IN THE SUPREME COURT
STATE OF GEORGIA

FORD MOTOR COMPANY, Petitioner, v. KIM HILL and ADAM HILL, surviving children and Co-Administrators of the Estates of Melvin Hill and Voncile Hill, deceased, Respondents.	CASE NO. S19C1009

BRIEF OF AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

The sanctions order imposed against Ford in this case is clearly a contempt order that is directly appealable pursuant to O.C.G.A. § 5-6-34(a), and the order should be reversed because the trial court exceeded its authority to remedy and punish attorney conduct at trial. However, even if the Court decides that the sanctions order is not a contempt order, the Court should nevertheless grant certiorari to establish clear standards consistent with due process for use by trial courts in determining sanctions for litigation conduct, particularly civil "death penalty" sanctions equivalent to default judgment.

Although the courts of this State have recognized generally that due process imposes limits on sanctions, the case law lacks substantive guidance from this Court with respect to the factors to be applied in such cases. Other jurisdictions across the nation, by contrast, have established explicit guidelines, requiring among other things that the lower courts specifically address whether lesser sanctions will suffice to counteract the conduct and any resulting prejudice. Related to that, the courts also require that sanctions imposed have a direct relationship to the conduct at issue, namely that any sanctions actually address but not exceed the prejudice arising from the conduct. The sanctions order in this case did not address the availability of lesser sanctions and it imposed issue preclusion –

amounting in its effect to a complete default judgment on the merits – that bore no relationship to the conduct which the order purportedly sought to address.

Moreover, notwithstanding that this accident on April 3, 2014 involved a 2002 Ford F-250 pickup truck, the sanctions order on its face has due process infirmities beyond the parameters of this case because it decides that *all 1999-2016* Super Duty trucks were defectively designed, dangerously weak, with roofs susceptible to collapse or crush. It purports to establish that Ford's sale of these trucks "amounted to a willful, and reckless and wanton disregard for life…" Simply put, the order virtually mandates a verdict for punitive damages. It also removes the statute of repose defense under O.C.G.A. § 51-1-11 from the case.[1]

The sanctions will also divest Ford of its right to apportionment based on plaintiffs' settlements with all other tortfeasor defendants in the case, including Pep Boys which settled on the eve of the scheduled trial via a "consent judgment" for $2 million. Ford had a right to apportionment under O.C.G.A. § 51-12-31 and/or § 51-12-33 against the Pep Boys defendants based on the improper installation of a tire which was not designed for use on a heavy duty truck and indeed failed, precipitating the rollover. That valuable right of apportionment has also vanished from the case via the sanctions order, assuring the plaintiffs will

[1] The accident happened on April 3, 2014. The pick-up was manufactured in 2002. The ten-year statute of repose potentially bars several of plaintiffs' claims.

recover more than 100% of their damages in derogation of O.C.G.A. § 9-2-4, which allows for pursuit of multiple remedies but only one satisfaction. The sanctions order does not authorize the jury to consider any apportionment claim or evidence developed against other tortfeasors sued by the Hills.[2] The many infirmities touched on here demonstrate a denial of due process to Ford.

A party subject to the severest sanctions like those entered in this case must have immediate recourse to the appellate courts of this State. Allowing a party to appeal only after suffering the inevitable harsh verdict virtually mandated by the trial court's sanctions order actually thwarts effective appellate review. Such an appeal would focus -- not on the merits of the underlying action -- but on whether the party should have been sanctioned in the first instance. Due process demands more.

ARGUMENT

The trial court here took the extraordinary step of imposing issue-preclusive sanctions as a punishment for contempt of court, which is unauthorized under Georgia law and requires immediate reversal. Issue-preclusive sanctions implicate

[2] Ford filed a motion on March 23, 2018 for access to the settlement agreements of Pep Boys and Cooper Tire (which settled for an undisclosed amount), but the trial court declined to order their production and instead eliminated Ford's right of apportionment from the jury's consideration.

due process concerns and should be subject to direct appeal. If this Court should determine that the sanctions order is not a contempt order, the Court should nevertheless grant certiorari to bring Georgia in line with its sister States and establish clear, enforceable standards to protect due process where issue preclusion sanctions are imposed.

