IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

KIM HILL, et al.,

Plaintiff,

v. Case No. A19E0007

FORD MOTOR COMPANY, et al.,

Defendant.

DEFENDANT FORD MOTOR COMPANY'S RESPONSE TO PLAINTIFFS' EMERGENCY MOTION TO DISMISS

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INTRODUCTION

Defendant Ford Motor Company ("Ford") respectfully seeks appellate review of the Order Granting-in-Part Plaintiffs' Post-Trial Motion for Sanctions and Assessing Jury Costs Against Defendant (the "Order"), issued on July 19, 2018, in the above-styled action. The Order prohibits Ford from offering defenses to liability at retrial, and holds:

> [t]hus, upon retrial of this case, the only issues that the Court will allow for jury determination are (1) whether there is 'clear and convincing evidence' that punitive damages should be imposed against Ford, (2) whether Mr. and/or Mrs. Hill endured pain and suffering, (3) the amount of compensatory damages, and (4) the amount of punitive damages, if any.

(Order at 7.) The Order is, in substance and effect, an order holding Ford in contempt of court and imposing sanctions for Ford's alleged violations of evidentiary rulings at trial. Accordingly, it is directly appealable pursuant to O.C.G.A. § 5-6-34(a)(2). For this reason alone, Plaintiffs' Emergency Motion to Dismiss should be denied.

Alternatively, the Order presents an exceptional case of great import in which judicial economy will be served by conducting appellate review before final verdict and judgment. *See Waldrip v. Head*, 272 Ga. 572, 575 (2000) (holding that Georgia appellate courts have the authority to review interlocutory orders where "the case presented an important issue of first impression concerning a recently

enacted statute for which a precedent was desirable, dismissal would deny the litigant of the right of appellate review in this state, or consideration of the trial court order as 'final' served the interest of judicial economy"). Ford does not seek review in order to delay trial. Rather, Ford seeks appellate resolution of an "issue of great concern, gravity, and importance to the public"—namely whether trial courts in Georgia are authorized to usurp the role of the jury and pre-decide a party's liability as punishment for its counsel's alleged violations of evidentiary rulings at trial.[1] Ford seeks appellate review of this issue now to avoid having to try this case for a third time if this Court determines that the sanctions imposed by the trial court are not permitted.

Plaintiffs urge dismissal of this appeal, arguing that it is settled law in Georgia that sanctions striking pleadings, precluding defenses, or declaring default—so-called civil "death penalty" sanctions—cannot be directly appealed. In doing so, Plaintiffs rely wholly on inapposite authority holding that *discovery* sanctions are interlocutory. In their eagerness to secure a *fast*,[2] rather than fair,

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[1] To make matters worse, if the ruling in this case stands, the trial court will instruct the jury that Ford acted with "a willful, and reckless, and a wonton disregard for life" (Order at 7), which will further usurp the jury's role and command a finding of punitive liability.

[2] Plaintiffs are in such a hurry to avoid an appeal that they urge the Court to disregard its own usual practice, which is to take no action until an appeal has been docketed unless such action is necessary to preserve the Court's jurisdiction or to prevent an issue from becoming moot. *See* Ga. Ct. App. R. 40(b) ("Generally, no

trial, Plaintiffs completely ignore the key distinction between this case and the authority on which they rely, which is that the conduct at issue here relates to an alleged violation of an *evidentiary* ruling. Indeed, without any authority to support their position, Plaintiffs resort to repeatedly mischaracterizing the holding in *Ford v. Gibson*.[3] Critically, there, this Court held that "[o]rders imposing discovery sanctions, but not holding a party in contempt, are not directly appealable." (*Gibson* Order, attached as Exhibit 1 to Plaintiffs' Emergency Motion, at 2.) Because the Order in this case does not address any discovery misconduct by Ford, *Gibson* is irrelevant. Plaintiffs do not and cannot cite to a single case in which a Georgia appellate court held that the imposition of civil death penalty sanctions as punishment for evidentiary violations is not directly appealable.

