STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

KIM HILL and ADAM HILL, surviving children and Co-Administrators of the Estates of Melvin Hill and Voncile Hill, Deceased,	*	
Plaintiffs,	*	CIVIL ACTION
vs.	*	FILE NO. 16 C 04179-2
FORD MOTOR COMPANY, THE PEP BOYS- MANNY, MOE & JACK (Inc.), CURTIS CLINTON THOMPSON, JR., WILLIE BRASWELL, and DONALD TAYLOR,	*	
Defendants.	*	

PLAINTIFFS' POST-MISTRIAL MOTION FOR SANCTIONS
And
BRIEF IN SUPPORT

I. INTRODUCTION

Ford richly deserves to have its answer stricken. Ford deliberately procured a mistrial by *willfully* and *repeatedly* violating this Court's Orders. Despite the Court's repeated warnings that it would consider severe sanctions, Ford's violations escalated as the trial became progressively more devastating to Ford.

Before the trial commenced, Plaintiffs had warned the Court that Ford would not obey the Court's Orders. Ford's disdain for the law and rules is well documented. Ford's intention to defy Court Orders was presaged by its egregious and deliberate pretrial violation of this Court's Standing Order regarding exhibits.

See 3/15/18 Pls.' Emerg. Mot. For Sanctions. Yet Ford repeatedly represented to this Court that Ford would obey the Court's Orders. Ford's representations were false when made.

Ford's entire trial strategy was to present to the jury arguments and insinuations this Court had ruled ***out***, as irrelevant, inadmissible, or prejudicial. The junk Ford sought to inject related to every issue for jury decision—defect, causation, whether Ford was reckless, wanton or breached a duty to warn. Ford's misconduct was not accidental or isolated; it was a deliberate, systematic onslaught. Every Ford lawyer was involved; every Ford witness was involved.[1]

The truth is that to automakers evidence rules are irrelevant. To them, a trial is about hitting the hot buttons their jury psychologists have concluded will 'hook' a juror or two and drive a compromise verdict.[2] That's why Ford was so intent on driving home "failure to control," "impaired," "drugs," "alcohol," 'not properly belted.' It's always the victim's fault, so attack the victims – or their lawyers. That's what the "living skunk" was all about. Dr. Eisenstat was a huge problem—Ford could not find a credible pathologist to refute him and could not put Bennett

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[1] As to Krishnaswami, *see infra* Part II(4) at pp. 28-29; as to Germane, *see infra* Part II(2) at pp. 24-25; as to Vogler, *see infra* Part II(5) at pp. 30-31; as to McNish, *see infra* Part II(1) at pp 14-16.

[2] During trial Plaintiffs' lead counsel referred to that as the automakers' 'tackle box approach:' cast onto the waters as many 'lures' as possible, in an attempt to 'hook' one juror with one and another juror with another, to get a compromise verdict.

on the stand;[3] that's what having McNish fill the void was all about.[4] Ford makes no bones about the fact the rules do not bind Ford. That's what the dissimilar "testing," "Malibu," and "CRIS," and "statistics" were all about—in Ford-world the substantial similarity requirements don't apply to an automaker.[5] *Ford Motor Company was not about to let a Georgia trial judge interfere with its jury psychology*; *Ford appoints its own gatekeepers at trial—its lawyers.* That should be crystal clear by now.

Ford does not deny it violated this Court's Orders. Instead, it claims it was "entitled" to do so. In response to the Ford violation of Court Orders that 'broke the camel's back'—the McNish Order, *Ford actually argued* that it was ***"entitled"*** to ignore and violate the Court's Order. 4/5/18 TT (pm) at 18/3-19/6 (*Id.* at 18/18-19: "Dr. McNish indeed was and is under Georgia law appropriately qualified to give all of those opinions."); *Id.* at 20/10-13 ("There was no evidence the witness

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[3] Although automakers continue to list Bennett as a witness in an attempt to spook some Plaintiffs' lawyers, he seldom takes the stand because of his credibility issues.

