IN THE COURT OF APPEALS OF GEORGIA

KIM HILL and ADAM HILL,
surviving children and Co-Administrators
of the Estates of Melvin Hill and Voncile Hill, deceased,

Plaintiffs,

v.

FORD MOTOR COMANY, et al.,

Defendants.

PLAINTIFFS' EMERGENCY MOTION TO DISMISS FORD MOTOR COMPANY'S 'NOTICE OF APPEAL'

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I. INTRODUCTION

Pursuant to Court of Appeals Rule 41(d), and O.C.G.A. § 5-6-48(b)(2), Plaintiffs file this emergency motion to dismiss the "notice of appeal" filed by Ford, on grounds this Court lacks jurisdiction to consider this case at this time[1] because "the decision . . . is not [now] appealable." O.C.G.A. § 5-6-48(b)(2).

Ford *conceded* that a certificate of immediate review was required *by requesting* that the trial court execute a certificate of immediate review.[2] The trial court declined, but Ford filed a notice of appeal anyway, mischaracterizing the trial court's Order as a directly appealable order supposedly *holding Ford* "in contempt." This Court must dismiss this appeal for lack of jurisdiction because there is no final judgment[3] and the Order Ford purports to appeal is neither a contempt order nor an order that could possibly qualify for immediate appeal under the "rare" circumstances contemplated by *Waldrip v. Head*, 272 Ga. 572 (2000).

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[1] Court of Appeals Rule 41(d) ("motions to dismiss"): "If the Court determines that it has no jurisdiction over a pending appeal, the appeal shall be dismissed or transferred to the Supreme Court." Ex. 1 at 3, 8/31/05 Order, *Ford v. Gibson*, No. A05A2092 ("Because Case No. A05A2092 is a direct appeal from a non-final judgment that is not directly appealable in its own right, we are without jurisdiction to consider it. Therefore it is hereby DISMISSED.").

[2] 7/23/18 Ford letter to J. Bratton, *which the trial court declined to grant.*

[3] *See* O.C.G.A. § 5-6-34(a)(1)-(13).

Equally important, this Court should dismiss the appeal *now*, without waiting the many months for the trial court to complete the transcript and transmit the record.[4] This Court's lack of jurisdiction is obvious from the face of the trial court's Order; delaying the inevitable dismissal merely allows Ford to help itself to an unauthorized and undeserved delay of retrial.

Ford filed its "notice of appeal" purely to delay the final judgment it has sought to avoid. A final judgment was days away when Ford's misconduct caused a mistrial, as the trial court specifically noted. "Ford's ability to appeal the Court's rulings with which it took exception was within arm's length. Upon verdict, *likely days away*, all rulings would have been directly appealable." Ex. 3, 7/19/18 Order at 5 n.3.

Ford knows its "notice" is utterly unlawful: *this Court* taught *this same defendant* that lesson 13 years ago. Then, as now, Ford claimed that a sanctions

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[4] In *Gibson v. Ford*, for example, Final Judgment was on 12/16/05, but the case was not docketed in the Supreme Court *for fifteen months*. More recently, In *Walden v. Chrysler*, Ct. App. Case No. A16A1285, the notice of appeal was filed 8/10/15; the Record was not transmitted to and the appeal was not docketed in this Court until ***7 ½ months later*** – on 3/23/16. That Ford seeks to maximize delay cannot be doubted: Ford's "notice of appeal" states "Ford respectfully requests that the clerk omit nothing from the record on appeal. Ford designates all transcripts, pleadings, papers, exhibits, depositions, and other materials to be filed as part of the record on appeal." Ex. 2, Ford's 8/9/18 "notice of appeal."

order amounted to a "contempt" finding, although the orders held no one in "contempt." *See* Ex. 1, 8/31/05 Order, *Ford v. Gibson*, No. A05A2092.[5] This Court told Ford then: *"[o]rders imposing discovery sanctions, but not holding a party in contempt, are not directly appealable*. To appeal such an order, the application procedures outlined in OCGA § 5-6-34(b) must be followed. Because Ford failed to comply with these procedures, this Court is without jurisdiction to consider the direct appeal in Case No. A05A2092." *Id.* at 2 (emphasis added).[6] Ford did not heed the lesson.[7]

Ford's "notice of appeal" depends upon Ford's claim that the trial court's Order "is, in substance, intention, and effect, an order *holding Defendant [Ford]* in contempt." Ex. 2, 8/9/18 Ford "notice of appeal" at 1, ¶1 (emphasis added).

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[5] That time, 13 years ago, this Court noted that the trial court "did not hold Ford in contempt," despite Ford's "calling it a contempt order." Ex. 1 at 2.

[6] Ford also knows its attempt to delay judgment day by its "notice" is unlawful because Ford can read the law. *See* O.C.G.A. § 5-6-34(a)(1)-(13) (enumerating the types of judgments and orders subject to a direct appeal – none of which apply here).

[7] One cannot resist remembering the great scene from "Darkest Hour" – "*when will the lesson be learned!"* https://www.youtube.com/watch?v=TJ5sjFf4w1k. For Ford, the answer is clear: never. In *Gibson*, Ford made *three* requests to the trial court for a certificate of immediate review, filed *six* "notices of appeal" *plus two* petitions for supersedeas, ultimately requiring *five* decisions by the Supreme Court and *three* decisions by this Court. By that strategy Ford delayed trial in a case which had commenced March 1, 2000 until November 14, 2005, and delayed the end of the case until April 4, 2008 – over seven years.

First, that claim is irrefutably false: the trial court did no such thing. *See* Ex. 3, 7/19/18 Order. To the precise contrary, the trial court did not even suggest that it *might* hold defendant Ford in "contempt."[8] The trial court's Order *did* state that "[b]efore this case is scheduled for a second trial, the Court will convene a hearing" to determine *if* one of Ford's lawyers, Thomas, should be held "in contempt." *Id.* at 7 (emphasis added). However, no such hearing has been scheduled or held, no such order issued, and Plaintiffs have asked the trial court *not* to hold anyone in "contempt," precisely to avoid the sort of delay Ford attempts here. Pls.' 8/8/18 "Request for Trial Special Setting and Opposition to Ford's Forthcoming Attempts to Delay Trial" at 1, 2, 3.[9]

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[8] There should be some consequences to such false pleading. *See Jones v. Peach Trader Inc.*, 302 Ga. 504, 510 n.7 (2017). Yet here we are, 13 years after Ford did the same thing, in this same Court, in *Gibson v. Ford* – and Ford is at it again. Clearly "frivolous, delay-oriented appeals" are not rendered "less likely" by the specter of appellate court "sanctions." *Id*.

[9] In their motion for sanctions, Plaintiffs expressly asked the trial court ***not*** to hold Ford or any of its lawyers in contempt. *See* 4/24/18 Pls.' Post-Mistrial Motion for Sanctions ("MFS") at 53 ("Plaintiffs do *not* seek, and Plaintiffs ask that the Court do *not* impose, anything that Ford could try to call a "contempt" of court sanction in order to try to manufacture a claimed basis for a delaying interlocutory appeal. That will serve only to delay the trial." (emphasis in the original)); 8/8/18 Pls.' Request for Trial Special Setting and Opposition to Ford's Forthcoming Attempts to Delay Trial at 1 ("Plaintiffs further respectfully request that this Court not hold Ford or any Ford lawyer in 'contempt' . . . .").

Second, as this Court has held in a later case (after *Gibson*), affirmed unanimously by the Supreme Court, even a trial court order that *actually did hold* that *a defendant* was in "willful contempt" "is not directly appealable as a contempt judgment under OCGA § 5-6-34(a)(2) where, as in the present case, it does not impose a sanction that is available for criminal contempt and does not attempt to coerce compliance with the prior discovery order as in cases involving civil contempt." *Am. Med. Sec. Group, Inc. v. Parker*, 284 Ga. 102, 102 (2008) (*aff'g* this Court's order dismissing attempted "appeal").

Even more important than the result in *Parker* are the reasons the Supreme Court stated for its decision:

> Immediate appeals of such orders would undermine trial judges' discretion to structure a sanction in the most effective manner. They might choose not to sanction an attorney, despite abusive conduct, in order to avoid further delays in their proceedings. Not only would such an approach ignore the deference owed by appellate courts to trial judges charged with managing the discovery process, it also could forestall resolution of the case as each new sanction would give rise to a new appeal. The result might well be the very sorts of piecemeal appeals and concomitant delays that the final judgment rule was designed to prevent.