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order shall be made or direction given in an appeal until it has been docketed in this Court"); *Wilshin v. State*, 289 Ga. App. 683, 685 (2008) (noting that Court of Appeals will grant an emergency motion under Rule 40(b) only "in limited circumstances, . . . to preserve our jurisdiction or to prevent an issue from becoming moot"); *Copeland v. Continental Kewitt*, 218 Ga. App. 305, 305 n.1 (1995) ("While we could exercise our inherent power under Court of Appeals Rule 40(b) to prevent the issue from becoming moot by dismissing the appeal and remanding the case to the trial court, here we decline to do so in the interests of judicial economy.").

[3] Plaintiffs' Emergency Motion also mischaracterizes the facts of this case and the circumstances of the first trial. Because the only issue currently before the Court is whether the Order is directly appealable, Ford's Response is limited to that issue.

Because the Order in this case is not a discovery sanction but is instead, in substance and effect, an order holding Ford in contempt of court for its counsel's alleged violation of an evidentiary ruling, the Order is directly appealable. Moreover, the issue presented here—whether a trial court may issue death penalty sanctions to punish a party for its counsel's actions at trial—is a rare issue (one of first impression in Georgia) of such gravity and concern to the public that it warrants review by this Court. Finally, if the Court dismisses Ford's appeal, the trial court will proceed with trial on the issue of damages only, which will prove a wasteful endeavor if this Court finds error in the trial court's decision to impose death penalty sanctions against Ford. Review of the Order *now* is in the interest of judicial economy. For these reasons, Plaintiffs' Emergency Motion to Dismiss should be denied.

ARGUMENT AND CITATION TO AUTHORITY

I. THE ORDER IS DIRECTLY APPEALABLE BECAUSE IT IS, IN SUBSTANCE AND EFFECT, AN ORDER HOLDING FORD IN CONTEMPT.

A. Contempt Orders Are Directly Appealable.

Georgia law expressly authorizes a direct appeal from an order of contempt. O.C.G.A. § 5-6-34(a)(2); *Allison v. Wilson*, 320 Ga. App. 629, 635 (2013).[4] The

[4] Plaintiffs wrongly assert Ford "conceded" that a certificate of immediate review was required to appeal the Order. First, Ford's July 23 letter made no such "concession." Second, Ford was required to request a certificate of immediate

purpose of the court's inherent authority to hold persons or entities in contempt of the court is to compel obedience to the court's judgments, orders, and process. *See* O.C.G.A. § 15-1-3; *In re Orenstein*, 265 Ga. App. 230, 232 (2004) ("Constitutional courts of Georgia have inherent and legislative authority to punish for contempt, any person in disobedience of its judgments, orders, and processes.") (internal quotations omitted). Although the Court, at the urging of Plaintiffs' counsel, was careful not to say it was finding Ford in contempt, "the appealability of an order is determined, not by its form or the name given to it by the trial court, but rather by its substance and effect." *Am. Med. Sec. Grp., Inc. v. Parker*, 284 Ga. 102, 104 (2008).

B. <u>The Order Is a Contempt Order.</u>

1. <u>The Order Punishes Violation of Evidentiary Rulings.</u>

The Order begins by describing the conduct for which the trial court imposes its sanctions. The trial court focuses on Ford's "willful violation of a pretrial order prohibiting Ford's expert Dr. Thomas McNish from giving specific cause of death testimony," and states that Ford's "violation of the Court's order *in limine* was the culmination of Ford's continuing disregard for several pre-trial evidentiary rulings." (Order at 1.)

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review within ten days of the issuance of the Order. O.C.G.A. § 5-6-34(b). Ford's pursuit of alternative paths to appeal to preserve all of its rights does not change Georgia law permitting direct appeal of a contempt order.