[4] Ford had a pathologist other than Bennett, but apparently that one would not play with Ford. *See, e.g.,* Nightingale Dep. 56/5-14 (referring to those attending the 5/11/16 LEC in Detroit, "there was a pathologist. I'm not recalling his name. And I believe Dr. Bennett was there as well."

[5] *See, e.g.,* 9/22/17 Ford Resp. to Pls.' MIL re dissimilar incidents at 11-12; 9/22/17 Ford Resp. to Pls.' MIL re Malibu/CRIS at 1; 9/22/17 Ford Resp. to Pls.' MIL re Statistics at 15, 20; 9/22/17 Ford Resp. to Pls.' MIL re "Drop 'tests'" etc. at 3, 4, 6.

was not qualified and we -- as I indicated before under 703 and 705, we were -- *we were then **entitled** to go there.*") (emphasis added).[6] Ford's lawyer made a similar argument—that Ford was entitled to ignore and violate the Court's Order—after Ford intentionally violated the Court's Orders by telling the jury that Mr. Hill was supposedly impaired by drugs. Ford's attitude was that what the jury should hear was *up to Ford*, not the Court. 3/30/18 TT (pm) at 74/15-18 (Evans explaining why he violated the Court's Order: "I just want to make sure this jury has everything they want to know, *that **I think** I would want to know....*").

To evade the constraints imposed by this Court's Orders and to inject into the trial things the Court had ruled *out*, Ford violated this Court's Order of sequestration for all witnesses. The Court had invoked the rule of sequestration and applied it to all witnesses, including experts. 3/23/18 TT (am) at 21/4-17.[7] Ford *confessed to violating* that ruling with respect to McNish:

> [BY MR. EVANS:]And as a result of Dr. Eisenstat, a pathologist, talking about how the Hills hit the roof, something he admitted repeatedly was beyond his expertise, the question then became, okay, ***can we then take Dr. Eisenstat's testimony, provide that as***

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[6] This Court disagreed: "THE COURT: My order was clear. The Court does not find that he has sufficient skill or expertise to provide that opinion as to the cause of death. Just because you think you got there, doesn't mean you were entitled to go blow right through it, which is what happened." 4/5/18 TT (pm) at 23/2-6.

[7] 3/23/18 TT (am) at 21/12-17: "THE COURT: I think I have already ruled on it, that I was going to apply the rules of sequestration uniformly to any and all people who we expected to be testifying in this case. The rule is invoked. It is -- and if it is violated, it can result in a prohibition of that witness testifying at all."

> ***contemplated under 703 to Dr. McNish so that Dr. McNish***, who is a doctor, who does have an M.D., who has been a treating physician, ***could opine as to the evidence that was actually in the record.***

4/5/18 TT (pm) at 17/17-25. Ford violated the Court's sequestration Order so that it could violate the Court's Orders prohibiting Ford from eliciting cause of death testimony from McNish.

Germane's testimony proved Ford had violated the rule with him, too. It was obvious Germane and Ford's lawyers had discussed Buchner's prior testimony and choreographed a response to Buchner's criticisms of Germane's animation. Asked whether he had discussed Mr. Buchner's criticisms, Germane started to answer before stopping himself and testified "I don't know for sure what [Mr. Buchner] said." Dr. Germane then admitted that he and Ford's lawyer "discussed...what kind of things should be explained":

> By Mr. Peak
> Q. Have you heard about Mr. Buchner's criticisms of your animation, sir?
> A. *Only what came out. I don't know for sure what he said.*
> ...
> Q. And it's your testimony that during that time period you didn't discuss Mr. Buchner's testimony or his criticisms of your animation at all?
> A. *We discussed my animation and what kinds of things should be explained*, but I didn't discuss Mr. Buchner's testimony.

4/3/18 TT (pm) at 131/8-132/2 (emphasis added).