Id. at 106, *citing Cunningham v. Hamilton County*, 527 U.S. 198, 209, 119 S. Ct. 1915 (1999). As the Supreme Court held in *Scruggs v. Ga. Dep't of Human Res.*, "the certificate of immediate review is not 'surplusage.' The certificate is an essential component of a trial court's power to control litigation." 261 Ga. 587,

589 (1991) (citation omitted). Trial courts deserve more respect than Ford Motor Co. gives them.[10]

Ford is trying to take advantage of a change in Georgia law to help itself to an unwarranted delay of the second trial. It used to be that when a litigant filed an unauthorized "notice of appeal" the trial court could dismiss the "notice." That changed last year, with the Supreme Court decision in *Jones*, 302 Ga. at 507, holding that only the appellate courts could dismiss an appeal for lack of jurisdiction. Ford is trying to take advantage of Court of Appeals Rule 11 (a), (d); Ford hopes that the mere filing of its "notice," even where there is clearly no right to appeal now, will stop the second trial while months pass by waiting for the clerk of the trial court to transmit to the Clerk of this Court the record and transcripts.[11]

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[10] Ford cannot complain that the trial court refused to grant its request for a certificate of immediate review. It has long been the law in Georgia that trial courts have "carte blanche" and "unfettered discretion" to deny a request for a certificate of immediate review. *Lee v. Smith*, 119 Ga. App. 808, 808 (1969); *Rogers v. Dep't of Human Res.*, 195 Ga. App. 118, 118 (1990); *Scruggs*, 261 Ga. at 588 (1991); *Ivey v. State*, 264 Ga. App. 377, 385 (2003).

[11] In *Jones*, the Supreme Court did state that "trial courts need not be stymied by the repetitive filing of notices of appeal challenging interlocutory decisions solely for the purpose of creating disruption and delay," both because such a litigant can be "sanctioned" by the appellate court and because "supersedeas never attached because the case was never truly on appeal; accordingly the trial court's intervening decisions will stand." 302 Ga. at 510. That ignores practical realities. These Plaintiffs, and the trial court, ***are*** "stymied" by the mere filing of Ford's "notice"; indeed, that is transparently why Ford filed the "notice." Those thoughts

Nothing compels this Court to allow that delay. Court of Appeals Rule 40(b) provides only that "*[g]enerally*, no order shall be made or direction given in an appeal until it has been docketed in this Court." (emphasis added). But that general practice is not absolute and does not reflect any lack of constitutional or statutory authority. This Court recognizes, for example, that it may act before docketing to grant a stay pending appeal. *Id*. Likewise, this Court should act before docketing to reject an appeal over which it plainly has no jurisdiction without delaying the case for months or longer.

That is the real purpose of Ford's "notice of appeal" – to delay verdict and judgment in a case in which Ford "willfully caused a mistrial" by repetitively violating the trial court's Orders. *See* Ex. 3, 7/19/18 Order (the Order from which Ford filed its "notice of appeal.")[12] There is no doubt about that: Ford filed its

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in *Jones* are of especially no help here, just as such a thought would have been no help in *Gibson v. Ford*, because the next step in this case, as it was in *Gibson*, post-sanctions Order, *is a trial* pursuant to the sanctions Order. No trial judge is going to spend time trying a case when Ford has one of its unlawful 'notices of appeal' outstanding – particularly not a judge who, like the one in this case, has wasted three weeks of his calendar as a result of Ford deliberately causing a mistrial.

[12] The violation of court orders that precipitated the mistrial was merely "the culmination of Ford's continuing disregard for several pretrial evidentiary rulings" (Ex. 3, 7/19/18 Order at 1); "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." *Id*. at 5.

"notice of appeal" ***the day after*** Plaintiffs filed a pleading to "request that this Court reschedule this case for retrial as early as is convenient for the Court." Pls.' 8/8/18 "Pls.' Request for Trial Special Setting and Opposition to Ford's Forthcoming Attempts to Delay Trial" at 1, 2, 3.

There is utterly no basis in law for Ford to get away with delaying the re-trial of this case by the mere filing of an unauthorized "notice of appeal." That is why Ford's "notice" cites to no authority permitting that result.[13]

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[13] Now is not the time for Plaintiffs to respond to Ford's twisted rhetoric about various pretrial orders entered by the trial court. But because Ford's intent is to suggest this was a trial court 'out of control,' some mention is warranted. Every one of those arguments could have been made after Final Judgment – had Ford allowed the trial of this case to reach Final Judgment. Plaintiffs will state that each and every one of Ford's perfervid complaints is demonstrably false. (For example, as to Ford's paragraph (a), after massive publicity about Plaintiffs' biomechanics expert Dr. Joseph Burton being indicted and pleading guilty to crimes, Ford insisted it would "hang" him around "the neck" of Plaintiff's lead counsel "like a living skunk." 10/30/17 Hg. Tr. at 143/24-144/4. As to paragraph (b), McNish did not have "unchallenged expertise" – he had none, on cause of death, and had been Dauberted by nine different courts. As to paragraph (c), Nightingale was not "excluded" at all; his testimony was limited to the areas of his supposed expertise. As to paragraph (d), the created-for-litigation-only "Malibu" and "CRIS" demonstrations have been frequently excluded from evidence, as charlatanry. As to paragraph (3), the trial court followed the statute. As to paragraph (4), there was no evidence Mr. Melvin Hill was impaired –none at all, yet Ford deliberately injected that insinuation into the trial.) Plaintiffs could go on, but that should be unnecessary. Plaintiffs will refute Ford's arguments, post-Final Judgment.

Obviously realizing that its "contempt" argument is demonstrably false, the second paragraph of Ford's "notice" attempts to rely on *Waldrip v. Head,* but that decision does not authorize this Court to bypass the *statutory* requirements for an interlocutory review in this case.

First, even if this Court, as well as the Supreme Court, can bypass the statutory jurisdictional requirements, which would appear to remain an open question,[14] the Supreme Court has emphasized that it does so only "on rare occasions" – "when the case presented an important issue of first impression concerning a recently enacted statute for which a precedent was desirable, **[*or*]** dismissal would deny the litigant the right of appellate review in this state, ***or*** consideration of the trial court order as 'final' served the interest of judicial economy." *Waldrip,* 272 Ga. at 384-85 (citations omitted and emphasis added). None of those rationales justify usurping "the legislative function" in this case. *See id.* at 390 (Carley, J., dissenting).

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[14] *C.f. Fein v. Chenault,* 330 Ga. App. 222, 227 (2014) ("We held that an appellate court generally will not review a trial court's exercise of its discretion to grant or deny a certificate of immediate review [citations omitted]. We further held that this is not one of those extraordinary cases described in *Waldrip v. Head,* 272 Ga. 572, 532 S.E.2d 380 (2000), that qualify for an exception to the certificate requirement because the trial court's actions would preclude appellate review of a substantive issue.").

Second, Ford's claim that the trial court's Order makes this an "exceptional case[] that involve[s] an issue of great concern, gravity, and importance to the public and no timely opportunity for appellate review" exists is transparent nonsense. Ex. 2, Ford "notice of appeal" at 1, ¶ 2. Sanctions orders against a party for deliberately disobeying court orders are not "exceptional" – they are, unfortunately, rather common, particularly for defendants like Ford. The only thing "exceptional" about this particular sanctions Order is the wholesale extent of Ford's repeated violations of so many trial court orders.[15]

The trial court's July 19, 2018 Order was not "exceptional" at all; instead it was well within a trial court's authority. In fact, *the same approach* to *the same defendant* deliberately deciding to disobey a trial court's orders was *unanimously* approved by the Supreme Court in *Ford v. Gibson*, a decade ago. *Ford v. Gibson*, 283 Ga. 398, 402 (2008) ("The trial court did not abuse its discretion where, in light of its conclusion that Ford had wilfully disobeyed its prior discovery order, the court could have imposed the ultimate sanction of default but instead opted for

[15] Despite decades of experience litigating against automakers, Plaintiffs' counsel have quite literally never seen anything like what happened in this case. It was evident from the outset that Ford would not obey the trial court's orders, and the willful disobedience was a deluge: every day of trial brought more violations than Plaintiffs' counsel could keep up with.

the lesser sanction of issue preclusion."). *Sounder authority for what the trial court here did cannot be found than a unanimous Supreme Court decision.*

Ford is certainly not without "timely opportunity for appellate review" – it can appeal after final judgment. O.C.G.A. § 5-6-34(d). Indeed, but for Ford's own misconduct this case would have reached verdict and the final judgment *would already be on its way* to this Court for a lawful appellate review, as the trial court specifically noted. Ex. 3, 7/19/18 Order at 5 n.3.[16]

The immutable fact that explains all of Ford's conduct, including its unlawful "notice of appeal" intended to delay trial, is that Ford cannot defend a roof design it abandoned years ago, but refuses to confess is deadly dangerous. That explains Ford's strategy of trying to defend at trial by reliance on false insinuations and accusations against everyone – including the trial judge; Ford's

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[16] In *Waldrip*, by contrast, the Supreme Court allowed the interlocutory appeal despite the absence of a certificate of immediate review for two reasons: (1) the Court felt it had no choice because otherwise there would be no meaningful appellate review: "once the entire files of trial and appellate counsel are released, the habeas petitioner has no meaningful way to protect privileged matter that is unrelated to the specific claim of ineffectiveness or to restrict its use"; and (2) "every habeas court addressing the waiver issue has refused to issue a certificate of immediate review, thus precluding appellate review of the substantive issues that Waldrip has raised," which caused the Supreme Court to conclude that "the establishment of a precedent appears desirable." *Waldrip*, 272 Ga. at 576-77.

deliberate derailing of the first trial; and Ford's attempt by this "notice" to delay the retrial for months on end.

