No. A19E0007

In the
COURT OF APPEALS FOR THE STATE OF GEORGIA

Kim Hill, et al.,

Appellants/*Plaintiffs*,

v.

Ford Motor Company,

Appellee/Defendant.

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF APPELLEE

Philip S. Goldberg
(*Pro Hac Vice Application Pending*)
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Phone: (202) 783-8400
Fax: (202) 783-4211
Attorney for Amici Curiae

Leonard Searcy, II
(Ga. Bar No. 633303)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (816) 421-5547
Counsel of Record for Amici Curiae

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 464-5948
Of Counsel for the Chamber of Commerce of the United States of America

John Whatley
David Bright
ALLIANCE OF AUTOMOBILE MANUFACTURERS
803 7th Street, N.W., Suite 300
Washington, DC 20001
Of Counsel for the Alliance of Automobile Manufacturers

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STATEMENT OF INTEREST

This case is of importance to *amici* and its members because it raises the core issue of whether Georgia courts can be relied upon to uphold a defendant's constitutional right to have its liability based on the merits of a claim. Imposing liability as an extreme, punitive sanction because of a judge's subjective view of an attorney's conduct undermines the administration of justice.

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% 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

This appeal goes to the heart of the ability of a litigant to achieve justice in Georgia: whether a judge, through the inherent authority to punish a party for the alleged contemptuous behavior of its counsel's in-trial conduct, can take away that party's right to defend itself against liability. Here, the Judge concluded that Ford's counsel did not follow his orders regarding inadmissible causation evidence. He then penalized Ford by, among other things, striking all of its defenses, including on separate product liability issues, and by issuing findings essentially guaranteeing an award of punitive damages. Thus, the ruling at bar includes outcome determinative sanctions having nothing to do with the evidentiary orders Ford's counsel allegedly breached.

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

Under Georgia law, this appeal satisfies two grounds for immediate appeal. First, because the sanction goes far beyond what is needed to cure the counsel's alleged misconduct, the sanction is so punitive that it 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 uses this inherent authority to strike 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 deny Plaintiffs' Emergency 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 it 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, apparently at Plaintiffs' suggestion, 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.").

If the Court determines that the sanction is, in effect, a contempt order, it is required to provide a direct appeal pursuant to O.C.G.A. § 5-6-34(a)(2). The General Assembly defines 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 provided courts with the 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). But, such punishment is still 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). In *Bagwell*, the Court explained that this delineation must remain firm because sanctions that punish conduct rather than coerce compliance

are, by definition, criminal and, as in *Cousins*, requires heightened due process protections. *See* 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 would need to 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: criminal sanctions require heightened protections, a sanction beyond curative is criminal, 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. It then used its inherent authority powers to issue additional sanctions. In an effort to compensate the court and Plaintiffs for their costs incurred from defense counsel's alleged misconduct, the trial court charged Ford with the court's costs of

empaneling the jury and indicated that it will 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.

The trial court, though, did not stop there. It also punished Ford by striking its answers to liability. Specifically, it precluded Ford from contesting its findings 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 do, 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 the right of the jury to be the finder of fact on these issues.

The trial court here 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."). The

court had a number of less severe options, including the use of curative jury instructions or admonishments to counsel in the new trial that would not eliminate Ford's ability to present a liability defense. 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 can use its inherent authority only in targeted, less sweeping ways. "Although punishment and deterrence are legitimate purposes for sanctions, they do not justify trial by sanctions." *Id.* at 918 (internal citations omitted).

While this appeal presents an issue of first impression in Georgia, 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., TransAmerica Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917-20 (Tex. 1991). 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).

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) (finding 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 type of sanction, which was used in the case at bar, 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 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 claims or defenses is the *only* sanction that can cure the infraction. Thus, such sanctions are appropriate only when no lesser sanction can cure the misconduct.

Because of the severity and finality of "death penalty" sanctions, such orders must be immediately appealable for the right of appeal to be effective. As the Texas Supreme Court explained, "[w]henever 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 simply 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. In these cases, justice delayed will be justice denied.

If this Court did not provide its immediate attention to this appeal, it would be creating a new avenue for leveraging inherent authority sanctions to deprive defendants the right of defense irrespective of the merits. The Court should not allow tort litigation in Georgia to be skewed in favor of plaintiffs, even when sympathetic, without thorough review.

Here, Ford's rights were taken away without safeguards. The trial court deprived Ford of its right to defend the case on the merits even though Plaintiffs' ability to establish liability was unaffected by the alleged violations of the trial court's evidentiary rulings. An immediate appeal, as required by Georgia law, can provide businesses and other members of the public with the confidence that if

they do business in Georgia and are sued here, that their fundamental rights will not be taken away unless they have engaged in misconduct justifying that result.

CONCLUSION

For these reasons, this Court should deny the Plaintiffs' Emergency Motion to Dismiss the notice of appeal.

Respectfully submitted,

/s/Leonard Searcy, II
Leonard Searcy, II (Ga. Bar No. 633303)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (816) 421-5547

Phil Goldberg
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Phone: (202) 783-8400
Fax: (202) 783-4211

Attorneys for *Amici Curiae*

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 464-5948
Of Counsel for the Chamber of Commerce of the United States of America

John T. Whatley
David Bright
ALLIANCE OF AUTOMOBILE MANUFACTURERS
803 7th Street, N.W., Suite 300
Washington, DC 20001
Of Counsel for the Alliance of Automobile Manufacturers

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PROOF OF SERVICE

I certify that on September 13, 2018, 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:

James E. Butler, Jr., Esq.
Brandon L. Peak, Esq.
David T. Rohwedder, Esq.
Chris B. McDaniel, Esq.
BUTLER WOOTEN & PEAK LLP
105 13th St., P.O. Box 2766
Columbus, GA 31902

Gerald Davidson, Jr.
MAHAFFEY PICKENS TUCKER, LLP
1550 North Brown Rd., Ste. 125
Lawrenceville, GA 30043

Michael D. Terry
Frank Lowrey VI
BONDURANT MIXSON & ELMORE
1201 W. Peachtree St. NW, Ste. 3900
Atlanta, GA 30309

Michael G. Gray, Esq.
WALKER, HULBERT, GRAY
& MOORE, LLP
909 Ball St., P.O. Box 1770
Perry, GA 31069

Counsel for Appellants

William N. Withrow, Jr.
Pete Robinson
James B. Manley, Jr.
TROUTMAN SANDERS LLP
600 Peachtree St. NE, Ste. 3000
Atlanta, GA 30308-2216

Michael R. Boorman
Audrey K. Berland
Philip A. Henderson
HUFF, POWELL & BAILEY, LLC
999 Peachtree St. NE, Ste. 950
Atlanta, GA 30309

Paul F. Malek
D. Alan Thomas
HUIE FERNAMBUCQ & STEWART, LLP
2801 Highway 280, Ste. 200
Birmingham, AL 35223

Michael W. Eady
THOMPSON COE COUSINS
& IRONS, LLP
701 Brazos St., Ste. 1500
Austin, TX 78701

Patrick T. O'Connor
OLIVER MANER, LLP
218 W. State St.
Savannah, GA 31401

Counsel for Appellee

/s/Leonard Searcy, II
Leonard Searcy, II (Ga. Bar No. 633303)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (908) 848-6310