I. The Court should grant certiorari in order to establish clear and exacting standards for the imposition of civil "death penalty" sanctions consistent with the requirements of due process.

Georgia's jurisprudence lacks substantive guidance from this Court concerning the steps that a trial court must take to ensure that the imposition of sanctions – particularly extreme civil "death penalty" sanctions – comports with due process. Certiorari should be granted in this case so that this Court, like the highest courts of many of Georgia's sister States as well as federal jurisdictions, can establish the necessary due process standards to guide the decisions of trial courts in considering whether to impose the severest of sanctions as the entry of default or issue preclusion which, in its effects, constitutes a loss of all defenses and any right of apportionment.

The Georgia Court of Appeals has recognized that compliance with due process requires that any imposition of discovery sanctions be "both 'just' and

'specifically related to the particular "claim" which was at issue in the order to provide discovery.'" *Resource Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 738, 698 S.E.2d 19, 35 (2010) (quoting *Serra Chevrolet v. Gen. Motors Corp.,* 446 F.3d 1137, 1151 (11th Cir. 2006)). That language was derived from the decision of United States Supreme Court in *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), in which the Court upheld a finding of personal jurisdiction based on the violation of a discovery order under Federal Rule of Civil Procedure 37(b)(2). The Supreme Court there concluded that the sanction was "just" based on a list of factors including not only a finding of repeated disregard of the trial court's discovery order but also the provision of an additional opportunity of the sanctioned party – not availed – to avoid application of the sanction by producing information that would show an absence of personal jurisdiction. The sanction also specifically related to the claim at issue because the failure of the defendants to comply with discovery orders concerning evidence of contacts with the jurisdiction prevented the plaintiff from establishing the full extent of those contacts, "the critical issue in proving personal jurisdiction." 456 U.S. at 709.[3]

[3]Most of the case law related to sanctions arises in the context of discovery disputes. The ultimate effect of a "death penalty" sanction is often the same, however, whether it arises in that context or, as in this case, in the putative exercise of the court's "inherent authority" to control litigation conduct. As a result,

Notwithstanding the recognition by Georgia's Court of Appeals of the strictures of due process in this context, Georgia trial courts lack exacting standards from this Court in connection not only with discovery sanctions, but also with sanctions arising from alleged conduct at trial. Thus, in *Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206, 538 S.E.2d 441 (2000), in connection with discovery sanctions, the Court required only an opportunity to be heard and a finding of willful failure to obey. In *McConnell v. Wright,* 281 Ga. 868, 644 S.E.2d 111 (2007), again in the context of discovery sanctions, the Court cautioned against the use of dismissal of an action or a default judgment "except in extreme cases." *See also Swindell v. Swindell*, 233 Ga. 854, 856, 213 S.E.2d 697, 699 (1975). And, in *Ford Motor Co. v. Gibson,* 283 Ga. 398, 659 S.E.2d 346 (2008), the Court upheld the imposition of issue preclusion sanctions – which essentially amounted to a default judgment – on the basis of a finding of willful disobedience of a prior discovery order. While the absence or presence of willful behavior is an important factor in determining the "justness" of an award, due

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discovery cases will also be discussed herein. Nonetheless, it bears noting that a common rationale for the imposition of such sanctions in the discovery context – the presumption that undisclosed evidence would have vitiated or at least severely damaged the withholding party's case – is not present in this case or other cases premised on conduct at trial. *See, e.g., Hammond Packing Co.*, 212 U.S. at 325 (recognizing the historical view that "for failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed").

process requires more. The absence of additional guidance, coupled with the discretion afforded a trial court with respect to the imposition of sanctions, leads to the type of unwarranted sanctions imposed in this case, all in violation of due process.[4]