An order of this Court is necessary, now, on an emergency basis, to prevent the unconscionable disruption and inexcusable delay Ford intended by the filing of its "notice of appeal." Court of Appeals Rule 40(b)(1). Given that the Order Ford purports to appeal shows on its face that it is not appealable before final judgment, this Court should neither facilitate nor allow Ford's attempt to delay this litigation even further. Ford's 'appeal' should be dismissed, now, clearing the way for a trial, verdict, final judgment, followed by a lawful appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

This is a product liability case. Plaintiffs are the sons of Melvin and Voncile Hill, who were both killed as a result of the roof in their 2002 Ford F250 truck crushing down on them in a rollover wreck – something that was not only foreseeable, but that Ford knew had happened hundreds of times.[17]

On April 3, 2014, Melvin Hill was driving a 2002 Ford F-250 Super Duty truck south on state route 49 near Americus, Georgia.[18] Voncile Hill, Melvin's

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[17] Ford sold 5,192,392 of the 1999-2016 "Super Duty" trucks with the subject roof design.

[18] The factual statements made herein are from Plaintiffs' 9/22/17 Pls.' "Statement of Material Facts" ("SMF"), at – in order stated above - ¶¶ 1, 4, 8-9, 11, 10, 12, 14,

wife, was riding in the front passenger seat. Suddenly and without warning, the front right tire on the Hills' truck suffered a catastrophic tread/belt separation that caused the tire to explode, the Hills' truck to leave the right side of the two-lane roadway, and roll over. The truck rolled a total of one and a half times. Under these circumstances, a passenger's life depends upon the strength of the roof. During the rollover, however, Ford's roof totally collapsed down flat, crushing on Melvin and Voncile Hills' heads, causing fatal injuries. Melvin Hill and Voncile Hill are completely innocent victims whose deaths were caused by Ford's defective roof structure.

Ford knew, *long before April 3, 2014* when Mr. and Mrs. Hill were killed by roof crush, that the subject roof was defectively and dangerously weak, from, among other things, (1) the fact that the roof as originally designed had failed Ford's own internal standard for roof strength – and did not satisfy any known standards; (2) the fact that Ford executives ordered Ford engineers to make the subject roof weaker to save money; (3) actual notice from victims of roof crush in the subject trucks, including the 162 lawsuits admitted by Ford; and (4) Ford's

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16, 30-33, 21-22, 34, 15, 16-25, 92.

internal documents proving the subject roof was dangerously weak *and that Ford knew it.*

It is undisputed that Melvin and Voncile Hill were unaware of and could not have known about the dangers posed by the roof on their 2002 F-250 Super Duty truck. Though Ford was completely aware of the dangers posed by the weak roofs, it is undisputed Ford did not give Melvin or Voncile Hill, or anyone else, any warning that the Super Duty roof was dangerously weak or that it could collapse and kill them in a foreseeable rollover wreck. To this day, Ford refuses to warn and still has not warned anybody of the dangers of the Super Duty roof structure.

Trial commenced on March 19, 2018. On the *fifteenth* day of trial, the trial court declared a mistrial "because of [Ford] and its counsels' willful violation of a pretrial order prohibiting Ford's expert Dr. Thomas McNish from giving specific cause of death opinion testimony." Ex. 3, 7/19/18 Order at 1. "That violation of the Court's order in *limine* was the *culmination of Ford's continuing disregard* for several pre-trial evidentiary rulings." *Id.* (emphasis added).

Long before trial, on September 1, 2017, the parties had filed pretrial motions, including motions *in limine* and "*Daubert*" motions. *See id.* at 3. "Months prior to trial, the Court expended six full days immersed in pre-trial hearings, asking questions, and engaging counsel concerning their positions on all

issues." *Id.* "The Court took all matters under careful consideration." *Id.* "In sum, the Court spent countless hours hearing, considering, reconsidering, researching, and ruling on the parties' exclusionary motions." *Id.* at 4. "After lengthy review of the evidence presented, and the arguments of counsel, and upon a detailed analysis of the law, the Court entered rulings on all motions in *limine* by, at the latest, five weeks prior to trial." *Id.* at 3.

Despite the trial court's clear orders and despite the fact that "[d]uring trial, the Court repeatedly reminded the parties of its rulings *in limine*," "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." *See, e.g.*, *id.* at 4-5. Ford's misconduct was a deliberate, systematic onslaught – starting with voir dire and continuing daily, calculated to prevent a verdict at all, or to force Plaintiffs to accept a verdict tainted by inadmissible insinuations and accusations – against Plaintiffs, their counsel, and their expert witnesses.

Just for example:

- Ford deliberately violated the trial court's order "excluding argument or suggestions of driver error or driver fault on the part of Melvin Hill." Ex. 3, 7/19/18 Order at 2. Ford had no evidence to support any such

suggestion. Yet "counsel for Ford brought up a GBI post-mortem toxicology-testing report on Mr. Hill's blood, in front of the jury, intimating that the results showed that Mr. Hill had alcohol in his blood." *Id.* at 4. As the trial court noted, "[t]his example of Ford's willful disregard of the Court's orders in *limine* was particularly troubling, because the toxicology report showed that alcohol was not present in Mr. Hill's blood." *Id.*[19]

- The same Ford lawyer referred to "the chemicals, the medicine that were in Mr. Hill from the GBI" and flat said that Mr. Hill was impaired.[20] It did not end there; the same Ford lawyer twice repeated his violation, in the presence of the jury, stating, for example, "these medications within their therapeutic dosages **can impact performance whether or not you are driving a truck** or walking down the road." *Id.*[21] As the trial court had held, there was no evidence of impairment by "medications."

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[19] It's worse than that: Ford and its lawyers knew that Mr. and Mrs. Hill *never used alcohol* – their sons so testified both in depositions long before trial and at trial, and *there was no evidence to the contrary.*

[20] 4/24/18 Pls.' Motion for Sanctions ("MFS") at 20.

[21] A complete discussion of additional violations of the trial court's order regarding driver fault or error can be found in Pls.' MFS at 16-25.

- Ford deliberately violated the Court's order "prohibiting Dr. Thomas McNish from opining as to the precise cause of death of Mr. or Mrs. Hill." Ex. 3, 7/19/18 Order at 2. That violation was particularly egregious.

> [D]uring trial, the Court repeatedly restated that Dr. McNish would not be allowed to testify as to the particular causes of the Hills' deaths, but would only be allowed to testify as to causes of death generally expected in similar accidents. The Court's limitations on the scope of Dr. McNish's testimony were brought up several times by Ford, during the course of trial. Before Dr. McNish was to take the witness stand, Ford's counsel again argued against those limitations. ***The Court instructed Ford's counsel, Alan Thomas to explain to McNish, before his testimony began, that he would not be allowed to give specific cause of death opinions. Mr. Thomas assured the Court that he would so instruct Dr. McNish, before calling him to the witness stand. Mr. Thomas went out into the hall for the purpose of giving McNish instruction.*** Shortly thereafter, McNish began testifying. In clear disregard of the Court's ruling, Mr. Thomas asked Dr. McNish whether he agreed with Plaintiffs' experts' opinion as to the cause of Mr. Hill's death. Dr. McNish then opined, before the jury, to the very testimony that the Court prohibited - i.e., his opinion as to the cause of Mr. Hill's death.

Id. at 4 (emphasis added).

- "Ford deliberately injected the idea of [alleged improper] seat belt use, as relevant, at least twice, before the jury." Ex. 3, 7/19/18 Order at 3.[22]

[22] A complete discussion of additional violations of the trial court's order regarding seatbelts can be found in Pls.' MFS at 13, 28-30.

There were a host of other examples. The damage had been done. Concerned that Ford's repeated violations of so many trial court orders would, as Ford intended, result in a compromise verdict, Plaintiffs moved for and the trial court declared a mistrial.

On April 24, 2018, Plaintiffs filed their Post-Mistrial Motion for Sanctions and Brief in Support, meticulously detailing Ford's cumulative willful violations of the trial court's orders. In response, Ford remained unrepentant, blamed everyone else for its misconduct, and insulted Plaintiffs and the trial court.