Specifically, the Order addresses Ford's alleged violations of the following evidentiary rulings:

> (1) [the trial court's] order *in limine* of January 22, 2018 excluding evidence concerning Mr. and Mrs. Hill's use of seat safety belts, or lack thereof,
>
> (2) [the trial court's] order *in limine* of February 12, 2018, excluding argument or suggestion of driver error or driver fault on the part of Melvin Hill, and
>
> (3) [the trial court's] order *in limine* of February 12, 2018, prohibiting Dr. Thomas McNish from opining as to the precise cause of death of Mr. or Mrs. Hill.

(Order at 2.)

Importantly, the trial court describes in detail the conduct it found contemptuous, stating, "defense counsel continually and deliberately injected questions and comments, elicited testimony, and placed documents before the jury, concerning matters that this Court had ruled inadmissible." (Order at 3.)[5] As indicated, the trial court seeks to punish Ford for what the court held to be improper actions by Ford's counsel in making prejudicial arguments and presenting inadmissible evidence to the jury. (*See* Order at 5 (finding that "Ford, intentionally, and after several warnings and admonitions, elicited testimony that

[5] Ford emphatically disagrees with the trial court's characterization of its counsel's conduct but recognizes this is not the appropriate juncture to address that issue.

forced [the trial court] to declare a mistrial").)[6]

2. The Trial Court Describes Ford's Conduct in the Language of Contempt.

The language used by the trial court tracks the language Georgia courts use in imposing punishment for disobedience of orders *in limine*. *See, e.g., Pleas v. State,* 268 Ga. 889, 891 (1998) (holding contempt was appropriate where contemnor, through his courtroom conduct, "expressed general disrespect for the court" and, "even after warnings about his conduct, . . . directly and intentionally violated the Court's order"); *Forum Grp. at Moran Lake Nursing and Rehab. Ctr., LLC v. Terhune*, 318 Ga. App. 281, 283 (2012) (citing party's having "repeatedly attempted to violate the trial court's rulings" on motions *in limine*); *In re Longino*, 254 Ga. App. 366, 368 (2002) (trial court held that contemnor had "deliberately violated its evidentiary order").

The Order refers to Ford as having allegedly committed a "willful violation of a pretrial order," as part of a "continuing disregard for several pre-trial evidentiary rulings" and accuses Ford and Ford's counsel of acting "deliberately" and "continuously" in "clear disregard of the court's ruling[s]." (Order at 1, 3, 4,

[6] The trial court relied on an agency theory to punish Ford for its counsel's conduct. (Order at 5 ("While it was Mr. Thomas' conduct that ultimately caused the Court to declare a mistrial, the Court finds that he was acting as Ford's agent.").) Plaintiffs implicitly concede that this was the basis for punishing Ford. (Plaintiffs' Emergency Motion at 25 ("Abundant experience teaches that it literally does no good to 'punish' the defense lawyer; more will simply appear.").)

5.) The trial court also described its order imposing sanctions as an effort "to control the conduct of [the court's] officers in furtherance of justice." (Order at 5.) Finally, the trial court fines Ford for the cost of empaneling a jury "[a]s a result of Ford and its counsel's willfully causing a mistrial," and then strips Ford of its defenses and orders issue preclusion as "further sanction for Defendant's willful misconduct, and in order to ensure an orderly and fair trial. . . ." (Order at 6.) In short, the trial court's language makes clear that the purpose and effect of its order is to punish Ford for allegedly disobeying the Court's evidentiary rulings.[7]

3. The Trial Court Relied on its Inherent Authority to Punish Violations of its Evidentiary Rulings.

Georgia law expressly addresses the type of conduct the Order seeks to punish, and it provides trial courts limited statutory authority to address that conduct by rebuking the offending attorney, offering the jury curative instructions, or declaring a mistrial:

> Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke counsel and by all needful and proper instructions to

[7] Plaintiffs all but admit the Order is a mislabeled contempt order. On August 8, 2018, Plaintiffs filed a motion in the trial court seeking a special setting of the retrial ("Request for Trial Special Setting"), in which they asked the trial court to "*not* hold Ford or Thomas in contempt," because "Ford will attempt a trial-delaying interlocutory appeal." (Request for Trial Special Setting at 2.) Ford's Response to Plaintiffs' Request for Trial Special Setting is attached hereto as Exhibit A.