Reviewing (and reversing) such a sanctions order in *Chudasama v. Mazda Motor Corporation*, 123 F.3d 1353 (11th Cir. 1997), the Eleventh Circuit noted that its "review should be particularly scrupulous lest the district court too lightly resort to this extreme sanction, amounting to judgment against the defendant without an opportunity to be heard on the merits." 123 F.3d at 1366 (quoting *Emerick v. Fenick Indus., Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976)). The court noted that "a district court abuses its discretion under Rule 37(b)(2) if it enters a default when 'less draconian but equally effective sanctions were available.'" *Id.* at 1371; *see also In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1228 (9th Cir. 2006) ("The district court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction

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[4] In *General Motors Corp. v. Conkle*, 226 Ga. App. 34, 42, 486 S.E.2d 180, 188 (1997), the Court of Appeals set out 12 factors for consideration in determining whether to impose the ultimate sanction of default or dismissal, including "the efficacy of alternative sanctions against the party or counsel." As a subsequent case later noted, however, that decision was physical precedent only. *Daniel v. Corp. Prop. Investors*, 234 Ga. App. 148, 505 S.E.2d 576 (1998). Neither of Georgia's appellate courts has since purported to apply the 12-factor test set out in *Conkle*.

and the adequacy of less drastic sanctions."); *Lawrence v. Curry Shack, Corp.,* 2019 WL 1493577, at *2 (S.D.N.Y. Apr. 3, 2019) ("dismissal without prejudice, rather than dismissal with prejudice, is proper because courts considering dismissal for failure to prosecute . . . must consider the efficacy of lesser sanctions"). "[T]he imposition of such severe sanctions," the court in *Chudasama* wrote, "'is appropriate only as a last resort.'" *Id.* at 1372 (quoting *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993).[5]

Nine years later, in *Serra Chevrolet, supra,* the Eleventh Circuit held that the striking of a defendant's affirmative defenses violated due process where those defenses "had no apparent relationship with the discovery abuse." 446 F.3d at 1152. "Because the legal defenses were not 'specifically related to the particular

[5] In *Chudasama*, the trial court entered a 76 page "death penalty" sanctions order drafted by counsel for the plaintiffs, stripping the company of its liability defenses (to claims that the doors and side panels of the mini-van were defectively designed so as to subject occupants to crush injuries). Mazda was said to have failed to provide adequate responses to 121 requests for production and 635 interrogatories seeking worldwide and detailed information about all Mazda employees and every document concerning any component of any year model of the MPV minivan. Because of serial adverse rulings against Mazda, the Eleventh Circuit divested the trial judge of further handling of the case, after navigating the interlocutory order issue because the ends of justice required it. In this case, there were nine sets of interrogatories in the Cobb and Gwinnett County actions directed to Ford, 14 sets of document requests totaling 228, and 271 requests for admission. When that discovery did not produce a sanctions order striking the answer, plaintiffs' counsel sought to strike Ford's substantive defenses, tests, and experts through motions in limine.

"claim" which was at issue in the order to provide discovery,' [cit.], the sanctions violated the due process rights of GM." *Id.* (quoting *Insurance Corp. of Ireland*, 456 U.S. at 707).

In 1993, the Florida Supreme Court concluded "that the trial courts need a meaningful set of guidelines to assist them in their task of sanctioning parties and attorneys for acts of malfeasance and disobedience." *Kozel v. Ostendorf*, 629 So.2d 817, 818 (Fla. 1993). "Without such a framework," the court reasoned, "trial courts have no standard by which to judge the severity of the party's action or the type of sanction that should be imposed." *Id.* The court adopted the following set of factors: "1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration." 629 So.2d at 818. "Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative," the court concluded. *Id.*; *see also Ham v. Dunmire*, 891 So.2d 492, 498 (Fla. 2004) ("Although a trial court 'unquestionably has power

to discipline counsel' for violating court orders, an action should not be dismissed when the malfeasance can be adequately addressed through the imposition of a contempt citation or lesser degree of punishment directly on counsel.").