The trial court granted in part Plaintiffs' Post-Mistrial Motion for Sanctions. Ex. 3, 7/19/18 Order at 1. Although "Plaintiffs pointed out numerous of Ford's violations of this Court's Orders *in limine*," in its July 19 Order the trial court chose to specifically "address the three of the Court's orders as to which Ford's violations were most troublesome and reproachable." *Id.* at 2. The trial court held that "Ford willfully caused a mistrial in this case, in bad faith, and issue preclusion sanctions are appropriate." *Id.* at 5 (emphasis added). The trial court also "assess[ed] Gwinnett County's trial costs against Ford, and its counsel"; "reserve[d] ruling on Plaintiffs' O.C.G.A. § 9-15-14 motion for attorney fees and costs"; and stated it "will convene a hearing [before the case is scheduled for a second trial] at which [Ford lead lawyer Alan Thomas] will be required to show

cause (1) why he should not be held in contempt of Court for his conduct outlined above, and (2) why his privilege to practice law in this Court should not be rescinded as a result of his trial conduct." *Id.* at 5-7. That is the only context in which the Order even mentions "contempt"—a statement of the trial court's intent to convene a later proceeding at which it will decide *whether* to hold one of Ford's counsel in contempt and, *if* so, the consequences.

Ford ***conceded*** the July 19 Order was "not otherwise subject to a direct appeal," and, instead, is subject only to the interlocutory appeal provisions of O.C.G.A. § 5-6-34(b): on July 23, 2018, Ford requested that the "Court execute the attached Certificate of Immediate Review ***pursuant to O.C.G.A. § 5-6-34(b) regarding that order***." 7/23/18 Ford ltr. to J. Bratton (emphasis added). On July 30, 2018, Ford reminded the trial court that "[t]oday is the final day for Judge Bratton to issue a Certificate of Immediate Review on this matter, if he so chooses." 7/30/18 Ford email to Staff Attorney E. Hight. The trial court did not grant a certificate of immediate review of the July 19 Order.

Yet, on August 9, 2018, Ford filed the subject "notice of appeal" anyway.

III. THE LAW: DISMISSING APPEALS

Georgia law provides that an appeal should be dismissed "[w]here the decision or judgment is not then appealable. O.C.G.A. § 5-6-48(b)(2). Only

Georgia's appellate courts have authority to dismiss an appeal pursuant to O.C.G.A. § 5-6-48(b). *Jones*, 302 Ga. at 510.

It is well established that "an attempt to appeal an interlocutory order without following the procedures statutorily mandated [by O.C.G.A. § 5-6-34(b)] is ineffective in conferring jurisdiction on the appellate court to hear the appeal." *Islamkhan v. Khan*, 299 Ga. 548, 552 n.7 (2016); *accord Eidson v. Croutch*, 337 Ga. App. 542, 543 (2016). In particular, dismissal for lack of jurisdiction is required where the party seeking appellate review of an interlocutory order failed to obtain a certificate of immediate review. *Jones*, 302 Ga. at 516; *Bailey v. Bailey*, 266 Ga. 832, 832-33 (1996); *Murray v. Rozier*, 186 Ga. App. 184, 185 (1988); *see also Gelfand v. Gelfand*, 281 Ga. 40, 41 (2006); *Scruggs*, 261 Ga. at 589. Ford knows that. *See*, *e.g.*, Ex. 1, 8/31/05 Order, *Gibson v. Ford*, *supra* ("Because Ford failed to comply with these procedures, this Court *is without jurisdiction* to consider the direct appeal . . . ." (emphasis added)).

Orders imposing sanctions but not holding a party in contempt, are not directly appealable and must be dismissed where the party attempting to appeal such an order fails to comply with Code § 5-6-34(b). *See* O.C.G.A. § 5-6-34(a)(1)-(13) (enumerating the types of judgments and orders subject to a direct appeal). This Court and the Supreme Court have repeatedly rejected attempts by litigants—

including Ford—to mischaracterize non-appealable orders as contempt orders in an attempt to justify an unlawful appeal. *See* Ex. 1, 8/31/05 Order, *Gibson v. Ford*, *supra*; *Parker*, 284 Ga. at 105-07 (affirming dismissal of appeal and holding "contrary to the appellants' assertion that there was a contempt punishment imposed on them, we conclude that the sanction imposed by the trial court [dismissing the defendant's answer and entering a default judgment as to liability] does not constitute either criminal or civil contempt" and "such an order is not directly appealable as a contempt judgment under OCGA § 5-6-34(a)(2)."); *Dial v. Bent Tree Nat. Bank*, 215 Ga. App. 620, 620 (1994) (While the trial court's order contemplated a contempt finding if defendant failed to comply with the order, "the trial court did not find [defendant] in contempt" and therefore the trial court's order was "not a final order for purposes of OCGA § 5-6-34(a)" and defendant's appeal "must be dismissed."); *Cornelius v. Finley*, 204 Ga. App. 299, 300 (1992) (holding "[t]he trial court did not find [defendant] in contempt of court" and therefore "the appeal must be dismissed since the direct appeal of this order was improper."); *Klein v. Standard Fire Ins. Co*., 191 Ga. App. 417, 417 (1989) (holding that direct appeal of trial court order *not* holding appellant in contempt "must be dismissed as we are without jurisdiction to entertain it."); *Payne v. Presley*, 169 Ga. App. 36, 36 (1983) ("The trial court did not find appellant in contempt. Until further action is

taken, the contempt proceeding is pending in the court below and the trial court's order is not final and therefore not appealable. Judgments not final can be appealed only by compliance with the interlocutory appeal provision at OCGA § 5-6-34(b) and as such compliance was lacking here, the appeal must be dismissed." (internal citations omitted)); *McDonald v. McDonald*, 244 Ga. 453, 453 (1979) (dismissing appeal where the trial court did not rule on the contempt issue because there was no "judgment adjudicating contempt."); *Cunningham v. Hamilton Cty., Ohio*, 527 U.S. 198, 201 (1999) (holding sanction order was not directly appealable where "petitioner was never found to be in contempt of court" by the trial court). *See also Gourmet Delights, Inc. v. Edgewater Country Club, Inc*., 185 Ga. App. 660, 660 (1988) (holding that appellant's direct appeal from sanctions order striking defendant's answer, entering judgment for plaintiff, reserving the issue of damages for trial, and awarding plaintiff attorney fees in connection with its motion for sanctions was "premature" and not appealable because "to be appealable, a judgment must be final, i.e., the case must no longer be pending in the trial court"); *Am. Exp. Co. v. Yondorf*, 169 Ga. App. 498, 498 (1984) (Sanction order forming "the basis of this notice of appeal…not being one of those designated by OCGA § 5-6-34 as subject to direct appeal, and there being no certificate of immediate

review in the case as required by OCGA § 5-6-34(b), this appeal is accordingly dismissed.")

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Ford's 'appeal' should be dismissed because Ford failed to obtain a certificate of immediate review of the July 19 Order.

O.C.G.A. § 5-6-34(b) provides the only path to appellate review of interlocutory orders imposing sanctions but not holding a party in contempt. *See Dep't of Human Res. v. Hutchinson*, 217 Ga. App. 70, 72 (1995) ("the express mention of one thing implies the exclusion of another"). It is undisputed that Ford did not obtain a certificate of immediate review from the trial court. Without a certificate of immediate review, this case is "not then appealable" and Ford's "notice of appeal" must be dismissed under O.C.G.A. § 5-6-48(b)(2). Ex. 1, 8/31/05 Order, *Gibson v. Ford*, *supra*; *Jones*, 302 Ga. at 516; *Bailey*, 266 Ga. at 832-33; *Murray*, 186 Ga. App. at 185; *Gelfand*, 281 Ga. at 41; *Scruggs*, 261 Ga. at 589.

B. Ford cannot fabricate grounds for a direct appeal by trying to inject a finding of "contempt" into the trial court's July 19 Order.

Ford purposefully misrepresented the July 19 Order as "in substance, intention, and effect, an order holding [Ford] in contempt of Court" because a contempt citation allows an immediate, direct appeal under O.C.G.A. § 5-6-

34(a)(2). But the trial court clearly did not hold Ford (or anyone else) in contempt. To the contrary, the trial court, under the heading "SANCTIONS," *stated its actual holdings*, (1) "that issue preclusion is appropriate for the retrial of this case"; (2) awarding against Ford and its attorneys "Gwinnett County's expenditure of $10,440.00 to empanel a jury and to pay for juror time"; and (3) "reserv[ing] ruling on Plaintiffs' O.C.G.A. § 9-15-14 motion for attorney fees and costs." Ex. 3, 7/19/18 Order at 5-7. Then, *under a separate heading* titled "CONTEMPT OF COURT AND *PRO HAC VICE* STATUS OF ALAN THOMAS," the trial court explicitly stated "*Before this case is scheduled for a second trial*, the Court *will convene* a hearing *at which Mr. Thomas will be required to show cause* (1) why he should not be held in contempt of Court for his conduct outlined above, and (2) why his privilege to practice law in this Court should not be rescinded as a result of his trial conduct." *Id.* at 7 (emphasis added). A show-cause hearing has not even been scheduled.