> the jury endeavor to remove the improper impression from their minds. In its discretion, the court may order a mistrial if the plaintiff's attorney[8] is the offender.

O.C.G.A. § 9-10-185.

In addition to the statutory authority granted to ensure a fair trial through curative remedies, trial courts also possess the inherent authority to punish violations of orders *in limine* through contempt. If, in the court's discretion, punitive measures are necessary in addition to the curative measures authorized by O.C.G.A. § 9-10-185, a trial court may use contempt to punish "[d]isobedience or resistance by any officer of the courts, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the courts." O.C.G.A. § 15-1-4(3). *See also In re Orenstein*, 265 Ga. App. at 232.

Georgia courts routinely exercise their inherent authority to punish violations of orders *in limine* through contempt. *See, e.g., Pleas,* 268 Ga. at 891 (affirming trial court order holding attorney in contempt and imposing a fine because "through his courtroom conduct [counsel] had expressed general disrespect for the court and that even after warnings about his conduct [counsel] directly and intentionally violated the Court's order") (internal quotations omitted);

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[8] A trial court may order a mistrial for conduct by either party's counsel. *See Counts v. Moorehead*, 232 Ga. 220, 220 (1974) (affirming *Moorehead v. Counts*, 130 Ga. App. 453, 458 (1973) (reasoning the statute's purpose "is not to distinguish between counsel for plaintiff and defendant, but to place an affirmative duty on the trial judge to see that fair procedures are observed . . .") (Deen, J., concurring in the judgment)).

Forum Grp. at Moran Lake Nursing and Rehab. Ctr., LLC, 318 Ga. App. at 283, 289 (affirming trial court judgment where, during trial, defendant appearing *pro se* "repeatedly attempted to violate the court's rulings on [Plaintiff's] motion in limine, to the point that the trial court found him in contempt and ordered him arrested and held for 48 hours"); *In re Longino*, 254 Ga. App. at 368 (affirming trial court finding of contempt where attorney used his witness to violate the court's motion in limine because "[t]o intentionally introduce evidence in contravention of a ruling by a trial court is contemptuous").

Tellingly, the trial court here expressly relies on its "inherent authority" to "impose sanctions on the party or its attorney, to compel obedience to its orders and control the conduct of its officers in furtherance of justice." (Order at 5.) Moreover, in describing its authority to impose sanctions, the trial court quotes from *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74 (1960), a case addressing "the power of the courts to punish for contempt." (Order at 2.) The United States Supreme Court has held that the source of the court's authority to issue an order is key to determining whether an order is valid. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-54 (1909) (holding that death penalty sanctions were appropriate under statutory authority to thwart discovery abuse but violated due process when imposed pursuant to inherent authority to punish violations of court orders). *See also Remington Arms Co., Inc. v. Caldwell*, 850 S.W.2d 167, 171-72

(Tex. 1993) (holding that trial court erred in imposing death penalty sanctions after declaring mistrial because such sanctions "are applicable to pretrial discovery matters only, not conduct occurring in the course of the trial," but recognizing that "[t]he trial court does, however, have comprehensive inherent and statutory power to discipline errant counsel for improper trial conduct in the exercise of its contempt powers.").