The Texas Supreme Court has also established a framework for trial courts in determining whether and to what extent to impose sanctions, recognizing that "[t]he imposition of very severe sanctions is limited, not only by these standards, but by constitutional due process." *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). "First," the court wrote, "a direct relationship must exist between the offensive conduct and the sanction imposed." *Id.* "This means," the court continued, "that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party." *Id.* "The point is," the court emphasized, "the sanctions the trial court imposes must relate directly to the abuse found." *Id.*

As a second step, the Texas Supreme Court required that the courts "consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." *Id.* Such sanctions "must not be excessive" and "[t]he punishment should fit the crime." *Id.* Thus, the court noted, "[a] sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purpose." *Id.*

The trial court in that case had entered an order striking TransAmerican's pleadings after that company's president had not been made available for deposition in response to a notice. Noting that the sanctions were "the most devastating that a trial court can assess against a party," the Texas high court concluded that sanctions "cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit." *Id.* at 917-18. "Although punishment and deterrence are legitimate purposes for sanctions," the court continued, "they do not justify trial by sanctions . . . ." *Id.* at 917, citing *Hammond Packing*, 212 U.S. at 350-51. The Supreme Court granted mandamus with respect to the trial court's order, in effect remanding the case. Among other things, there was "nothing in the record to indicate that the district court considered imposition of lesser sanctions or that such sanctions would not have been effective." *Id.* To the contrary, "the record strongly suggest[ed] that lesser sanctions should have been utilized and perhaps would have been effective," the court reasoned. *Id.*; *see also Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 850 (Tex. 1992) (reversing sanctions order striking pleadings where there was "no direct relationship between the offensive conduct and the sanction imposed," the sanctions was "more severe than necessary to satisfy the legitimate purposes of sanctions," "no lesser sanction

was first imposed," and there was no evidence to justify a presumption that the defendant's "claims or defenses lack merit").

The Texas and Florida courts are by no means alone in requiring that sanctions not exceed those reasonably necessary to address the misconduct in question. A common refrain from many appellate courts across the nation has been that such sanctions must bear a direct relationship to the behavior at issue and that harsh sanctions should not be imposed when lesser sanctions are available. Thus, for example, the Arizona Supreme Court has made clear that '[t]he sanction of dismissal is warranted only when the court makes an express finding that a party, as opposed to his counsel, has obstructed discovery, and that the court has considered and rejected lesser sanctions as a penalty." *Seidman v. Seidman,* 222 Ariz. 408, 413, 215 P.3d 382, 387 (2009), quoting *Wayne Cook Enters., Inc. v. Fain Props. Ltd. P'ship*, 196 Ariz. 146, 149, 993 P.2d 1110, 1113 (Ariz. App. 1999). "Without express findings from the court that it thoroughly considered whether less severe sanctions would suffice," the court wrote in *Seidman*, "we cannot conclude that [the sanctioned party] was afforded due process." *Id.*; *see also CMJ Management Co. v. Wilkerson*, 91 Mass. App. Ct. 276, 284-85, 75 N.E.3d 605, 612 (2017) ("Relevant factors in a due process examination include 'the degree of culpability of the . . . party [to be sanctioned]; the degree of actual

prejudice to the other party; whether less drastic sanctions could be imposed; . . . and the deterrent effect of the sanction.'").

