IN THE COURT OF APPEALS
STATE OF GEORGIA

KIM HILL, et al., Appellants/Plaintiffs, v. FORD MOTOR COMPANY, Appellee/Defendant.	APPEAL NO: A19E0007

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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INTERESTS OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.[1]

Many of PLAC's members do business in the State of Georgia. These members have a direct interest in the outcome of this case

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[1] A list of PLAC's current corporate membership is attached as Appendix A to this brief.

because the trial court's order, if allowed to stand, undermines the rights of defendants in the Georgia court system. PLAC members are concerned about a trend where trial courts deprive civil defendants of their rights to a defense and a jury trial (or greatly impair those rights) by entering punitive orders and then actively try to thwart immediate appellate review. This case presents this Court with an opportunity to explore and establish guidelines for such situations.

SUMMARY OF ARGUMENT

The importance of prompt appellate review cannot be overstated when civil defendants are denied their rights by extreme, case-determinative sanctions imposed by trial courts which simultaneously attempt to prohibit the defendants from seeking appellate review. These practices undermine the constitutional and statutory rights of the defendants, and post-trial review is often inadequate to remedy the harms. When faced with a similar situation of a defendant's rights being threatened, the Georgia Supreme Court intervened in *Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000), and granted interlocutory review. The Court acknowledged a gap in Georgia's appellate review process and exercised jurisdiction to ensure important rights were

vindicated. Here, this Court should exercise jurisdiction, following the Georgia Supreme Court's lead in *Waldrip*.

PLAC is also concerned that the trial court's order is a contempt order in everything but name. The trial court should not be allowed to inflict all of the punishments of contempt but avoid appellate review by captioning the order as something else. The trial court's attempt to thwart immediate appellate review threatens the balance the Georgia legislature struck to ensure defendants are afforded a timely appeal if a trial court holds them in contempt.

ARGUMENT

I. Interlocutory Appellate Review Should be Available for Orders Imposing Extreme Sanctions That Threaten Fundamental Rights.

Growing out of a simple courtroom disagreement regarding the scope of expert witness testimony, which was subject to an order *in limine*, this evidentiary dispute spiraled into extreme sanctions normally reserved for the most egregious conduct. Instead of issuing a typical curative instruction to the jury, the trial court ordered a mistrial and then ordered sanctions against Ford that are so severe that Ford is now barred from offering any liability defense at re-trial. Order Granting-in-Part Plaintiffs' Post-Trial Motion for Sanctions and

Assessing Jury Costs Against Defendant, at 7 ("Order"). The sanctions levied by the trial court also include a jury instruction that will almost certainly result in punitive damages being awarded. *Id.* PLAC is disturbed by the increasing prevalence of extreme sanctions orders by trial courts. Extreme sanctions should only be granted in rare circumstances. *General Motors Corp. v. Conkle*, 226 Ga. App. 34, 43–44, 486 S.E.2d 180, 189 (1997). Such sanctions also deserve interlocutory appellate review because they threaten the constitutional rights of the litigants.

A. Interlocutory Appellate Review Safeguards Constitutional Rights.

"The fundamental importance of private interests which appellate error correction protects—and the risk of erroneous deprivation of . . . property without such process—may tip the balance in favor of recognizing a . . . right of appeal." Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1245 (2013). "As the American Bar Association has pointed out, appellate review is not merely a desirable part of legal practice—it is, instead, a 'fundamental element of procedural fairness.' " *Id.* (quoting 3 Am. Bar Ass'n, Judicial Admin. Div., STANDARDS RELATING TO APPELLATE COURTS § 3.10, at 18 (1994)).

While review after final judgment is often sufficient to protect litigants, "[a]ny judicial system that affords a right to appellate review must ensure that appeal does not come too late to be effective." Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351 (1961). "At the same time—especially when the amount of litigation is substantial—the system must be designed to promote the efficient disposition of judicial business." *Id.* Interlocutory appeals should be allowed, then, if "early resolution of the . . . claim might '[m]aterially advance the termination of the litigation[,] . . . clarify further proceedings[, or p]rotect the petitioner from substantial or irreparable injury." John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 228 (1994). Thus, when trial courts enter orders that "inflict some kind of severe irreparable harm on a party," the orders should be promptly appealable. Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 259 (2001).