The premise of Ford's "notice of appeal," that the trial court's Order amounts to holding Ford in contempt, is absolutely false. The trial court did not

'hold' even Thomas in contempt, and, if Plaintiffs can persuade the trial court not to, hopefully will not.[23]

The fact this trial court has held no one in "contempt" is dispositive of Ford's attempted appeal. In *Payne v. Presley*, 169 Ga. App. 36 (1983), for example, the Court of Appeals dismissed an appeal because, as here, the trial court never made a specific finding of contempt.

> The trial court did not find appellant in contempt. Until further action is taken, the contempt proceeding is pending in the court below and the trial court's order is not final and therefore not appealable. Judgments not final can be appealed only by compliance with the interlocutory appeal provision at OCGA § 5-6-34(b) and as such compliance was lacking here, the appeal must be dismissed.

Id. at 37; *see also Parker*, 284 Ga. at 105-07; *Dial*, 215 Ga. App. at 620; *Cornelius*, 204 Ga. App. at 300; *Klein*, 191 Ga. App. at 417; *Gourmet Delights, Inc.*, 185 Ga. App. at 660; *Yondorf*, 169 Ga. App. at 498; *McDonald*, 244 Ga. at 453; *Cunningham*, 527 U.S. at 201.

As *Ford v. Gibson* clearly established, a sanctions order governing the issues and proof that may be submitted at trial is not an order of contempt. Ex. 1, 8/31/05 Order, *Ford v. Gibson, supra*. The Georgia Supreme Court addressed a similar

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[23] *See* p. 4, and n.9, *infra*. Abundant experience teaches that it literally does no good to 'punish' the defense lawyer; more will simply appear. In fact, focusing on the lawyer for a deviant corporation is a distraction, and is counter-productive.

issue in *Parker*, 284 Ga. at 104. After "committ[ing] an act of wilful contempt in failing to comply" with the trial court's order, the trial court issued a sanctions order striking the defendant's answer and entering a default judgment as to liability against the defendant. *Id*. at 102. Attempting to appeal that interlocutory order, the defendant argued that the trial court's sanction order should "be considered a contempt case within the meaning of O.C.G.A § 5-6-34(a)(2)." *Id*. at 104. The Supreme Court disagreed and held that the sanctions order was "not directly appealable as a contempt judgment," despite the trial court's finding of wilful contempt, because the trial court did "not impose a sanction that is available for criminal contempt and [did] not attempt to coerce compliance with the prior discovery order as in cases involving civil contempt." *Id*. at 102. The Supreme Court noted that "the sanction of dismissing an answer and entering a default judgment on liability does not fall within" the category of civil or criminal contempt. *Id*. at 104.[24]

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[24] "As for criminal contempt, a superior court's power to punish for it is limited by OCGA § 15-6-8(5), which gives superior courts the authority to impose fines not exceeding $500 and imprisonment not exceeding 20 days. Thus, in the present case, the sanction of dismissing the appellants' answer and entering a default judgment cannot be considered a punishment for criminal contempt. Moreover, it does not constitute a punishment for civil contempt, as the order was unconditional and was not intended to coerce compliance with the prior discovery order." *Id.* at 104.

In this case, the issue preclusion sanctions ordered by the trial court are less severe than the sanctions evaluated by the Supreme Court in *Parker* and do not fall within the category of civil or criminal contempt. Nor were they even preceded by any finding of contempt, as was the case in *Parker*. Because the trial court's power to punish for criminal contempt is limited by O.C.G.A. § 15-7-4(a)(5),[25] the trial court's issue preclusion sanction "cannot be considered a punishment for criminal contempt."[26] *Id.* at 105. Moreover, it is irrefutable that the sanctions at issue in this case do "not constitute a punishment for civil contempt, as the order was unconditional and was not intended to coerce compliance with the prior [] order." *Id*. at 105. (Ford had certainly established, during the first trial, that attempting to "coerce" compliance by Ford with court orders was pointless.) Instead, as the trial court expressly held, issue preclusion sanctions were imposed "to ensure that Plaintiffs are afforded a fair trial." Ex. 3, 7/19/18 Order at 5.

Ford knew there was no "contempt" finding and that its attempt to delay this case was unlawful. *Had Ford believed the representation it has now made to this*

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[25] O.C.G.A. § 15-7-4(a)(5) ("The punishment of contempt by fines not exceeding $1,000.00, by imprisonment not exceeding 20 days, or both.").

[26] Ford cannot contend that the trial court's sanction for jury costs amounts to a directly appealable contempt order. *See, e.g.*, *Hill v. Doe*, 239 Ga. App. 869, 870 (1999) (holding that a trial court's sanction awarding jury costs is within the purview of O.C.G.A. § 9-15-14(b) and is therefore "not directly appealable").

Court, it would never have sought a certificate of immediate review from the trial court as required by O.C.G.A. § 5-6-34(b).

C. This Court can and should dismiss Ford's Notice of Appeal now, without waiting months for the transcript and record.

Before 2017, trial courts in Georgia were permitted to dismiss notices of appeal for the reasons set forth in O.C.G.A. § 5-6-48(b). *Jones*, 302 Ga. at 509-10 (citing numerous appellate decisions affirming a trial court's dismissal of a notice of appeal); *see also Jones v. Singleton*, 253 Ga. 41, 41 (1984) ("The trial court properly dismissed appellants' first two notices of appeal since at the time they were filed, there was no final judgment in the case. No interlocutory appeal could be taken as the trial court did not certify the case for immediate review." (citations omitted)).

Ford hopes to take advantage of the Supreme Court's 2017 decision in *Jones*. The trial court can no longer dismiss Ford's appeal despite the obvious lack of jurisdiction. Ford hopes that this Court will decline to act until the transcript is completed, the record transmitted, and the appeal docketed. In that way, Ford seeks to grant itself a months-or-more-long "stay" of retrial, despite the obvious lack of any jurisdictional basis for appeal.

Allowing that tactic to work would have bad consequences, not just for this case, but for many others. ***Any*** party could try to avoid ***any*** trial by the mere

expediency of filing an unlawful notice of appeal. That's because the mere filing of a notice of appeal can potentially put everything on hold *for months* while the record and transcripts are prepared, transmitted, and eventually filed in the Clerk's office at the Court of Appeals. Court of Appeals Rule 11(a).

Here, the unappealability of the trial court's order shows on its face. It is a sanctions order precluding Ford from contesting certain issues at trial, in order to ensure that there is no repeat of the fiasco by which Ford sabotaged the first trial. It is no more appealable than the sanctions order in the *Gibson v. Ford* case, which did precisely the same thing. But if the Court does not act now, Ford will have succeeded in delaying trial—and a lawful appeal after final judgment—by many months. Nothing requires this Court to allow that result.

First, there is no jurisdictional obstacle to acting now, based on the face of the trial court's order. No constitutional or statutory prohibition requires this Court to await docketing before exercising its powers. Rule 40, for example, provides that this Court may act on an appeal prior to docketing, and it could not do so if there were such a legal prohibition.

Second, there is no practical obstacle to acting now. This Court does not need the transcript or other pleadings in order to know that the order Ford purports to appeal is not appealable—it need only read the order and past decisions in cases

such as *Gibson* and *Parker*. After all, if an order striking an answer, based on a finding of contempt, is not a directly appealable contempt order (*Parker*), then this order cannot possibly be one. Further, just as with a *proper* request for interlocutory appeal, this Court can consider pleadings or orders from the trial court record based on the parties' filings, rather than a copy of the record compiled and certified by the trial court Clerk's office. *See, e.g.*, Court of Appeals Rule 30(e), (f) & (g). Delaying dismissal pending the compilation and transmission of the trial court record merely rewards Ford, wastes the resources of the trial court, and delays the inevitable.

V. CONCLUSION

The most salient truth about this litigation is that Ford fears and will do anything to avoid a trial, verdict, and final judgment. Contrary to Ford's *modus operandi* and view of the court system for decades, Ford does not make the rules or the law. Ford's 'appeal' should be dismissed immediately to avoid any further delay.

Respectfully submitted, this 22nd day of August, 2018.

This submission does not exceed the word count limit imposed by Rule 24. Plaintiffs show that they have served a copy of this motion on Ford before filing the motion with the Court of Appeals.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served all counsel of record in the within matter with a copy of Plaintiffs' Emergency Motion to Dismiss Ford Motor Company's ' Notice of Appeal,' before filing the motion with the Court of Appeals, via U.S. Mail and e-mail, properly addressed to ensure delivery to:

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This 22nd day of August, 2018.