The Order imposing sanctions on Ford makes clear that it is based on the trial court's inherent power to redress Ford's alleged usurpation of the trial court's authority. (Order at 2.) The Order explicitly punishes Ford for its counsel's having allegedly "arrogated the Court's gatekeeping function," and is therefore, in substance and effect, one holding Ford in criminal contempt, which is directly appealable. (Order at 5.)[9]

[9] As Ford will demonstrate when this appeal is heard on the merits, there was no basis for sanctions against Ford. Additionally, the sanctions imposed by the Order exceed the trial court's authority to punish for contempt. Georgia law limits the available punishment for criminal contempt to a fine not to exceed $1,000, imprisonment for up to 20 days, or both. O.C.G.A. § 15-6-8(5). Imposing a sanction other than fine or imprisonment is reversible error. *See, e.g., Mathis v. Corrugated Gear and Sprocket, Inc.*, 263 Ga. 419 (1993) (trial court erred by imposing fine for contempt that exceeded statutory maximum); *see also H.J. Russell & Co. v. Manuel*, 264 Ga. App. 273, 276 (2003); *Rapaport v. Buckhead Coach, Inc.*, 234 Ga. App. 363, 364 (1998). For purposes of this motion, it is clear that the trial court intended to punish Ford for violations of its evidentiary rulings; the propriety of the sanctions imposed will be addressed on appeal.

C. To Avoid a Direct Appeal, Plaintiffs Improperly Focus on the Trial Court's Label of the Sanctions Issued and Rely on Inapposite Case Law Discussing Violations of Discovery, Not Evidentiary, Rulings

To argue against the appealability of the Order, Plaintiffs cite a host of cases holding that civil death penalty sanctions orders are not directly appealable. (Motion to Dismiss at 21-22.) Plaintiffs' argument is fundamentally incorrect for two reasons. First, the sanctions issued here are available only in the case of a discovery violation, and the trial court's attempted use of those sanctions cannot convert a contempt order into a discovery order. Second, Plaintiffs rely almost entirely on cases in which courts were addressing the appealability of orders imposing sanctions for discovery abuses. For the reasons set forth herein, Plaintiffs' attempts to characterize the Order as an interlocutory discovery order must fail.

1. The Trial Court Improperly Imposed Sanctions Available Only for Discovery Abuses.

Trial courts are authorized by statute to remedy a party's refusal to comply with orders compelling discovery, and that authority permits trial courts to impose so-called civil death penalty sanctions. O.C.G.A. § 9-11-37(b) (authorizing trial courts to issue an order that certain designated facts will be taken as established for the purpose of the action, an order refusing to allow a disobedient party to support or oppose designated claims or defenses, or an order striking out pleadings or

rendering a default judgment against the disobedient party only "if a party fails to obey an order to provide or permit discovery").

The public policy supporting death penalty sanctions applies only where they are imposed against a party who refuses to comply with an order compelling discovery. That is because when a party wrongfully withholds evidence, it prevents the other party from accessing the facts necessary to support a claim or defense. Moreover, willful, sustained disobedience to an order to compel discovery generally cannot be cured through less-drastic measures, because parties often have no alternative sources for the evidence sought. *See Bettis v. Toys "R" Us—Delaware, Inc.*, 273 F. Appx. 814, 817 n.5 (11th Cir. 2008) ("Rule 37 sanctions are intended to prevent unfair prejudice to the litigants and insure the integrity of the discovery process."). *See also* 7 *Moore's Federal Practice*, § 37.50 (Matthew Bender 3d Ed.) (explaining that sanctions are meant to combat prejudice caused "when a party blocks its opponent's access to evidence that the opponent needs to fairly litigate a consequential issue, claim, or defense").

Here, there has been no discovery abuse, and the alleged violations in this case, involving evidentiary rulings, had the effect of providing the jury with *more* evidence. As a result, no presumption about hidden evidence is necessary to cure any prejudice to the other party. Rather, exposing the jury to supposedly prejudicial evidence or argument could have been remedied through a number of

statutorily-authorized measures. For example, the trial court could rebuke counsel in the presence of the jury or instruct the jury that the evidence or argument was improperly presented and should not be considered. O.C.G.A. § 9-10-185; *Stolte v. Fagan*, 291 Ga. 477, 481 (2012) (holding trial court had a duty to take remedial action to correct improper argument, "a curative instruction or rebuke of counsel, for example").