The Montana Supreme Court has required, among other things, an examination of "whether the sanction imposed proportionally relates to the nature and effect of the violation or abuse." *Montana State Univ.-Bozeman v. Montana First Judicial District Court*, 392 Mont. 458, 468, 426 P.3d 541, 550 (2018). "Extreme sanctions precluding or truncating litigation on the merits (i.e., claim dismissal, default judgment, striking of asserted defenses, or exclusion of evidence) are generally proper only when the predicate discovery abuse is so inexcusable and prejudicial that it outweighs the express preference [under Montana statute] for adjudication on the merits." 392 Mont. at 469, 426 P.3d at 550. Finding that the default judgment entered by the trial court was "not reasonably proportional to the nature and extent of the breach of duty and any resulting prejudice," the court concluded that the trial court had abused its discretion in that case. 392 Mont. at 483, 426 P.3d at 559; *see also City of Philadelphia v. Fraternal Order of Police Lodge No. 5*, 604 Pa. 267, 284, 985 A.2d 1259, 1270 (2009) ("we highly disfavor dismissal of an action, whether express or constructive, as a sanction for discovery violations absent the most extreme of circumstances"). Otherwise stated, "it is clear in the exercise of judicial discretion in formulating an appropriate sanction order, the court is required to select a

punishment which 'fits the crime.'" *Davis v. Showell*, Case No. 3806 EDA 2015, 2016 WL 7324297, at *3 (Pa. Super. Ct. 2016).

Sitting *en banc*, the Supreme Court of Washington ruled that "[w]hen a trial court imposes dismissal or default in a proceeding . . . it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed." *Rivers v. Washington State Conf. of Mason Contractors*, 145 Wash.2d 674, 686, 41 P.3d 1175, 1181 (2002). Although the trial court's order in *Rivers* stated that lesser sanctions had been considered, the supreme court reversed, finding the "limited language" of the trial court insufficient to determine whether the "drastic sanction of dismissal" was warranted. 145 Wash.2d at 696, 41 P.3d at 1186. "Before resorting to the sanction of dismissal," the court concluded, "the trial court must clearly indicate on the record that it has considered less harsh sanctions . . . ." *Id.*; *see also Henderson v. Hughes*, 2019 WL 1064108, at *2 (D. Nev. Mar. 6, 2019) ("key factors are prejudice and availability of lesser sanctions").

The trial court's sanctions order in this case does not satisfy any reasonable formulation of due process requirements. The order imposes "issue preclusion" sanctions, incorrectly implying that it is not in effect an ultimate default sanction,

and identifies Ford's transgressions at trial as (1) improper reference to possible driver error ruled out by a motion in limine; (2) improper expert testimony as to cause of death, permitted for plaintiff's expert, but not for Ford's expert; and (3) improper reference to the use of safety belts by the Hills. Each of these issues could have been cured at trial by an appropriate instruction to the jury to disregard the ruled-out evidence. Alternatively, the jury they could have been instructed not to consider any seat belt testimony, that the cause of death was as stated by plaintiffs' expert, and that there was no driver error by Mr. Hill. Instead, going well beyond such measures, the trial court ordered that the following would be deemed established:

(1) the truck's roof (for models from 1999 to 2016) "was defectively designed and dangerously weak;"

(2) the roof (for models from 1999 to 2016) was "susceptible to collapse or crush in a foreseeable rollover wreck which can cause death or serious injury to occupants;"

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

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

(5) Ford "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) 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."

All that remains for a jury's consideration is the issue of compensatory and punitive damages. The order says as much:

> 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.

(Emphasis added.)

The trial court's order imposes sanctions that go well beyond the asserted transgressions of Ford's counsel. The trial court's order provides a blank check to a jury-- which in *Chrysler Group, LLC v. Walden*[6] found $150 million in compensatory damages against Chrysler because of a gas tank defectively located

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[6]339 Ga. App. 733, 792 S.E.2d 754, *aff'd*, 303 Ga. 358, 812 S.E.2d 244 (2018).