B. Extreme Sanctions Threaten the Important Constitutional Rights to a Defense and to a Jury Trial.

This Court should promptly review orders that deprive defendants of their rights to a defense, to due process, and to a jury trial. "The drastic sanctions of dismissal and default cannot be invoked . . . except in the most flagrant cases . . ." *Conkle*, 226 Ga. App. at 43–44, 486 S.E.2d at 189 (citation omitted); *see also Porter v. Buckeye Cellulose Corp.*, 189 Ga. App. 818, 822, 377 S.E.2d 901, 906 (1989) ("As a general rule, the drastic sanctions of default and dismissal should be invoked only when the failure to respond to discovery is wilful, in bad faith or in conscious disregard of an order.") (internal citations and quotations omitted). Such penalties should be justified, and promptly reviewed on appeal, because they implicate important constitutional rights.

"These fundamental constitutional rights require that every party to a lawsuit be afforded the opportunity to be heard and to present his claim or defense, i.e., to have his day in court." *Thomas v. Johnson*, 329 Ga. App. 601, 604, 765 S.E.2d 748, 750–51 (2014) (quoting *Cousins v. Macedonia Baptist Church of Atlanta*, 283 Ga. 570, 573–74, 662 S.E.2d 533 (2008)). Those rights are found in the Georgia Constitution, which states that "No person shall be deprived of the right to . . . defend,

either in person or by an attorney, that person's own cause in any of the courts of this state." GA. CONST. Art. I, § I, Para. XII. The Georgia Constitution also provides that "No person shall be deprived of . . . property except by due process of law." GA. CONST. Art. I, § I, Para I.

In *Thomas*, this Court reversed the trial court because of limitations placed on a litigant that prevented a full and meaningful presentation of the merits of the case. 329 Ga. App. at 604, 765 S.E.2d at 750–51. The limitations deprived the litigant of its constitutional rights of due process and unfettered access to the courts. *Id.* Likewise, in *Cousins*, 283 Ga. at 574, 662 S.E.2d at 536, the Georgia Supreme Court held that the ability to present witnesses and other lawful evidence is integral to due process and access to court rights. *Id.* (citing GA. CONST. Art. I, § I, Paras. I, XII). Thus, reversal was necessary because the limitations placed on the corporate defendants by the trial court prevented a full and meaningful presentation of the merits of the case. *Id.* Because these rights are endangered by trial courts entering extreme sanctions, this Court should grant review of such orders to ensure that the sanctions are warranted.

Additionally, sanctions that pre-determine liability or damages threaten constitutional rights by usurping the role of the jury. The Georgia Constitution states: "The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party." GA. CONST. Art. I, § I, Para. XI(a).[2] In *Johnson v. State*, 223 Ga. App. 294, 295, 477 S.E.2d 439, 440 (1996), this court held that a jury instruction violated the defendant's right to a jury trial. The trial court instructed the jury that if the defendant was found guilty of aggravated assault with a knife, the jury necessarily had to find him guilty of the charge of possession of the knife. *Id.* This court reversed, holding the jury instruction impermissibly prevented the jury from independently considering whether or not the defendant was guilty of possession. *Id.* (citing GA. CONST. Art. I, § I, Par. XI(a)).

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[2] This right is applicable to civil litigants such as Ford. *See Howard v. Bank S., N.A.*, 209 Ga. App. 407, 410, 433 S.E.2d 625, 627 (1993), *aff'd*, 264 Ga. 339, 444 S.E.2d 799 (1994) (reversing trial court order striking the demand for jury trial because the Constitution of Georgia as well as the Civil Practice Act guarantee the right of a jury trial to civil litigants in most cases absent an explicit waiver of the same).

Nor can the jury be deprived of its role of determining whether damages are appropriate and the amount of any such damages. In *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 736–37, 691 S.E.2d 218, 223–24 (2010), the Georgia Supreme Court invalidated a statute limiting awards of noneconomic damages in medical malpractice cases to a predetermined amount. The Court found the statute violated the constitutional right to jury trial. *Id.* (citing GA. CONST. Art. I, § I, Para. XI(a)). Extreme sanctions deprive the jury of its constitutional role.

C. Orders Imposing Extreme Sanctions Should be Appealable Under *Waldrip* to Ensure Protection of Constitutional Rights.

The Georgia Supreme Court recognizes appellate review as an important vehicle for protecting constitutional rights and has sought to cure "defect[s] in the interlocutory review process." *Waldrip*, 272 Ga. at 575, 532 S.E.2d at 384. Extreme punishments, such as striking answers and harmful jury instructions, must be justified and should only be granted in rare circumstances. *Conkle*, 226 Ga. App. at 43–44, 486 S.E.2d at 189 ("The drastic sanctions of dismissal and default cannot be invoked under O.C.G.A. § 9-11-37 except in the most flagrant

cases . . .”). These orders demand interlocutory appellate review because of their potential to inflict irreparable harm.