Not once did Ford deny having violated this Court's Order for sequestration for all witnesses. *The reason* Ford violated that Order is what really matters: it was

to prepare its witnesses *to violate* the Court's Orders, which they all did. *See* note 1, *supra*.

At ***no*** time did Ford or any of its lawyers share with the Court the fact they had decided they were "entitled" to violate the Court's Order ***and planned to do so.*** No litigant is above the law, and a Court's Orders *are* the law. Ford's disregard for the Court's authority is contrary to Georgia law and demands the imposition of the severest sanctions.

The worst thing is that Ford remains totally unrepentant; Ford's response to the Court's finding that Ford was guilty of willfully violating Court Orders was to attack the Court. 4/12/18 Mot. to Recuse; Boorman Aff. At least in Pennsylvania when Ford lawyer Evans committed the same misconduct Ford committed in this case, he told that court he would not do those sorts of things again.[8] Here, instead of accepting responsibility for the significant harm its actions caused Plaintiffs *and the Court*, Ford has gone on the warpath—viciously attacking Plaintiffs, Plaintiffs' counsel, and the Court. Ford's misconduct at trial and response to being challenged about that misconduct absolutely proves that Ford will not change. The

[8] "MR. EVANS: No. I will be much more careful about making sure that I don't even go near the line" 8/7/08 Order (three judge panel), *Ace American Ins. Co. v. Underwriters at Lloyds and Cos.*, Court of Common Pleas, Philadelphia Co. PA Case No. 0077.

damage Ford's misconduct caused will not be remedied or avoided in the future by some slap on the wrist sanction.

Ford was unrepentant even during the trial: Ford repeatedly argued that this Court was powerless to punish Ford for violating Orders, essentially daring the Court to act. *It was Ford that told the Court* the only remedy for Ford's violations of Court Orders was a mistrial. *See, e.g.*, 4/2/18 TT (am) at 60/17-21; 4/3/18 TT (am) at 5/4-5; *see also* 4/5/18 (PM) Tr. at 13/14-14/1. A mistrial was fine with Ford; it was getting killed at trial. Ford got what it wanted. Ford defeated justice. 4/6/18 TT (am) at 7/6-8 ("I have determined that in the interest of justice, this case can no longer proceed at this time and move forward. I have declared a mistrial . . ."). Now Plaintiffs *and this Court* are entitled to a remedy – for the past misconduct, and to prevent this case from being plagued by any such misconduct in the future.

Violating the Court's Orders was not all of Ford's strategy: Ford also prolonged the proceedings and obstructed the search for truth by deliberately making Plaintiffs object to both interminable violations of the Court's Orders and to interminable improper behavior during Ford's direct examination of witnesses. *For example*, the Court repeatedly admonished Ford not to lead the witness and

suggest the answers;[9] Ford ignored the Court and kept right on. Indeed, it was Ford's lawyers doing the testifying. *For example*, Ford wasted hours and hours on irrelevances, such as having McNish re-stage Germane's 'accident reconstruction.' *See also* 3/30/18 TT (pm) at 91/2-24.[10]

Ford was *repeatedly warned* by the Court—about Ford's violations of Court Orders and repeated violations of Rule 403 (unfair prejudice, misleading the jury, delay and waste of time, and "the needless presentation of cumulative evidence"). The warnings started before trial, when the Court sanctioned Ford for violating the Court's Standing Order regarding exhibits. 3/16/18 Order. Then at trial Ford repeatedly violated that Sanctions Order. *See, e.g., infra* pp. 24, 36-37.

The warnings started *early* in the trial:

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[9] *See, e.g.,* 3/27/18 TT (pm) at 85/14-15, 129/7-8; 3/28/18 TT (am) at 33/3-7, 48/13-17; 4/3/18 TT (pm) at 9/9-10, 137/17-18, 140/16-17; 4/4/18 TT (am) at 63/5-6; 4/4/18 TT (pm) at 64/23, 65/7; 4/5/18 TT (am) at 53/2-3, 56/21-22.