For these reasons, civil death penalty sanctions are not permissible sanctions for violations of evidentiary rulings. *See Parker*, 284 Ga. at 104 ("There are two kinds of contempt for violations of court orders, civil and criminal, and the sanction of dismissing an answer and entering a default judgment on liability does not fall within either category."). *See also Hammond Packing Co.*, 212 U.S. at 349-54 (contrasting "a denial of all right to defend as a mere punishment" with "the undoubted right of the lawmaking power to create a presumption of fact"); *Remington Arms Co., Inc.*, 850 S.W.2d at 171-72 (holding that the trial court "was not justified in basing a discovery sanction . . . on attorney misconduct at trial"). The trial court's attempted imposition of such unauthorized sanctions does not convert the Order, which punishes Ford's violation of evidentiary rulings, into an interlocutory discovery order that escapes immediate appeal.

2. Plaintiffs Cite Only Cases Dealing with Discovery Abuses and Focus Only on the Sanctions Themselves.

Plaintiffs rely almost entirely on cases discussing violations of orders to produce discovery.[10] *See, e.g. Cunningham v. Hamilton Cty., Ohio*, 527 U.S. 198 (1999) (refusal to respond to interrogatories); *Parker*, 284 Ga. at 102 (refusal to produce discoverable documents); *Dial v. Bent Tree Nat. Bank*, 215 Ga. App. 620 (1994) (refusal to attend deposition); *Cornelius v. Finley*, 204 Ga. App. 299 (1992) (refusal to respond to interrogatories); *Gourmet Delights, Inc. v. Edgewater Country Club, Inc*., 185 Ga. App. 660 (1988) (failure to comply with discovery); *American Exp. Co. v. Yondorf*, 169 Ga. App. 498 (1984) (refusal to respond to interrogatories); *Payne v. Presley*, 169 Ga. App. 36 (1983) (refusal to comply with subpoena); 8/31/05 Order, *Gibson v. Ford*.[11] In doing so, Plaintiffs fail to

[10] The two cases on which Plaintiffs rely that do not concern discovery sanctions are similarly inapposite. *See McDonald v. McDonald*, 244 Ga. 453, 453 (1979) (holding that order resulting from contempt proceedings requiring defendant to pay his children's college expenses was not directly appealable because the trial court did not rule on the motion for contempt); *Klein v. Standard Fire Ins. Co.*, 191 Ga. App. 417, 417 (1989) (holding that order denying defendant's motion for contempt was not directly appealable).

[11] Plaintiffs' Motion to Dismiss presents a patently false characterization of the holding in *Gibson*. Plaintiffs assert that *Gibson* "clearly established" that "a sanctions order *governing the issues and proof that may be submitted at trial* is not an order of contempt." (Motion to Dismiss at 25 (emphasis added).) The *Gibson* order includes no reference to admissibility rulings or orders *in limine*—rather, like the majority of Plaintiffs' cited authority, *Gibson* dealt with the appealability of an order imposing sanctions imposed against Ford "for disobeying court *discovery* orders." 08/31/05 Order, *Gibson v. Ford* (emphasis added).

appreciate that the presence or absence of discovery abuse is the controlling question—if there is no discovery misconduct, the Order cannot be an interlocutory discovery order.

Because there is no discovery violation that forms the basis for the Order, the authority on which Plaintiffs rely is inapposite. Indeed, Plaintiffs rely heavily on the Georgia Supreme Court's decision in *Parker*. There, the court recognized that non-discovery orders do not fall within the reasoning or purview of *Parker*. 284 Ga. at 106 (distinguishing *Cunningham v. Hamilton County*, 527 U.S. 198, 207 (1999) on the grounds that "*Hamilton* did not involve a discovery sanction" and thus the "rationale of *Hamilton* is not applicable.").