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IN THE COURT OF APPEALS OF GEORGIA

KIM HILL and ADAM HILL,
surviving children and Co-Administrators
of the Estates of Melvin Hill and Voncile Hill, deceased,

Plaintiffs,

v.

FORD MOTOR COMANY, et al.,

Defendants.

PLAINTIFFS' EMERGENCY MOTION TO DISMISS FORD MOTOR COMPANY'S 'NOTICE OF APPEAL'

INDEX TO EXHIBITS

1. August 31, 2005 Georgia Court of Appeals Order – *Ford v. Gibson*, No. A05A2092;
2. August 9, 2018 - Ford Motor Company's Notice of Appeal, *Hill v. Ford*, Case No. 16C04179.
3. July 19, 2018 Order Granting-In-Part Plaintiffs' Post-Trial Motion for Sanctions and Assessing Jury Costs Against Defendant, *Hill v. Ford*, Case No. 16C01479.

EXHIBIT 1

Court of Appeals
of the State of Georgia

ATLANTA, August 31, 2005

The Court of Appeals hereby passes the following order:

A05A2092. FORD MOTOR COMPANY v. GIBSON et al.
A05A2093. DRAW-TITE, INC. v. GIBSON et al.
A05A2094. GIBSON v. FORD et al.

Artumus Gibson has filed a motion to dismiss for lack of jurisdiction the direct appeal in Case No. A05A2092 and its cross-appeals in Case Nos. A05A2093 and A05A2094. Ford claims it is entitled to a direct appeal from an August 25, 2004, order granting Gibson's second motion for sanctions against it for disobeying court discovery orders.

"OCGA § 9-11-37 (b) (2) grants trial courts a very broad discretion in applying sanctions against disobedient parties in order to assure compliance with the orders of the courts with regard to the conduct of discovery." *Yarbrough v. Kirkland*, 249 Ga. App. 523, 524 (1) (548 SE2d 670) (2001) (citation and punctuation omitted); see also *Payne v. Presley*, 169 Ga. App. 36 (311 SE2d 849) (1983). Such sanction may include declaring designated facts to be established for the purposes of the action under OCGA § 9-11-37 (b) (2) (A) and holding a party in contempt under OCGA § 9-11-37 (b) (2) (D). See *Yarbrough*, supra. An appellate court, "which is far removed from the unfolding development in the life of a case in court and does not participate in its ongoing journey," must respect a trial court's discretion and reverse only when that discretion is manifestly abused. *General Motors Corp. v. Blake*, 237 Ga. App. 426, 427 (1) (515 SE2d 166) (1999); see also *Yarbrough*, supra.

LC number(s): ST00CV0111

The record reveals that, in its August 25 order, the trial court chose to impose the discovery sanction of declaring designated facts as established pursuant to OCGA § 9-11-37 (b) (2), but it did not hold Ford in contempt. Furthermore, when Ford subsequently filed a notice of appeal from the order, calling it a contempt order, the trial court dismissed the notice of appeal, clarifying in an order entered September 4, 2004, "The Court's previous Order dated August 25, 2004, did not in any respect hold Defendant Ford Motor Company (hereinafter "Ford") in contempt of Court; such order clearly establishes that the Court imposed sanctions under the Court's authority pursuant to OCGA § 9-11-37 (b)." The trial court dismissed the notice of appeal "upon the grounds that: (1) Defendant is attempting a direct appeal of a pretrial discovery ruling for which Defendant Ford only has a right to an interlocutory appeal; (2) Defendant Ford has not sought from the Court a certificate of immediate review. . .; and (3) Defendant has failed to follow the appropriate interlocutory appellate procedure and no final judgment has been entered." See *Attwell v. Lane Co.*, 182 Ga. App. 813, 814 (1) (357 SE2d 142) (1987) (trial court is authorized to dismiss a notice of appeal where the contested order is not then appealable).

Orders imposing discovery sanctions, but not holding a party in contempt, are not directly appealable. *Cornelius v. Finley*, 204 Ga. App. 299 (418 SE2d 815) (1992); *Payne*, supra; *American Express Co. v. Yondorf*, 169 Ga. App. 498 (313 SE2d 756) (1984). To appeal such an order, the application procedures outlined in OCGA § 5-6-34 (b) must be followed. *Cornelius*, supra at 300; *Payne*, supra; *American Express Co.*, supra. Because Ford failed to comply with these procedures, this Court is without jurisdiction to consider the direct appeal in Case No. A05A2092. *Cornelius*, supra; *Payne*, supra; *American Express Co.*, supra.

Ford next claims that it is entitled to a direct appeal from the dismissal of its notice of appeal from the August 25 order, citing *Gilman Paper Co. v. James*, 235 Ga. 348 (219 SE2d 447) (1975) and *Castleberry's Food Co. v. Smith*, 205 Ga. App. 859, 860 (424 SE2d 33) (1992). But in those cases, the appellate courts reviewed whether the trial courts had abused their discretion in ruling on motions to dismiss appeals from *directly appealable orders*. Those cases do not authorize a direct appeal where the trial court has dismissed an appeal from an order that was not directly appealable. Where, as here, an "appeal is from an order dismissing an unauthorized appeal of an interlocutory order . . . , [s]uch an interlocutory order is not appealable absent compliance with OCGA § 5-6-34 (b)'s interlocutory appeal procedures." *Rolleston v. Cherry*, 233 Ga. App. 295, 296 (504 SE2d 504) (1998). To permit otherwise would allow any party to simply file a notice of appeal from *any* trial court order with which it disagrees, wait for the trial court to dismiss that notice of appeal, and then file a notice of appeal to secure a direct appeal – thereby circumventing the entire interlocutory appeal procedure.

Because Case No. A05A2092 is a direct appeal from a non-final judgment that is not directly appealable in its own right, we are without jurisdiction to consider it. Therefore, it is hereby DISMISSED. A cross-appeal may survive the dismissal of the main appeal only when the cross-appeal can stand on its own merit. *Jones Roofing & Constr. Co. v. Roberts*, 179 Ga. App. 169, 169-170 (2) (345 SE2d 683) (1986). As the cross-appeals in Case Nos. A05A2093 and A05A2094 cannot stand on their own merit, this Court has no jurisdiction over them. Thus, the cross-appeals in Case Nos. A05A2093 and A05A094 are hereby DISMISSED. See *Serco Co. v. Choice Bumper*, 199 Ga. App. 846 (406 SE2d 276) (1991).

It follows that Gibson's renewed motions to dismiss Case Nos. A05A2092, A05A2093, and A05A2094 are hereby denied as moot; Ford's request for oral argument is also denied as moot.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta AUG 31 2005

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Will L. Matt III Clerk.

EXHIBIT 2

IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

KIM HILL, et al,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 16-C-04179-S2
	)	
FORD MOTOR COMPANY, et al.	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Defendant Ford Motor Company ("Ford") appeals to the Court of Appeals of Georgia from the Order Granting-in-Part Plaintiffs' Post-Trial Motion for Sanctions and Assessing Jury Costs Against Defendant, entered on July 19, 2018 (the "Order"). The Order is, in substance, intention, and effect, an order holding Defendant in contempt of the court and is therefore directly appealable pursuant to O.C.G.A. § 5-6-34(a)(2).

Alternatively, Georgia appellate courts are empowered "to consider appeals of interlocutory orders when [the court] disagree[s] with the trial court concerning the need for immediate appellate review of an interlocutory order," in "exceptional cases that involve an issue of great concern, gravity, and importance to the public and no timely opportunity for appellate review." Waldrip v. Head, 272 Ga. 572, 575 (2000).

The imposition of impermissible death-penalty contempt sanctions, violating basic due process rights by adjudicating a controversy not based on the merits, constitutes an exceptional case justifying interlocutory review of the Order, particularly in light of the trial court's blanket *refusal* to certify that or any Order for immediate review—a practice consistently and without exception followed with each and every certificate of immediate review requested by Ford.