[10] The Court: "The Court has some concerns with the progress of this trial. It's dragging at a painful speed. And every time I announce how late we're going to go it seems like there's a filibuster that occurs to drag out the witness. It happened yesterday. [Ford cross of Herbst] It's happening now. [Ford cross of Eisenstat] . . . It's wearing thin. Every last nerve I have is about gone. I'm going to tell this jury what I told them is not true; they are going to stay until we get down with Dr. Eisenstat. And if we can figure out a way to get it done quicker, we'll just be here all night." The Court expressed similar concerns during Ford's direct of Krishnaswami (3/27/18 TT (pm) at 121/13-15) and direct of Ford witnesses Germane (4/3/18 TT (pm) at 65/15-17; 75/6-8) and Vogler (4/4/18 TT (pm) 65/1-2).

> "[I]f I find that a motion in limine -- more importantly, if I find that a mistrial has been procured through mischief or an intentional willful act, we'll be looking at very serious sanctions against the offending party. I want everyone to understand that. This is too important."

3/22/18 TT (am) at 16-21. That was just the fourth day of trial, yet by then it was obviously clear to the Court what Ford was up to.

The warnings continued *during* the trial. *See, e.g.,* 4/2/18 TT (am) at 20/6-10 ("The camel's back is strained, deeply strained at this point in this trial, and it's about to break. Keep playing around with it. You're going to find yourself in a situation you don't want to be in. I can promise you that."); 4/2/18 TT (am) at 60/14-16 ("The more difficult thing is struggling with Mr. Butler's request for default because I am very, very, very close to doing that.").

Plaintiffs and Plaintiffs' counsel are acutely aware how much time and effort this Court has put into this case, and what an interference that has been with the other business to which this Court must attend. Neither this Court nor Plaintiffs should be victimized again, at the second trial, by Ford's strategy of turning the trial into a circus.

Plaintiffs have two goals here: *First*, to remedy the wrongs already done to the Court *and* to Plaintiffs. *Second,* to make sure that when this case is retried Ford has not been rewarded for its misconduct and no such misconduct can further plague this litigation. That must be done; otherwise such misconduct would be

rewarded and thereby actively encouraged. There must not be a third trial of this case.

Ford's last violations, by Ford lawyer Thomas and Ford witness McNish, are merely one example. Whether McNish could testify to cause of death was *excessively* litigated. The Court's Order was clear: "The Court finds that Dr. McNish's opinions were thoroughly explored at the hearing [on October 31, 2017]. . . . The Court does not find that Dr. McNish has sufficient skill or experience to provide expert opinion as to the cause of death of either decedent." 2/12/18 Order on MIL No. 7. That issue was reargued before McNish took the stand, as the Court specifically noted. 4/5/18 TT (pm) at 3/14-17.

There were many other examples of Ford purposefully violating this Court's Orders, only some of which will be detailed herein.

Plaintiffs could ask, as they repeatedly did at trial, that Ford's answer be stricken in its entirety and that the next jury be instructed that the Court finds Ford liable to Plaintiffs on all claims—for compensatory damages and punitive damages, and that the roof is defective and Ford knew it, and that Ford's conduct was reckless, and wanton, and in breach of Ford's duty to warn of a known danger.

Instead Plaintiffs request that the Court impose issue preclusion sanctions, the remedy imposed by Hon. Kent Lawrence in *Gibson v. Ford*—a decision unanimously affirmed by the Georgia Supreme Court. *See Gibson v. Ford,* 283

Ga. 398, 400-401 (2008).[11] Specifically Plaintiffs request that the Court Order that the following facts shall be taken as established for purposes of this action and Ford Motor Company will be precluded from contesting said facts:

(1) That the roof on the subject 1999-2016 Super Duty trucks was and is defectively designed and dangerously weak;
(2) That the roof on the subject 1999-2016 Super Duty trucks was and is 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 acts and failures to act by Ford Motor Company in selling trucks with that weak roof amounted to a willful, and a reckless, and a wanton disregard for life;
(4) 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 so warn the public; *and*
(5) 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 both Mr. and Mrs. Hill.

