No. A19A1055

In the
COURT OF APPEALS FOR THE STATE OF GEORGIA

Kim Hill, et al.,
Appellees/Plaintiffs,

v.

Ford Motor Company,
Appellant/Defendant.

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION AND SUGGESTION OF REHEAING EN BANC

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STATEMENT OF INTEREST

This case, along with Appellant's Motion for Reconsideration and Suggestion of Rehearing *En Banc*, are of major importance to *amici* and their members. They raise fundamental issues of whether Georgia courts can be relied upon to uphold a defendant's constitutional right to present a full and fair defense and have liability rest on the merits of a claim. The significance of the sanctions below, which essentially impose liability on the defendant, and the inconsistent rulings by two panels of the same Court in this same case on whether the Court must hear this immediate appeal scream for reconsideration and *en banc* review.

The Alliance of Automobile Manufacturers, Inc. ("the Alliance"), formed in 1999 and incorporated in Delaware, has twelve members: BMW Group, FCA US LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car Corporation. Alliance members are responsible for 70 percent of all car and light truck sales in the United States. The Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and market-based, cost-effective solutions to meet emerging challenges associated with the manufacture of new automobiles.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The unusual events of this appeal and the gravity of the underlying issues present this Court with a case that is clearly appropriate for reconsideration, not only by the judges on this panel but also by the Court as a whole. Under Rule 37(g), a motion for reconsideration is to be heard by the "judges who voted on the original decision." Here, there were two "original decisions," and they reached opposing results: a panel decision dated September 10, 2018 denied Plaintiffs' motion to dismiss this appeal, and a panel decision dated January 16, 2019 granted

[1] *Amici* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Plaintiffs' motion to dismiss this appeal. The decision whether to hear this appeal is clearly divisive among the judges on this Court. A ruling should be issued by the full court, sitting *en banc*, in order to provide the Court's definitive view as to whether this appeal meets the criteria for immediate review as set forth in *Waldrip v. Head*, 272 Ga. 572 (2000) and O.C.G.A. § 5-6-34(a)(2).

The standards and issues raised by this appeal go to the heart of a litigant's access to justice in Georgia: can a judge, through the inherent authority to punish a party for the alleged contemptuous behavior of its counsel's in-trial conduct, take away that party's right to defend itself against liability? Here, the Judge concluded that Ford's counsel did not follow orders regarding inadmissible causation evidence. It then penalized Ford by striking all of its defenses, including on separate product liability issues, and issuing findings essentially guaranteeing an award of punitive damages. These outcome determinative sanctions have little to do with the evidentiary orders Ford's counsel allegedly breached and deprive Ford the right to have the jury resolve the facts underpinning the alleged liability.

This appeal satisfies the two grounds for immediate appeal under Georgia law. First, because the sanction goes far beyond what is needed to cure the counsel's alleged misconduct, the sanction is punitive and triggers the right to an immediate appeal as provided in O.C.G.A. § 5-6-34(a)(2) for contempt orders.

Second, it invokes the scope of inherent authority sanctions, which, as discussed below, has increasingly become "an issue of great concern, gravity, and importance to the public." *Waldrip v. Head*, 272 Ga. 572, 575 (2000) (setting further criteria for immediate review). When a court exercises its inherent authority in a way that strikes all defenses to liability, there is "no timely opportunity for appellate review," thereby requiring immediate review. *Id.*

For these reasons, *amici* urge the Court to grant Appellant's Motion for Reconsideration and Suggestion of Rehearing *En Banc* and deny Plaintiffs' Motion to Dismiss. Georgia law requires the Court to address the injustice caused by the trial court's order without delay.

ARGUMENT

Ford has the constitutional right to defend itself against the allegations of liability at bar. *See* Ga. Const. Art. I, § I, Para. XII ("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. I. ("No person shall be deprived of . . . property except by due process of law."). In the event a party or its counsel violates a court order, the trial court has the inherent authority to "exercise [its] powers as necessary in aid of its jurisdiction." Ga. Const. Art. VI § I, Para. IV. But, both the Georgia Supreme Court and the Supreme Court of the

United States have made clear that "limitations imposed by a trial judge [cannot] prevent a full and meaningful presentation of the merits." *Cousins v. Macedonia Baptist Church of Atlanta*, 283 Ga. 570, 573-74 (2008) (internal quotations omitted); *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 209 (1958) (Court-imposed sanctions "must be read in light of the provisions of [the Constitution] that no person shall be deprived of property without due process."). Yet, that is exactly what happened here.