From time to time, the Georgia Supreme Court has intervened to close gaps in the appellate review framework to ensure a defendant’s rights are protected. In *Waldrip*, the trial court’s orders threatened “the petitioner’s constitutional right to effective assistance of counsel and against compelled self-incrimination”, and the orders would “make a fair retrial impossible.” 272 Ga. at 580, 532 S.E.2d at 388. Under such circumstances, “to delay review . . . [wa]s to deny it entirely.” *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984).

The Georgia Supreme Court recognized it had inherent authority to correct the “defect[s] in the interlocutory review process”, because the Georgia Constitution affords to the Courts “the powers ‘necessary in aid of its jurisdiction’”. *Waldrip*, 272 Ga. at 574–75, 532 S.E.2d at 384–85 (quoting GA. CONST. Art. VI, § I, Para. IV; Art. VI, § XI, Para. IV.). A court should “use[] its inherent power when constitutional provisions, statutes, or court rules fail to supply answers to problems or when courts find themselves compelled to provide solutions that enable the litigative process to proceed smoothly.” *Id.* at 385. From these sources

of authority, the Georgia appellate courts "ha[ve] 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.* In making this determination, the Georgia Supreme Court relied on national standards for state appellate courts from the American Bar Association's Judicial Administration Division, which stated that "appellate courts retain the discretion of interlocutory review when it would . . . materially advance the end of the litigation [or] protect a party from irreparable harm". *Id.* (quoting ABA Standards 1994).

Such intervention by this Court is wholly appropriate here because post-trial appellate review will be insufficient to protect Ford's rights. Both conditions identified above in *Waldrip* apply to this case: Ford will suffer irreparable harm and there will be a waste of judicial resources if interlocutory appeal is denied. On re-trial, Ford will be barred from providing any defense to liability. Order at 7 (limiting re-trial issues to the amount of damages, whether plaintiffs endured pain and suffering, and whether punitive damages should be imposed). The jury will also be instructed on re-trial that Ford acted with "a willful,

and reckless, and a wonton [*sic*] disregard for life." *Id.* Such an instruction will almost certainly lead to the award of punitive damages. The combination of these sanctions will irreparably harm Ford's reputation when the verdict is rendered.

Moreover, as explained *surpa* in detail in Section I.B., such an order violates Ford's constitutional rights to present a defense and to due process of law. Additionally, the order usurps the role of the jury by pre-determining that Ford is liable and that punitive damages are due. Without appellate review, the jury on re-trial will merely become a vehicle to rubber-stamp the Court's orders. Allowing a re-trial instead of granting review will also lead to a huge waste of judicial resources if this Court later finds, after post-trial appeal, that the trial court erred in assessing these extreme sanctions. The better course, in the name of equity and judicial economy, is to consider the appeal now to determine whether Ford's constitutional and statutory rights have been violated.

II. Contempt Orders Do Not Become Unreviewable Merely Because They Are Captioned As Something Else.

Contempt orders are of such a serious nature that the Georgia legislature provided for direct appellate review by statute in O.C.G.A. § 5-6-34(a)(2). *See also Allison v. Wilson*, 320 Ga. App. 629, 635, 740

S.E.2d 355, 360 (2013). Important constitutional rights are implicated by such orders, and the legislature determined that another check on the trial court's imposition of such draconian penalties should apply. The trial court should not be able to thwart legislative intent to provide interlocutory review by simply captioning the order as something other than a contempt order.

While the trial court's order is styled as an "Order . . . For Sanctions," it is more analogous to a civil contempt order. Plaintiffs, in their "Request for Trial Special Setting", explicitly 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. The trial court responded by holding Ford in contempt in everything but name. Fortunately, whether an order is "directly appealable as a contempt judgment . . . is an issue of law that must be resolved by this Court." *Am. Med. Sec. Grp., Inc. v. Parker*, 284 Ga. 102, 102 n.2, 663 S.E.2d 697, 698 n.2 (2008).

The trial court's own logic and intent show the order is really one for contempt. The trial court applied its "sanctions" order "*to compel obedience to its orders* and to control the conduct of its officers in

furtherance of justice." Order at 5 (emphasis added). Coercing future obedience to the court's orders through punishment places this order in the realm of civil contempt. *Power to punish for contempt*, DAVIS AND SHULMAN'S GA. PRACTICE & PROCEDURE § 3:6 (2017–18 ed.) ("Civil contempt imposes conditional punishment as a means of coercing future compliance with a prior court order.").