That this Court has the inherent power to impose the foregoing sanctions against Ford cannot be doubted:

Every court has power:

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[11] Unanimous decision affirming the Order of the State Court of Clarke County, Georgia, that "[t]he following facts shall be taken as established for purposes of this action and Ford Motor Company will be precluded from contesting: (1) that Ford Motor Company defectively designed the fuel system and seats on the subject vehicle; (2) that the fuel system and seats were susceptible to failure in rear impact collisions; (3) that the acts and omissions of Ford Motor Company in connection with the design, manufacture and sale of the fuel system and seats of the subject vehicle [met the exception to the statute of repose, OCGA § 51–1–11(c), in that they] amount to a willful, reckless, or wanton disregard for life or property; and (4) that Ford Motor Company failed to adequately warn consumers, including Mrs. Gibson, of these dangers."

(1) To preserve and enforce **order** in its immediate presence and, as near thereto as is necessary, to prevent interruption, disturbance, or hindrance to its proceedings;
(3) To compel obedience to its judgments, orders, and process . . .
(4) To control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto;

O.C.G.A. § 15-1-3 (emphasis added).

II. FORD'S CUMULATIVE WILLFUL VIOLATIONS OF THIS COURT'S ORDERS

Ford's intentional violations began immediately and continued throughout the trial. The straw that broke the camel's back may have been during Ford's examination of McNish, when Ford's lead counsel and its expert witness willfully violated the Court's Orders prohibiting McNish from offering cause of death opinions.[12] But that was merely the last of Ford's violations of this Court's Orders.

Ford's violations started immediately, during general *voir dire*. The Court prohibited Ford from making "any assertion *or insinuation* that Ford's lawyers represent[ed] Ford's employees or engineers." 2/12/18 Order on Pls.' MIL No. 39,

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[12] 4/5/18 TT (pm) at 3/11-23: "THE COURT: In reflecting what happened this morning regarding the testimony of Dr. McNish, the Court finds that testimony was elicited in direct violation of this Court's order in limine. That order had been discussed and expressed in great detail prior to the witness taking the stand. It was in fact the subject of an hour-long colloquy yesterday afternoon. This Court finds that the defense's violation was willful, has prejudiced the plaintiffs and as a sanction as a minimum, this Court will be telling the jury that the defense counsel and the witness willfully disregarded the Court's instruction and that as a result, they shall disregard Dr. McNish's testimony in its entirety."

or that a verdict would adversely affect Ford's employees and operations. *Id.* at MIL No. 40. Ford disregarded those Orders during general *voir dire*, when Ford's lawyer referenced Mr. Krishnaswami and the "over 200,000" employees of Ford:

> [BY MR. BOORMAN:] I also want to introduce you again to Mr. Ram Krishnaswami. He's an employee of Ford. He and his family live in Michigan, *but he is down here for this trial. . . .* and now [Ford] *employs over 200,000 people across the world.*

3/19/18 TT (pm) at 4/9-17 (emphasis added). There's no reason to mention Ford's supposed "200,000" employees except to induce jurors to think a verdict for Plaintiffs would hurt those employees.

Ford's violations continued in its opening statement. The Court prohibited Ford from making any reference "to the possibility" that the Hills were not properly belted.[13] Defying the Court's Order, Ford's lawyer displayed to the jury a large exhibit instructing the jury that over 97% of "*belted occupants*" are not injured or killed in rollover wrecks.[14] That was done deliberately by Ford to make the jury believe that, since Mr. and Mrs. Hill both were killed in this rollover, they were *not* wearing their seatbelts.