As allowed by O.C.G.A. § 5-6-34(d), Ford further appeals all prior orders and rulings that may affect the proceedings below. Those orders include, but are not limited to, all of the following:

a) Orders parsing what words defense counsel could and could not use and prohibiting any reference to Dr. Joseph Burton before the jury while discussing the secret *ex parte* exhumations and autopsies of the Plaintiffs' parents undertaken and completed by Dr. Joseph Burton and Dr. Jonathan Eisenstat during the pendency of this litigation at the direction of Plaintiffs' counsel, to wit, Orders on Plaintiffs' Motion in *Limine* to Prevent Defense Argument and Insinuations About Exhumations & Autopsies, signed 1/19/2018 and entered on docket 1/22/2018 and signed and entered on docket 2/14/2018;

b) Orders and rulings limiting the testimony of Dr. Thomas McNish, an Air Force and NASA flight surgeon and renowned biomechanical engineer, with unchallenged experience and training in determining injury causation and cause of death in all manner of accidents, by preventing him from giving a cause of death opinion because he was "not qualified," and then striking the entirety of his testimony and granting a mistrial at Plaintiffs' request when Dr. McNish answered a question, without objection, on whether he agreed with the opinion of Plaintiffs' expert (who performed the secret autopsy) regarding injury causation, to wit, Order Regarding Motions in *Limine* No. 10, signed and entered on docket 2/12/2018 and Oral Order Granting Plaintiffs' Motion for Mistrial, issued at trial 4/06/2018;

c) Orders excluding the expert testimony of Dr. Roger Nightingale, a Duke University scholar and renowned researcher who, although qualified by education, training, skill and experience to address biomechanics and injury causation in automobile accidents, did not also have a medical license, to wit, Orders Concerning Plaintiffs' Motions in Limine Numbers 6 and 11, signed 12/15/2017 and entered on docket 12/18/2017;

d) Orders excluding commonly-admitted, peer-reviewed, published crash testing and other testing demonstrating what happens in a rollover accident and when it happens, because under O.C.G.A. § 24-4-403 the science would be unduly prejudicial to the Plaintiffs' case, to wit, Orders Excluding and Limiting Evidence, Defense, Argument, or Reference to "Malibu" and "CRIS" Testing, signed on 12/15/2018 and entered on docket 12/18/2017, and signed and entered on docket 2/14/2018, Order Regarding Motions in *Limine*, signed and entered on docket 2/12/2018, and Order Granting Plaintiffs' Motion in *Limine* to Exclude Evidence, Defense Argument, or Reference to Ford's So-Called "Drop Tests" and "ROCS Tests," signed and entered on docket 2/12/2018;

e) Orders misconstruing O.C.G.A. § 40-8-76.1(d), inserting words not found in that statute, to wit, Orders Granting Plaintiffs' Motion in *Limine* to Exclude Any Argument, Questioning or Evidence About Alleged Seatbelt Use and Plaintiffs' Motion in *Limine* to Exclude Argument or Testimony Concerning the Hills' Allegedly Not Wearing Their Shoulder Belts Properly, signed 1/19/2018 and entered on docket 1/22/2018, and signed 3/16/2018 and entered on docket 3/20/2018;

f) Orders and rulings refusing to apply O.C.G.A. § 51-12-33, which requires the jury to apportion fault whenever the "plaintiff is to some degree responsible for the injury or damages claimed," and excluding evidence that the driver's toxicology tested positive for numerous prescription drugs with significant side effects, the driver was driving above the speed limit and too fast for conditions, violated warnings in the owner's manual by putting the wrong load range tire on his truck (which, according to Plaintiffs' experts, caused a tire failure), and failed to properly control his vehicle following a tire failure, to wit, Order Regarding Motions in *Limine*, signed and entered on docket 2/12/2018;

g) Orders accepting only one party's description of events even after it was proven to be utterly false and steadfastly refusing to hear or consider anything to the contrary, to wit, Order on Plaintiffs' Emergency Motion for Sanctions, signed 3/16/2018 and entered on docket 3/20/2018;

h) Orders refusing to let another judge even hear Ford's Motion to Recuse which met all the requirements for assignment and then refusing to certify that refusal for immediate interlocutory appellate review, to wit, Order Denying Motion to Recuse the Honorable Shawn F. Bratton *nunc pro tunc* to June 7, 2018, signed 6/15/2018 and entered on docket 6/18/2018;[1]

i) Orders and rulings allowing the admission of photographs and occupant names from 64 other accidents, occurring almost entirely outside of Georgia and merely depicting a Ford Super Duty truck that had been involved in a severe rollover accident, to wit, Order on Ford Motor Company's Motion in *Limine* to Exclude All Other Similar Incident (OSI) Evidence, signed and entered on docket 2/13/2018;

j) Orders allowing a failure to warn claim to be tried that was unsupported by evidence and duplicative of the design defect claim, to wit, Order Denying Ford Motor Company's Motion for Partial Summary Judgment on Plaintiffs' Failure to Warn Claims, signed 12/15/2017 and entered on docket 12/18/2017;

k) Orders rejecting the Eleventh Circuit's holding in Ivy v. Ford Motor Company for when a repose-barred claim—or any punitive damages claim for that matter—can survive summary judgment under Georgia law, to wit, Order Denying Ford Motor Company's

[1] This order replaced the Court's June 7, 2018 Order Denying Motion to Recuse the Honorable Shawn F. Bratton, which was vacated in an order signed 6/15/2018 and entered on docket 6/18/2018.

Motion for Partial Summary Judgment — Statute of Repose and Claims for Recovery of Punitive Damages, signed 12/15/2017 and entered on docket 12/18/2017;

l) Orders allowing a purported expert to opine about alternative roof designs without any concrete specifications of those designs and without any scientific basis to opine that a differently-designed roof would have changed the outcome in this case, to wit, Order Denying Defendant Ford Motor Company's Daubert Motion to Exclude the Testimony of Brian Herbst, signed 12/15/2017 and entered on docket 12/18/2017;

m) Orders excluding as both irrelevant and unduly prejudicial a case study conducted in accordance with standard NHTSA protocols and based upon data relied upon by the NHTSA and the automotive industry, merely because it appeared to involve statistics, to wit, Order Granting Plaintiffs' Motion in Limine to Exclude Ford Expert Michelle Vogler's Statistical Analysis of Dissimilar Accident Data, signed 12/15/2017 and entered on docket 12/18/2017;

n) The Court's signing of an *ex parte* consent judgment (signed and entered on docket 3/16/2018) dismissing a settling defendant on the Friday before trial, and then denying Ford's request that Plaintiffs produce the terms and conditions of the settlement that prompted that "consent judgment," to wit, the rulings during trial denying Ford's motion to compel production of the "Pep-Boy's release."

Many of the foregoing orders and rulings were the subject of requests for certificates of immediate review, none of which were allowed.

Pursuant to O.C.G.A. § 5-6-34(a) and (d), the Order and rulings described herein, and many others, are reviewable in the same manner as a final order.

Ford respectfully requests that the clerk omit nothing from the record on appeal. Ford designates all transcripts, pleadings, papers, exhibits, depositions, and other materials to be filed as part of the record on appeal.

The Court of Appeals, rather than the Supreme Court, has jurisdiction over this appeal because this case does not involve matters within the exclusive jurisdiction of the Supreme Court of Georgia.

Respectfully submitted, this 9th day of August, 2018.

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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Notice of Appeal 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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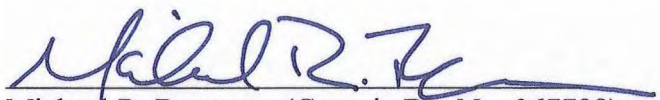

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EXHIBIT 3

IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

KIM HILL, et al., Plaintiff,	)	CIVIL ACTION
v.	)	FILE NO. 16-C-04179-S2
FORD MOTOR COMPANY, et al., Defendant.	)	

ORDER GRANTING-IN-PART PLAINTIFFS' POST-TRIAL MOTION FOR SANCTIONS AND ASSESSING JURY COSTS AGAINST DEFENDANT

Plaintiffs' Post-Mistrial Motion for Sanctions having been read, after considering the motion, Ford Motor Company's response thereto, all matters of record, and the applicable and controlling law, the Court finds as follows.

A. INTRODUCTION

The Court declared a mistrial in this case on the 15th day of trial, because of Ford Motor Company ("Ford") and its counsels' willful violation of a pretrial order prohibiting Ford's expert Dr. Thomas McNish from giving specific cause of death opinion testimony. That violation of the Court's order in *limine* was the culmination of Ford's continuing disregard for several pre-trial evidentiary rulings.

"The object of all legal investigation is the discovery of truth. Rules of evidence should be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law and evidence to the end that the truth may be ascertained and the proceeding justly determined." O.C.G.A. § 24-1-1. See United States v. Augenblick, 89 S. Ct. 528 (1969) (where the Court held that the rules of evidence are designed in the interest of fair trials). Pursuant to O.C.G.A. 24-1-104 (a), it is the court's duty and

responsibility to render decisions and Orders on the rules of evidence, in allowing or excluding evidence.

To meet that duty,"[c]ourts have the power 'to determine the manner in which they shall operate in order to administer justice with dignity and decorum, and in such manner as shall be conducive to fair and impartial trials and the ascertainment of truth uninfluenced by extraneous matters or distractions." Atlanta Newspapers, Inc. v. Grimes, 216 Ga. 74 (1960). "While a party is not entitled to a perfect trial -- a thing bordering on impossibility -- he is entitled to a fair trial, which the courts can and should afford." Am. Oil Co. v. McCluskey, 118 Ga. App. 123 (1968), rev'd on other grounds, 225 Ga. 63 (1969), citing Lutwak v. United States, 73 S.Ct. 481 (1952). When a party usurps the Court's authority, by disregarding the Court's orders, that party violates the principles of justice which our evidentiary rules are designed to serve.