I. The Trial Court's Sanction Is a Punitive Contempt Order Requiring Immediate Review Under Georgia Law.

This Court is obligated to assess for itself whether the sanction at bar exceeds the trial court's authority to sanction a party under its inherent powers and, consequently, raises to the level of criminal contempt. While the trial court was careful not to label this punishment a contempt order, this label must not shield the order from a rightful appeal. *See Am. Med. Sec. Grp., Inc. v. Parker*, 284 Ga. 102, 104 (2008) ("[T]he appealability of an order is determined, not by its form or the name given to it by the trial court, but rather by its substance and effect.").

When a sanction is, in effect, a contempt order, O.C.G.A. § 5-6-34(a)(2) requires this Court to provide a direct appeal. The General Assembly defined contempt as "[d]isobedience or resistance by any officer of the court, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree,

or command of the courts." O.C.G.A. § 15-1-4(3). The Georgia Supreme Court has also explained that the trial courts have inherent authority "to *punish* for contempt, any person in disobedience of its judgments, orders, and processes." *In re Orenstein*, 265 Ga. App. 230, 232 (2004) (emphasis added) (internal quotations omitted). Such a punishment is categorized as "a crime in the ordinary sense, requiring proof of the elements of the alleged contempt . . . beyond a reasonable doubt." *Cousins*, 283 Ga. at 575. The question for this Court, then, is whether the sanction striking Ford's answers qualifies as such punishment.

The U.S. Supreme Court has answered this question. It has held on multiple occasions that a sanction crosses into the sphere of criminal contempt when it exceeds that which is necessary to cure the alleged misconduct. *See Int'l Union v. Bagwell*, 512 U.S. 821 (1994) (discussing contempt orders); *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017) (applying the same approach to excessive fee awards). The Court has explained that sanctions that punish conduct rather than coerce compliance are, by definition, criminal and, as in *Cousins*, require heightened due process protections. *See Bagwell*, 512 U.S. at 829; *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (stating that punitive awards raise the "acute danger of arbitrary deprivation of property"). To "level that kind of separate penalty, a court must provide procedural guarantees applicable in criminal

cases, such as 'beyond a reasonable doubt' standard of proof." *Haeger*, 137 S. Ct. at 1186. Thus, Georgia and federal law are aligned: a sanction in excess of what is needed to cure the alleged misconduct is criminal, criminal sanctions require heightened protections, and Georgia affords criminal sanctions immediate review.

To be clear, the sanctions against Ford here cross far over the curative-criminal line. The trial court found that Ford's counsel violated its order by allegedly eliciting testimony on the use of seat belts, the cause of Plaintiffs' death, and Plaintiffs' fault regarding the accident. At that point, the court had statutory authority to rebuke the attorney, provide the jury with a neutralizing instruction, or declare a mistrial if the trial could not result in a fair verdict. *See* O.C.G.A. § 9-10-185 (providing for such remedies). The trial court declared a mistrial and used its inherent authority powers to issue compensatory sanctions to reimburse the court and Plaintiffs for the costs incurred from defense counsel's alleged misconduct. Specifically, the trial court charged Ford with the court's costs of empaneling the jury and indicated that it would set a hearing to determine whether to award attorneys' fees to Plaintiffs to compensate them for Ford's conduct in allegedly causing a mistrial. Any such recoveries must be limited to costs directly resulting from the alleged misconduct. These actions cured the alleged misconduct.

The trial court, though, did not stop there. It also punished Ford by striking its answers to liability. It precluded Ford from contesting that (1) Ford's truck was defectively designed and dangerously weak, (2) the truck's roof was susceptible to being crushed, (3) such a crush was foreseeable, (4) Ford's decision to sell such products "amounted to a willful, and reckless, and a wanton disregard for life," (5) Ford "knew of the dangers" posed by the products, (6) Ford had a duty to warn that it "willfully failed" to comply with, and (7) this alleged defect caused Plaintiffs' injuries and deaths. Thus, the sanctions exceeded the magnitude of the alleged offense, governed topics different from the alleged offense, and took away Defendant's right to have the jury be the finder of fact on these issues.