In *Parker*, the Court analyzed an order finding that a party committed an act of willful contempt by failing to comply with a prior discovery order. 284 Ga. at 102. The trial court imposed sanctions including the dismissal of the defendant's answer and the declaration of a default as to liability. *Id*. When the sanctioned party sought appellate review, the trial court dismissed the application for a certificate for immediate review, holding the order was not a directly appealable contempt order because it did not impose a contempt punishment. *Id.* The question presented on appeal was whether the order was a contempt order or an interlocutory discovery order. *Id*. at 105. The Georgia Supreme Court examined the conduct at issue (discovery abuse) and then looked to the sanctions imposed

and determined that it was an interlocutory discovery order.

Plaintiffs improperly focus on the court's deference to the type of punishment the court selected, which was appropriate and illuminating in *Parker* *only* because the trial court there had the inherent authority to punish for contempt as well as the statutory authority to impose civil death penalty sanctions for discovery abuse. See O.C.G.A. § 9-11-37(b). Here, however, there is no alleged discovery misconduct; accordingly, this Court need not consider whether the trial court intended to issue an interlocutory discovery order. Clearly, it did not.[12]

Plaintiffs argue the trial court foreclosed any opportunity for direct appeal when it labeled the Order one for "SANCTIONS" rather than for contempt. (Motion to Dismiss at 24-25.) This, too, misses the mark. A trial court's characterization of a sanctions order is not controlling. *Parker*, 284 Ga. at 102 n.2 (noting that, although concurring justices "would defer to the trial court's characterization," whether the order "was directly appealable as a contempt judgment or was an interlocutory discovery order is an issue of law that must be resolved by this Court."). Plaintiffs would make the trial court's characterization of the Order alone dispositive of its appealability and give no consideration to the

[12] Furthermore, it bears noting again that, not only was there no discovery abuse here, but Ford was trying to provide additional information to the jury. To the extent Ford's conduct warrants sanctions (a concept Ford opposes), the proper sanctions are for violation of a court order—i.e., contempt—not for withholding information from the other side. *See* Part II, *infra*.

Order's substance and effect, an approach which is expressly foreclosed by the Supreme Court's decision in *Parker*. Rather than focus solely on the nature of the sanctions the Order imposes, this Court should address the source of the trial court's power to punish and the conduct being sanctioned, which here is punishable only through rebuke, instruction, mistrial, or contempt (and only if this Court first concludes that the underlying order was correct.)

In this case, the trial court's available remedies included the inherent authority to punish for contempt and the statutory authority to issue curative instructions, rebuke the attorney, or declare a mistrial. The trial court did not have statutory or inherent authority to impose civil death penalty sanctions. The fact that the trial court imposed a sanction reserved for discovery violations does not transform the Order into an interlocutory discovery order. Rather, the Order is simply a contempt order that imposes an unauthorized punishment.[13]

[13] The propriety of the sanctions themselves is not currently before the Court—the only issue is whether Plaintiffs can avoid a direct appeal by persuading the trial court to impose unauthorized discovery sanctions under Rule 37 and simultaneously convincing it not to explicitly label Ford's conduct as contemptuous.

II. ALTERNATIVELY, THE ORDER IS DIRECTLY APPEALABLE BECAUSE IT PRESENTS AN EXCEPTIONAL CASE IN WHICH APPELLATE REVIEW SERVES THE INTEREST OF JUDICIAL ECONOMY.

This Order presents a separate basis for direct appeal. It is the "rare" type of exceptional case where Georgia appellate courts need to exercise jurisdiction prior to final disposition. *See Waldrip*, 272 Ga. at 575 (holding appellate courts may hear interlocutory appeals in "those exceptional cases that involve an issue of great concern, gravity, and importance to the public and no timely opportunity for appellate review"). This is because the Order usurps the role of the jury in a new, unjustified, and unauthorized way by taking extreme sanctions made available by statute only for discovery abuse and misapplying them in a contempt context.