In support of their motion for sanctions, Plaintiffs pointed out numerous of Ford's violations of this Court's orders in *limine*. This Order will address the three of the Court's orders as to which Ford's violations were most troublesome and reproachable: (1) this 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) this 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) this 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.[1]

[1] The Court ruled that Dr. McNish was qualified to testify as an expert regarding motor vehicle accidents and general injuries resulting therefrom, but that Dr. McNish did not have sufficient skill or experience to provide expert opinion as to the cause of death of either decedent. (Order Regarding Motions *in Limine*, entered on February 12, 2018, at number 7.)

B. PROCEDURAL HISTORY AND FINDINGS OF FACT

Filed on July 15, 2016, as a renewal action, the parties have extensively and exhaustively litigated this case. Months prior to trial, the Court expended six full days immersed in pre-trial hearings, asking questions, and engaging counsel concerning their positions on all issues. Specifically, on October 30, 2017, through November 2, 2017, and on the 28th and 29th of November, 2017, the Court afforded both sides ample time to present arguments and evidence, regarding some eighty-six motions in *limine*, and regarding numerous other pre-trial motions and issues. The motions in *limine* heard on those six days included Plaintiff's motions in *limine* to exclude (1) "any argument, questioning, innuendo or evidence about alleged seatbelt use," (2) "argument of suggestion of driver error or driver fault on the part of Melvin Hill," including driver impairment, and (3) "reference to or testimony by Thomas McNish regarding the causes of Mr. and Mrs. Hills' injuries and deaths." Each of these motions was briefed by each side; and the parties' extensively discussed and debated each motion at oral argument. All trial counsel were present at the pre-trial motion hearings.

The Court took all matters under careful consideration. After lengthy review of the evidence presented, and the arguments of counsel, and upon a detailed analysis of the law, the Court entered rulings on all motions in *limine* by, at the latest, five weeks prior to trial.

After the Court entered its order excluding seat belt evidence, Ford filed a motion asking the Court to reconsider that order. On February 14, 2018, the Court denied Ford's motion for reconsideration, again making clear that seat belt evidence was not admissible under the circumstances of this case. Nevertheless, Ford deliberately injected the idea of seat belt use, as relevant, at least twice, before the jury.

During trial, the Court reiterated, numerous times, that Ford would not be allowed to insinuate that Mr. Hill was at fault, or that he was impaired at the time of the accident. Nevertheless, counsel for Ford brought up a GBI post-mortem toxicology-testing report on Mr. Hill's blood, in front of the jury, intimating that the results showed that Mr. Hill had alcohol in his blood. This example of Ford's willful disregard of the Court's orders in *limine* was particularly troubling, because the toxicology report showed that alcohol was not present in Mr. Hill's blood.

Similarly, during trial, the Court repeatedly restated that Dr. McNish would not be allowed to testify as to the particular causes of the Hills' deaths, but would only be allowed to testify as to causes of death generally expected in similar accidents. The Court's limitations on the scope of Dr. McNish's testimony were brought up several times by Ford, during the course of trial. Before Dr. McNish was to take the witness stand, Ford's counsel again argued against those limitations. The Court instructed Ford's counsel, Alan Thomas,[2] to explain to McNish, before his testimony began, that he would not be allowed to give specific cause of death opinions. Mr. Thomas assured the Court that he would so instruct Dr. McNish, before calling him to the witness stand. Mr. Thomas went out into the hall for the purpose of giving McNish instruction. Shortly thereafter, McNish began testifying. In clear disregard of the Court's ruling, Mr. Thomas asked Dr. McNish whether he agreed with Plaintiffs' experts' opinion as to the cause of Mr. Hill's death. Dr. McNish then opined, before the jury, to the very testimony that the Court prohibited – i.e., his opinion as to the cause of Mr. Hill's death.

In sum, the Court spent countless hours hearing, considering, reconsidering, researching, and ruling on the parties' exclusionary motions. During trial, the Court repeatedly reminded the

[2] Mr. Thomas appeared before the Court *pro hoc vice*. The Court will further address Mr. Thomas' privilege to appear *pro hac vice* infra, and in subsequent orders.

parties of its rulings *in limine*. Nevertheless, 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. By this conduct, defense counsel arrogated the Court's gatekeeping function.

Ford and its counsel's actions outlined above showed manifest bad faith. Because Ford's appellate counsel was present at trial, weighing-in on issues as they arose, and having had access to daily copies of the trial transcript, one would have to suspend all common sense to believe that the violations were not deliberately calculated. Ford, intentionally, and after several warnings and admonitions, elicited testimony that forced this Court to declare a mistrial. Plainly, Ford willfully caused a mistrial in this case, in bad faith, and issue preclusion sanctions are appropriate.[3]

Under this Court's inherent authority, it may impose sanctions on the party or its attorney, to compel obedience to its orders and to control the conduct of its officers in furtherance of justice. 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. Ford's corporate representative sat at counsel's table throughout trial, was privy to all that took place, and participated in the misconduct by mentioning seatbelts in his testimony. In this case, the Court finds it is appropriate to hold both counsel and Ford responsible for the necessary sanctions.

C. SANCTIONS

Based upon the history and findings above, and to ensure that Plaintiffs are afforded a fair trial, the Court finds that issue preclusion is appropriate for the retrial of this case. Additionally,

[3] Ford's ability to appeal the Court's rulings with which it took exception was within arm's length. Upon verdict, likely days away, all rulings would have been directly appealable.

the Court finds it appropriate to assess Gwinnett County's trial costs against Ford, and its counsel.

1. Jury Costs

As a result of Ford and its counsel's willfully causing a mistrial, Gwinnett County's expenditure of $10,440.00 to empanel a jury and to pay for juror time was wasted. The Court will award this amount against Ford and its attorneys.

2. Plaintiffs' Attorney Fees and Costs

The Court reserves ruling on Plaintiffs' O.C.G.A. § 9-15-14 motion for attorney fees and costs. The Court will schedule a hearing on Plaintiffs' motion. At that hearing, the Court will consider evidence and argument concerning whether Ford and/or its counsel's conduct warranted sanctions under Section 9-15-14, and, if so, concerning the amount of attorney fees and costs necessitated by Ford's conduct in causing a mistrial.

3. Facts Established and Issues Precluded

As further sanction for Defendant's willful misconduct, and in order to ensure an orderly and fair trial, upon the retrial of this case, the following matters will be deemed established:

(1) That the roof on the subject 1999-2016 Super Duty trucks was defectively designed and dangerously weak;

(2) That the roof on the subject 1999-2016 Super Duty trucks was susceptible to collapse or crush in a foreseeable rollover wreck which can cause death or serious injury to occupants of the trucks;

(3) That the rollover wreck in this case was foreseeable;

(4) That Ford Motor Company's acts and/or failures to act, in selling trucks with such weak roofs amounted to a willful, and reckless, and a wonton disregard for life, for the purposes of the statute of repose;

(5) That Ford Motor Company knew of the dangers posed by the roofs in the subject trucks and therefore had a duty to warn members of the public of that danger, but willfully failed to warn the public; and

(6) That the defect in the roof of Mr. and Mrs. Hill's truck resulted in roof crush that caused the injuries that led to the deaths of them both.

Thus, upon the 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. With respect to punitive damages, the trial will be bifurcated.

D. CONTEMPT OF COURT AND *PRO HAC VICE* STATUS OF ALAN THOMAS

Alan Thomas was granted *pro hoc vice* status by this court On October 7, 2016, pursuant to Uniform State Court Rule 4.4. Before this case is scheduled for a second trial, the Court will convene a hearing at which Mr. Thomas will be required to show cause (1) why he should not be held in contempt of Court for his conduct outlined above, and (2) why his privilege to practice law in this Court should not be rescinded as a result of his trial conduct. See generally Ford Motor Company v. Young, 322 Ga. App. 348 (2013); Hood v. Carsten, 267 Ga. 579 (1997). See also Georgia Rules of Professional Conduct 3.3 (a) (1), 8.4 (a) (1) and 8.4(a) (4); O.C.G.A. 24-1-1, et seq.

WHEREFORE, Plaintiffs' Post-Mistrial Motion for Sanctions is granted-in-part as to issue preclusion, as set out above. The Court reserves ruling on that part of Plaintiffs' motion made pursuant to O.C.G.A. § 9-15-14. The amount of $10,440.00 is hereby awarded against Ford and its attorneys and in favor of Gwinnett County, for juror costs.

SO ORDERED, this 19 day of July, 2018.

Shawn F. Bratton, Judge
State Court of Gwinnett County

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