It was all downhill from there.

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[13] *See* 1/19/18 Order Granting Pls.' MIL re Seat Belts; 2/14/18 Order Denying Ford MFR re Seat Belts.

[14] Mr. Thomas referred to and published the large exhibit referencing "belted" occupants several times during Ford's Opening Statement to the jury. *See, e.g.,* 3/22/18 TT (pm) at 13/17-24; 30/3-10.

1. The McNish/Thomas violation that broke the camel's back.

Ford violated the McNish Order (2/12/18 Order Granting Pls.' MIL No. 7) despite repeated reiterations of it by the Court, including in seemingly interminable arguments during trial, culminating in an hour long discussion before Ford put McNish on the stand. Ford did not merely violate the Court's Orders; Ford made knowing misrepresentations to this Court, to hide its intention:

(1) Ford's lawyer represented to the Court that Ford would not violate the Order. 4/4/18 TT (pm) at 92/6-11 ("[Mr. Thomas] I just wanted to alert the Court that I wasn't going to get into it and I was going to approach before I got to it.");

(2) The Court reiterated its ruling and warned Ford that McNish was prohibited from "giving cause-of-death opinion." 4/4/18 TT (pm) at 94/1-10; *see also* 96/5-9 ("[THE COURT:] he's not giving specific opinions as to the specific injuries and causes in this case."); 142/13-14 ("THE COURT: And that's where I am right now is I still don't want to get into cause of death of either decedent.").

(3) Ford's lawyer represented to the Court he would "talk to Dr. McNish and advise him about the Court's rulings." 4/5/18 TT (pm) at 95/21-22. [15]

Ford's lawyer and paid witness then proceeded to do *precisely* what the Court had prohibited and what Ford's lawyer told the Court Ford would *not* do:

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[15] Ford's lawyer Thomas was not ignorant of the fact that, in Georgia, lawyers are not supposed to make false representations to the Court. In 2011, Judge Katheryn Tanksley, Cobb County State Court, revoked Thomas's *pro hac vice* admission for making false representations to the Court and plaintiffs. *See* 6/22/2011 Order, attached hereto as Exhibit 1. Thomas's *pro hac* was subsequently reinstated not because Judge Tanksley's Order was wrong, but because Thomas contended he was not afforded a hearing.

> Q [By Mr. Thomas] Now, with respect to Mr. Hill, did he suffer his injury -- you explained how his impact and all that. *Did he suffer his injury, though, by the roof coming down and striking the top of his head and putting his neck into flexion?*
> A *No, sir.*

4/5/18 TT (am) at 57/18-23 (emphasis added).

> Q [By Mr. Thomas] All right. *So, in your opinion, Dr. McNish, did Mr. Hill suffer the type of injury as Dr. Eisenstat said, this C-2 contusion that resulted in his death?*
> *A No, sir....*
> MR. BUTLER: Excuse me, Dr. McNish. Your Honor, this is the exact testimony that the Court ordered before trial this witness could not offer. He's talking about cause of death. He's disputing Dr. Eisenstat's conclusions about cause of death.

4/5/18 TT (am) at 63/19-64/7 (emphasis added).

Ford *admitted* at trial that its violation of the McNish Order had been pre-planned and deliberate—accomplished by the violation of this Court's Order for sequestration to which Ford confessed. *See* p. 4-5, *supra*. Ford and McNish had the evening of April 4 to perfect their plan. After trampling over the Court's Order, McNish left the witness stand, *winked* at Thomas, and smugly strolled out of the courtroom with a smile on his face, apparently proud of his role in executing the plan he and Ford's lawyers had concocted. 4/5/18 TT (am) at 66/3-11 (Ford's lawyers never denied the wink—they couldn't).