at the rear of a Jeep Grand Cherokee, or for $100 million in punitive damages in a jury award against General Motors for a defective side saddle gas tank design.[7] The trial judge here did not even attempt to discuss whether lesser sanctions would effectively resolve the issues created by the putative misconduct, much less actually explain why they would not have sufficed. None of the testimony or evidence identified by the trial court touched on whether the truck's roof was "defectively designed," whether the roof was "susceptible to collapse," whether such a rollover wreck was "foreseeable," whether Ford's "acts and/or failures to act" were willful or wanton, whether Ford had a duty to warn of dangers posed by the roofs, or whether the purported "defect" resulted in roof crush. The trial court made no effort to explain how any of these matters were affected by the conduct identified as supporting the sanctions. In short, there was no relationship, direct or otherwise, between the complained-of conduct and the sanctions that were entered. The punishment did not fit the putative "crime." Instead, the trial court, with no

[7] *General Motors Corp. v. Moseley*, 213 Ga. App. 875, 447 S.E.2d 302 (1994) (reversing the jury's punitive award based on inflammatory remarks of plaintiff's counsel and violation of motion in *limine*). The contradiction inherent in multiple verdicts against the automotive industry for putting the gas tank either on the side of the vehicle or in the rear resulted in legal author Philip K. Howard asking in The Collapse of the Common Good (Ballantine Books ed. 2002): "…where is the manufacturer supposed to put the tank?" (*Id.* at p. 21.)

elaboration, simply concluded that establishing these matters would "ensure an orderly and fair trial."

The sanctions order entered in this case -- which would take the merits out of the hands of the jury – is symptomatic of the absence of clear guidance in this State's jurisprudence concerning the proper tailoring of sanctions to concerns of due process, particularly in civil "death penalty" cases. Labeling the order as one for "issue preclusion" is merely window-dressing. The order is in its effect a default judgment, leaving only damages for determination by the jury. The sanctions order is nothing less than a direction to the jury to impose punitive damages on Ford, not because it is without a meritorious defense and not because its manufacturing design was in fact reckless or deliberately flawed, but because the trial court decided to impose sanctions completely out of proportion to the conduct sought to be punished. Indeed, all of this was accomplished without even an effort by the trial court to identify any evidence which would "justif[y] a presumption that [Ford's] claims or defenses lack merit." *Chrysler Corp. v. Blackmon*, 841 S.W.2d 855, 850 (1992). Due process has not been afforded in this case and will not be absent review.

Clear guidance is needed in Georgia with respect to such sanctions orders. Otherwise, this State will continue to be the situs of grossly excessive jury verdicts unaccompanied by a jury determination of actual fault. Such a result is not good

for society's perception of the justice system nor for the oft-cited goal of improving consumer safety.

II. Due process requires that a party subject to civil "death penalty" sanctions have immediate resort to the appellate courts.

The establishment of clear guidance for the trial courts is undercut, however, where there is no effective recourse to the appellate courts of this State when civil "death penalty" sanctions have been awarded. In determining that *mandamus* was appropriate under such circumstances, the Texas Supreme Court reasoned that "[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 rendition of an appeal judgment, then the eventual remedy by appeal is inadequate." *TransAmerican Natural Gas Corp.,* 811 S.W.2d at 919. Elaborating with respect to the facts of that case, the court found that the sanctioned party had no adequate remedy by appeal "because it must suffer a trial limited to the damages claimed by" the other party. *Id.* "The entire conduct of the litigation is skewed by the removal of the merits of TransAmerican's position from consideration and the risk that the trial court's sanctions will not be set aside on appeal," the court wrote. *Id.* Indeed, "[r]esolution of matters in dispute between the parties will be influenced, if not dictated, by the trial court's determination of the conduct of the parties during

discovery." *Id.* Thus, TransAmerican would be left "with an appeal, not on whether it should have been liable for those damages, but on whether it should have been sanctioned for discovery abuse," the court noted. *Id.* "This is not an effective appeal," the court concluded. *Id.*

The court reaffirmed its holding in *In re: Garza,* 544 S.W.3d 836, 840 (Tex. 2018), repeating that "[s]anctions that thwart effective appellate review by precluding a decision on the merits are reviewable by mandamus . . . ." As the court reasoned: "Appeal is not an adequate remedy where the practically certain effect of the sanctions will be reversal with the attendant waste of resources and time." *Id.* at 841; *see also Montana State University – Bozeman,* 392 Mont. at 483, 426 P.3d at 559 ("We hold that exercise of supervisory control is necessary and proper on the ground that this case presents a significant question as to whether the District Court is proceeding under a mistake of law [by imposing the sanction of default] which, if uncorrected prior to final judgment, will likely cause significant injustice rendering ordinary appeal inadequate.").