The trial court plainly did not "fashion an appropriate sanction." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991); *see also Dietz v. Bouldin,* 136 S. Ct. 1885, 1892 (2016) ("[A]n inherent power must be a reasonable response to a specific problem."); *Degen v. United States*, 517 U.S. 820, 827 (1996) ("A court's inherent power is limited by the necessity giving rise to its exercise."). This case can still be determined on its merits, and Ford has not forfeited its right to have its case heard on the merits. The trial court should be instructed before the retrial that it may use its inherent authority to address the alleged sanctionable conduct, but only in tailored, less sweeping ways. "Although punishment and deterrence are

legitimate purposes for sanctions, they do not justify trial by sanctions." *TransAmerica Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991).

Other states have provided for an immediate appeal when, as here, there is no relationship between the offensive conduct and sanction and the sanctions are excessive. *See*, *e.g.*, *id.* at 917-20. An immediate appeal will ensure that Ford does not "suffer a trial limited to damages." *Id.* at 919.

II. This Appeal Presents an Issue of Great Importance Requiring Immediate Review To Be Properly Adjudicated.

The second basis for this immediate appeal is that the trial court's extreme order raises "an issue of great concern, gravity, and importance to the public [with] no timely opportunity for appellate review." *Waldrip*, 272 Ga. at 575. The issues of inherent authority sanctions and sanctions that determine liability have been under increased scrutiny in recent years, including by the U.S. Supreme Court. *See*, *e.g.*, *Haeger*, 137 S. Ct. at 1178 (striking down excessive inherent authority sanctions); *Bagwell*, 512 U.S. at 821 (providing due process protections for punitive inherent authority sanctions); *Chambers*, 501 U.S. at 44-45 (instructing courts to "exercise caution" when using inherent authority sanctions). The Court, on several occasions, has expressed concern that because inherent authority sanctions have no textual guidelines, they can become punitive and excessive.

In this regard, *Parker*, where the Georgia Supreme Court assessed Rule 37 discovery sanctions, presents a different situation than the case at bar. *See* 284 Ga. at 105. In cases like *Parker*, statutes and rules provide courts with specific sanctions for prescribed misconduct. By contrast, with inherent authority sanctions, the General Assembly has not provided any approved sanctions from which to choose for the alleged evidentiary offense at issue. Justice Kennedy cautioned that when a statute or rule does not authorize a sanction, appellate courts must provide scrutiny to ensure that inherent authority sanctions are not "without specific definitional or procedural limits." *Chambers,* 501 U.S. at 70 (Kennedy, J., dissenting on other grounds). There are "constitutional limitations on the power of courts, even in aid of their own valid processes." *Rogers*, 357 U.S. at 209.

The Supreme Court has further cautioned that while many judges will show proper restraint in exercising this authority, some do not. *See Bagwell*, 512 U.S. at 831 (finding judicial-based sanctions "uniquely . . . liable to abuse"); *see also Bloom v. Illinois*, 391 U.S. 194, 207-08 (1968) ("[T]he unwisdom of vesting the judiciary with completely untrammeled power to punish contempt . . . makes clear the need for effective safeguards against the power's abuse."). As Justice Scalia explained, "[t]hat one and the same person would be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual

notions of fairness and separation of powers." *Id.* at 840 (Scalia, J., concurring). This rationale is exactly why the Court should reconsider and grant review here.

Experience also has shown that, when sanctions are available, there are lawyers who will "exploit or abuse judicial procedures" to generate such sanctions. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 n.4 (1980). Indeed, some lawyers have developed techniques for setting "traps" to trigger sanctions. *See, e.g.,* Kenneth W. Starr, *Law and Lawyers: The Road to Reform*, 63 Fordham L. Rev. 959, 965 (1995) (instigating sanctions "is now a standard part of the modern litigation's play book"); Douglas J. Pepe, *Persuading Courts to Impose Sanctions on Your Adversary*, Litigation, Vol. 36, No. 2 (Winter 2010) (providing tips for sanctions motions). They may intentionally provoke disputes to create the perception of bad faith, for example, by inundating courts with "motions for sanctions based upon speculation that responsive material is being withheld with nefarious intent." *Id.* The lawyer attempts to stoke a judge's anger at the opposing party, accusing it of intentionally obstructing justice, and seeks broad sanctions.