Even the conduct the court was allegedly punishing shows this order was in essence a civil contempt order. Georgia courts have the power to use contempt to punish "[m]isbehavior of any person or persons in the presence of such courts or so near thereto as to obstruct the administration of justice." O.C.G.A. §§ 15-1-4. This is exactly the kind of conduct the trial court said it was trying to punish: "Ford willfully caused a mis-trial in this case[] in bad faith." Order at 5. Assuredly, this is a civil contempt order.

Allowing trial courts to defeat appellate review of contempt orders by captioning them as something else will have wide-ranging consequences and will do damage to this Court's precedent. This behavior deprives defendants of a safety valve when faced with abusive orders from trial courts. As the United States Supreme Court observed

in *Firestone Tire & Rubber Company v. Risjord*, 449 U.S. 368, 377 (1981), "a party may defy [an] order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." This Court adopted the *Firestone Rubber* rule in *Johnson & Johnson v. Kaufman*, 226 Ga. App. 77, 82, 485 S.E.2d 525, 528–29 (1997) (stating that "we now adopt the United States Supreme Court's rationale").

In *Johnson & Johnson*, this Court limited the availability of interlocutory appeal for certain discovery orders, relying on the fact that "a party who has been ordered to comply with a discovery request *is not without remedy*." 226 Ga. App. at 80, 485 S.E.2d at 527 (emphasis added). "[D]iscovery orders are not 'final' because a party can refuse to comply and then appeal from a contempt order." 226 Ga. App. at 80, 485 S.E.2d at 528 (citing *Firestone Tire & Rubber Co.*, 449 U.S. at 377); *see also In re DeKalb Cty. Special Grand Jury Proceedings*, 252 Ga. App. 359, 359–60, 555 S.E.2d 791, 792 (2001) (denying direct appeal but recognizing the party is not without a remedy because of the party may invite contempt). Allowing trial courts to defeat this route to appeal by creatively captioning orders would undermine the reasoning

behind the denial of interlocutory appeal in *Johnson & Johnson* and *DeKalb*. The Court should not permit such a result.

CONCLUSION

For the foregoing reasons, PLAC respectfully requests the Court deny the emergency motion to dismiss the notice of appeal.

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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APPENDIX A

Corporate Members of the Product Liability Advisory Council

as of 9/5/2018

3M

Altec, Inc.

Altria Client Services LLC

Aptiv Plc

Astec Industries

Bayer Corporation

Becton Dickenson

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

The Boeing Company

Bombardier Recreational Products, Inc.

Bridgestone Americas, Inc.

Bristol-Myers Squibb Company

Cardinal Health

Caterpillar Inc.

CC Industries, Inc.

Celgene Corporation

Chevron Corporation

Continental AG

Cooper Tire & Rubber Company

Crane Co.

Crown Equipment Corporation

Daimler Trucks North America LLC

Deere & Company

DISH Network L.L.C.

The Dow Chemical Company

E.I. duPont de Nemours and Company

Emerson Electric Co.

FCA US LLC

Ford Motor Company

Fresenius Kabi USA, LLC

General Motors LLC

GlaxoSmithKline

The Goodyear Tire & Rubber Company

Great Dane LLC

Hankook Tire America Corp.

Harley-Davidson Motor Company

The Home Depot

Honda North America, Inc.

Hyundai Motor America

Illinois Tool Works Inc.

Isuzu North America Corporation

Jaguar Land Rover North America, LLC

James Hardie Building Products Inc.

Johnson & Johnson

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kubota Tractor Corporation

Lincoln Electric Company

Magna International Inc.

Mazak Corporation

Mazda Motor of America, Inc.

Medtronic, Inc.

Merck & Co., Inc.

Meritor WABCO

Michelin North America, Inc.

Microsoft Corporation

Mitsubishi Motors North America, Inc.

Mueller Water Products

Newell Brands Inc.

Novartis Pharmaceuticals Corporation

Novo Nordisk, Inc.

Pfizer Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

RJ Reynolds Tobacco Company

Robert Bosch LLC

The Sherwin-Williams Company

Stryker Corporation

Subaru of America, Inc.

TAMKO Building Products, Inc.

Teleflex Incorporated

Toyota Motor Sales, USA, Inc.

Tristar Innovative Products, Inc.

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Wal-Mart Stores, Inc.

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

ZF TRW

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2018, I served a true and correct copy of the foregoing **AMICUS BRIEF** upon all counsel of record by U.S. Mail, postage prepaid, and electronic delivery via the Court's e-filing system:

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