Georgia appellate courts have "the power to consider appeals of interlocutory orders when [they] disagree with the trial court concerning the need for immediate appellate review of an interlocutory order." *Id.* at 576. The rare cases in which appellate jurisdiction over an interlocutory order is appropriate include instances where the case presented an important issue of first impression, where dismissal would deny the litigant the right to appellate review, and where consideration of the trial court order as "final" serves the interest of judicial economy. *Id.* at 575.

In this case, the trial court took the exceptional step of imposing civil death penalty sanctions where such sanctions simply are not authorized. The trial court then went a step further, imposing the most severe sanction possible of striking Ford's answer and announcing that, upon retrial, it will be deemed established that Ford acted with a "willful, and reckless, and a wonton disregard for life," which effectively instructs the jury to award punitive damages. (Order at 7.) Permitting Georgia trial courts to impose unauthorized civil death penalty sanctions—particularly when those sanctions effectively guarantee an award of punitive damages—outside the discovery context would upset the constitutionally-mandated balance between the roles of jury and judge, usurping the role of the jury as fact finder. *See* Ga. Const. Art 1, § 1. ¶ XI ("The right to trial by jury shall remain inviolate, . . ."); *NAACP v. Overstreet*, 221 Ga. 16, 30-31 (1965) ("It is a question for the jury when punitive damages shall be allowed as well as the amount of such damages," and whether and in what amount to award punitive damages "is to be fixed by the enlightened conscience of an impartial jury."). Whether a party's counsel complies with a court's trial orders is not instructive of whether the party is liable in the underlying action.

Legislative death penalty sanctions are a necessary deterrent to thwart discovery abuse. But no justification exists for permitting a trial court to impose death penalty sanctions for violations of evidentiary rulings at trial. *See Hammond*

Packing Co., 212 U.S. at 349-54 (distinguishing between death penalty sanctions meant merely to punish for contempt and the exercise of "the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure of the proof ordered").

In *Hammond*, the Supreme Court explained that, unlike the inherent authority to enforce its orders, a trial court's authority to strike pleadings or declare default flows from "the right to create a presumption flowing from the failure to produce." *Id.* at 350-51. When such sanctions are imposed for discovery abuse, "the preservation of due process [is] secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Id.* at 351. Indeed, the Legislature has made clear that death penalty sanctions are not permissible outside the discovery context. *See Deal v. Coleman*, 294 Ga. 170, 172 (2013) ("When we consider the meaning of a statute, we must presume that the General Assembly meant what it said and said what it meant.") (internal quotations omitted); *Allen v. Wright*, 282 Ga. 9, 13 (2007) ("Georgia law provides that the express mention of one thing in an Act or statute implies the exclusion of all other things.") (internal quotations omitted). Instead, as discussed *supra*, curative instructions, attorney rebukes, mistrial declarations, and contempt orders provide more-than-sufficient remedies to ameliorate the effect of exposing jurors to inadmissible or prejudicial

evidence or argument. As a result, this Court should review and reverse the Order and restore the role of the jury as fact finder in this case.

Finally, it would be an enormous waste of judicial resources to permit the trial court to proceed with a damages trial before the Order is reviewed. Plaintiffs say they seek to avoid "piecemeal appellate review." (Request for Trial Special Setting at 3.) But that is exactly what will result from dismissal of Ford's appeal. This case has already resulted in one mistrial— and it is in the interest of justice to re-try this case only once. The Order decries the waste of time and resources that resulted from the mistrial, but Georgia's judicial resources deserve to be spent conducting trials which are *fair*, not just fast.

CONCLUSION

For the foregoing reasons, Ford respectfully requests that this Court deny Plaintiffs' Emergency Motion to Dismiss and give this important issue the review it deserves.

Respectfully submitted, this 5th day of September, 2018.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing *Defendant Ford Motor Company's Response to Plaintiffs' Emergency Motion to Dismiss* upon all parties by depositing a copy in the United States mail, with adequate first-class postage affixed thereto, addressed as follows:

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This 5th day of September, 2018.

/s/ William N. Withrow, Jr.
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