This tactic has proven to be extremely effective. Part of the reason is that, as the U.S. Supreme Court has stated, "[c]ontumacy often strikes at the most vulnerable and human qualities of a judge's temperament." *Bagwell*, 512 U.S. at 831; *see also* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and*

the Structural Constitution, 86 Iowa L. Rev. 735, 738 (2001) (observing that "sanctions sometimes reflect [judges'] personal pique"). "[E]ven the best-tempered judges can lose their impartiality when dealing with misconduct that they perceive as a personal attack." Pushaw, 86 Iowa L. Rev. at 765.

This practice has become so pervasive and dangerous that it has been termed "litigation by sanction" or the "sanction tort." *See* Charles Herring, Jr., *The Rise of the "Sanctions Tort,"* Tex. Law., Jan 28, 1991, at 22 (describing how lawyers engage in "outcome-determinative" gamesmanship); Retta A. Miller & Kimberly O'D. Thompson, *"Death Penalty" Sanctions: When to Get Them and How to Keep Them*, 46 Baylor L. Rev. 737, 738 (1994) (finding ""'gamesmanship' has become an integral part of litigation practice"). By "racking up enough sanctions . . . the merits of the case might never be reached at all." Nathan L. Hecht, *Discovery Lite! – The Consensus for Reform*, 15 Rev. Litig. 267, 270 (1996). Their ultimate goal is to make the judge "sufficiently irritated with the defendants," that they will hold the defendant "liable by fiat. No trial. No evidence." Sherman Joyce, *The Emerging Business Threat of Civil 'Death Penalty' Sanctions*, 18:21 Legal Backgrounder (Wash. Legal. Found. Sept. 10, 2009), at 1.

This sanction, which was used here, has been nicknamed "the civil death penalty" because of its finality. *See, e.g.*, *In re Carnival Corp.*, 193 S.W.3d 229

(Tex. Ct. App. 2006) (referring to the "death penalty sanction"). The "civil death penalty" is available when a party deprives another of the right to a trial on the merits, namely by withholding or destroying evidence. *See, e.g., Parker*, 284 Ga. at 102; *Rogers*, 357 U.S. at 210 (there can be a "permissible presumption" that a party's "refusal to produce material evidence" can be "an admission of the want of merit" of its own claim or defense). In those situations, there can *never* be a fair trial on the merits; striking the affected claims or defenses is the *only* sanction that cures the infraction. Because these sanctions are appropriate only when no lesser sanction can cure the misconduct, they are inappropriate here.

Because of the severity and finality of "death penalty" sanctions, such orders must be immediately appealable for the right of appeal to be effective. The Texas Supreme Court explained: "Whenever a trial court imposes sanctions which have the effect of adjudicating a dispute, whether by striking pleadings, dismissing an action or rendering a default judgment, but which do not result in a rendition of an appealable judgment, then the eventual remedy by appeal is inadequate." *Powell*, 811 S.W.2d at 919. Many companies cannot afford the financial and reputational risk of a massive verdict, including for punitive damages, irrespective of whether it should be liable in the first place. When the incentive to settle is so great, a final judgment may never reach this Court. Justice delayed will be justice denied.

If this Court does not provide its immediate review, it will incentivize further leveraging of inherent authority sanctions to deprive defendants of the right of defense irrespective of the merits. The Court should not allow tort litigation in Georgia to be skewed in favor of plaintiffs without review.

Here, the trial court took away Ford's rights without the needed safeguards. The Court of Appeals originally granted an immediate appeal, as required by Georgia law, and then another panel changed course without addressing the merits of the claims. The Court should reconsider this appeal to provide businesses and other members of the public with confidence that if they do business in Georgia and are sued here, their fundamental rights will be honored by the courts.

CONCLUSION

For these reasons, this Court should grant Appellant's Motion for Reconsideration and Suggestion of Rehearing *En Banc* and, ultimately, deny Plaintiffs' Motion to Dismiss the appeal.

Respectfully submitted,

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Dated: January 28, 2019

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I certify that on January 28, 2019, I served a true and correct copy of the foregoing *Amici* Brief was sent by U.S. Mail in a first-class postage-prepaid envelope addressed to the following:

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