In this case, declining to address the trial court's decision now renders Ford's ultimate appellate rights essentially illusory. Stripped of the ability to defend itself on the merits by extreme issue preclusion sanctions, Ford will be subjected to a harsh verdict after a trial in which the jury will only be asked to determine how much it should award against the company. When Ford is able to

appeal that then-final judgment, the issue will by necessity not involve the merits of any defense that Ford would have had to the claims against it, but whether the trial court should have issued the severest of sanctions in the first instance.[8]

The remedy is within this Court's power. This Court has previously noted: "Just as this Court granted parties the right of direct appeal of collateral orders, although there was no legislative grant of authority for that action, this Court has the power to consider appeals of interlocutory orders when we disagree with the trial court concerning the need for immediate appellate review of an interlocutory order." *Waldrip v. Head*, 272 Ga. 572, 576, 532 S.E.2d 380, 385 (2000). "In effect, this Court has granted the application for interlocutory review in those exceptional cases that involve an issue of great concern, gravity, and importance to the public and no timely opportunity for appellate review." *Id.*, 272 Ga. at 575, 532 S.E.2d at 385. This is such a case.

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[8]ATRA acknowledges the concern about "piecemeal appeals and concomitant delays" expressed by the Court in *American Medical Security Group, Inc. v. Parker*, 284 Ga. 102, 107, 663 S.E.2d 697, 701 (2008). Due process considerations, however, override efficiency issues. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 90 n. 22 (1972). Moreover, addressing the propriety of a civil "death penalty" before a trial, or retrial, is undertaken may itself be the more efficient course of action quite apart from due process concerns. The *Parker* case is also distinguishable from this case because it involved the failure to comply with a discovery order, giving rise to the negative presumption that has historically supported the consideration of severe sanctions. No such presumption is appropriate in this case.

CONCLUSION

The Court should review this matter to establish a set of clear standards to be followed before a trial court may impose civil "death penalty" sanctions, whether in discovery or at trial to assure that no party is deprived of constitutional due process. In a 1992 seminar white paper, lead counsel for plaintiffs advocated death penalty sanctions for defendants' abusive litigation strategies: "The motion for sanctions should stress that any sanction less than a complete default judgment would have little or no realistic effect in [sic] the abuser, but would instead vindicate the defendants' abusive litigation strategies."[9] An overreaching litigation-by-sanctions strategy was successful in the trial court in *Chudasama* and here, but was cured in *Chudasama* by interlocutory appellate review. When the strategy initially failed at the discovery stage, it then re-appeared with forty-five motions *in limine*, producing orders stripping the defendant of science-based defenses to plaintiff's roof crush arguments and eliminating defendant's defenses based on compliance with government safety standard testing and also case specific testing; thus creating a courtroom minefield for counsel to navigate. There is a total disconnect between the conduct of defense counsel as set forth in

[9] James E. Butler, Jr. and Patrick A. Dawson, *The Bench as Battleground: The Discovery Process is Broke and Only Judges Can Fix It*, at p. 17, republished at 2nd Annual "Bare Knuckles with the Judges" ICLE program on March 20, 2003.

the sanctions order and the death penalty sanctions imposed, which if allowed to stand will deprive Ford of a trial on the merits of its case, to include a showing that the vehicle in question met or exceeded government or industry standards when manufactured in 2002.

The sanctions order in this case makes plain the need for due process guidelines before depriving any party of its right to a trial on the merits. That issue is of sufficient gravity and concern to the public as to warrant review. The Court should grant the Writ.

This 25th day of April, 2019.

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