where issues were actually raised and specifically resolved by the trial court in the course of the initial trial." *Id.* Rather, the court construed *Mischlich* to mean that "as to those issues left unresolved in the first trial, parties at the retrial are not limited by the evidence previously adduced or the tactics formerly employed in the earlier proceeding." *Id.*

The *City of Cleveland* court's reasoning is in accord with the Appellate Division's rulings in *Hale* and *Wilkins*. None of the cases involved a dispositive ruling made during a trial later ending in a mistrial. Rather, as noted, they involved evidentiary rulings. See *Hale*, 127 N.J.

Super at 410; *Wilkins*, 217 N.J. Super. at 46.

In *Remco*, the plaintiff's antitrust claim was dismissed at the close of its case due to its failure to present sufficient evidence. Thereafter, the court declared a mistrial. At the second trial, the plaintiff attempted to reassert the previously dismissed antitrust claim. The court refused to allow the plaintiff to reassert the claim because it was not viable at the time of the mistrial.

"The second trial is not intended to afford either party an opportunity to fortify a position it was unable to maintain in the previous trial. The second trial is limited to a presentation of evidence on issues upon which the jury at the first trial was unable to agree." *Remco*, 34 F.R.D. at 260.

Despite the apparent breadth of *Hale*, the author submits that a mistrial should not nullify dispositive rulings made by a court during a trial. As noted, there are compelling reasons why dispositive rulings should survive the declaration of a mistrial and preclude a party from asserting the dismissed claims at a subsequent trial.

The distinction between the effect of a mistrial on dispositive rulings as opposed to evidential rulings finds further support in *United States v. Todd*, 920 F.2d 399 (6th Cir. 1990).

There, the trial court precluded the government from introducing documentary evidence allegedly containing the outline of a money-laundering scheme. Thereafter, for unrelated reasons, the court declared a mistrial. The evidence was admitted in evidence during the subsequent trial.

The *Todd* court held that the trial court in the second trial "was not bound

by prior evidentiary rulings made during the course of a prior proceeding." *Id.* at 402. The court, citing *City of Cleveland*, stated:

"[W]e note that the law-of-the-case doctrine can be applied to rulings made in a case that ends in a mistrial. Otherwise, a court would be required to rule de novo on every issue previously decided in a prior proceeding that ends in a mistrial. This would be inefficient, particularly when the previous trial had progressed considerably. In such a situation the law-of-the-case doctrine would prove useful. A court may recognize and enforce prior rulings based on this doctrine, but also retains the power to reconsider previously decided issues as they arise in the context of a new trial." *Id.* at 404.

Third Circuit Weighs In

Finally, the author suggests that the Third U.S. Circuit Court of Appeals has implicitly applied the rationale expressed in *City of Cleveland* and *Remco* by recognizing that a claim dismissed on a directed verdict during a trial ending in a mistrial cannot be asserted during a retrial.

In *Kutner Buick Inc. v. American Motors Corp.*, 868 F.2d 614 (3d Cir. 1989), the plaintiff asserted claims for breach of contract and fraud in the inducement. The trial court granted a directed verdict on the fraud claim and sent the contract claim to the jury. The jury, however, could not agree on a verdict on the contract claim so the court declared a mistrial. The court then granted a directed verdict in favor of the plaintiff on the contract claim.

On the defendant's appeal, the Third

Circuit reversed and remanded the trial court's ruling with respect to the contract claim. *Id.* at 620. In doing so, however, the Third Circuit upheld the trial court's directed verdict on the fraud claim, thereby obviating the need for a retrial on that claim. *Id.*

Hence, the Third Circuit may have tacitly acknowledged that a mistrial subsequent to a properly entered directed verdict does not affect the validity of the directed verdict and the dismissed claim may not be reasserted at retrial.

Based on the above principles, the author submits that a strong argument can be made that a party should be precluded from reasserting any claim that was adjudicated on the merits and dismissed at trial after a full and fair opportunity to be heard.

This is especially so when the event causing or leading to the mistrial does not affect the presentation of the evidence supporting the claim or the court's ruling. *Hale* and *Wilkins*, involving evidentiary rulings, are clearly distinguishable and do not apply to dispositive rulings.

In conclusion, the argument to be made may be summarized as follows:

- The party had a full and fair opportunity to present the evidence supporting the claim at the first trial;
- The claim was adjudicated on the merits and dismissed at the first trial;
- The subsequent mistrial in no way tainted the presentation of the party's evidence in support of its claim (or the dismissal of the claim); and
- The dismissal of the claim therefore remains valid, notwithstanding the subsequent mistrial. ■