Ford's trial strategy was transparent: violate the Court's Orders, slip in arguments and insinuations the Court had ruled 'out,' and force Plaintiffs to continuously object to Ford's misconduct, in an attempt to make it appear Plaintiffs

were 'hiding' things. The purpose was to turn the trial into a circus, where pretrial Orders mattered not one whit, so that Ford could plant 'seeds' of doubt into the minds of one or two jurors.

But there's more to Ford's carefully planned violation of the McNish Orders and rulings. To fully understand that saga, one must consider 'the rest of the story.' Plaintiffs repeatedly put it on the Record: Ford had only one 'expert' witness who was remotely qualified to talk about cause of injuries and cause of death: the pathologist Bennett. But Bennett had huge credibility problems—he'd been run out of at least two states and ordered by the official Montana State Medical Examiner back in 1999 not to do autopsies on children. So, Ford calculatedly sought to use McNish to solve the problem: "What they're trying to do is avoid calling Bennett. They're trying by insinuation to refute Dr. Eisenstat's opinions, which are irrefutable" through McNish. 4/5/18 TT (am) at 69/16-22. Craftily and in direct violation of the Court's Orders, Ford managed to do just that in the presence of the jury.

2. Ford repeatedly violated the Court's Orders prohibiting Ford from blaming Mr. Hill or claiming he was "impaired."

The Court also prohibited Ford from making any "[a]rgument or suggestion of driver error or driver fault on the part of Melvin Hill." 2/12/18 Order on Pls.' MIL No. 22. *The reason* for that Order, and the Court's rulings that Ford could not

insinuate that Mr. Hill was "impaired," was because there was no evidence to support such arguments or insinuations. As the Court put it:

> I didn't see anywhere in the record where Mr. Hill was, in fact, being blamed by any expert for anything he did improper that led to him driving off the road. So, if I missed that I need to know about it because my understanding was that we weren't going to go there."

3/21/18 TT (pm) 64/5-10 (emphasis added).

Prior to trial, Plaintiffs knew Ford could not be trusted to abide by that particular Court Order in limine. That is why on March 16, Plaintiffs filed a motion to enforce the Court's Order on Plaintiffs' MIL No. 22.[16] In response to that motion, *the Court repeatedly reiterated* that Ford was prohibited from blaming Mr. Hill for this wreck. *See e.g.*, 3/19/18 TT (am) at 6/25-7/14, 8/10-11, 10/2-4; 3/21/18 TT (pm) at 64/5-19; 68/22-24; 3/26/2018 TT (am) at 8/20-24.[17]

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[16] Plaintiffs filed their motion to enforce after Plaintiffs' counsel discovered that Ford tried to *dishonestly add* deposition designations from pharmacist witness, Buffington, to Ford's deposition designations—several months *after* the Court's Scheduling Order required deposition designations be completed. The added Buffington testimony purported to blame Mr. Hill for causing the wreck. Ford did not, and could not, deny that sneaking dishonesty. *See* Ford's Resp. to Pls.' Motion to Enforce the Court's Order on Pls.' MIL No. 22. Such blatant dishonesty is indefensible and is, in and of itself, deserving of sanctions.

[17] Additional citations to the Court's orders precluding Ford from blaming Mr. Hill are replete throughout the trial transcripts and contained in Plaintiffs' 4/2/2018 Motion for Sanctions. That motion details additional misconduct and willful violations of Court Orders and *is incorporated herein by reference.*

The Court addressed before *voir dire* whether there was going to be an issue about Mr. Hill supposedly being impaired by drugs and Benadryl. 3/19/18 TT (am) at 4/7-10/25. The Court stated:

> "[t]he takeaway is it's not – we've ruled it's not coming in. So I can't imagine that we're going to be getting into it. ... The defense witnesses haven't cast any blame on Mr. Hill for the wreck and based upon that and a number of other legal issues, I've ruled - *I've ruled it out.* So why would we be trying to get into that?"

Id. at 6/25-7/14. The Court went on to say:

> I don't know why we would be getting into any medications on *voir dire*. . . . I can tell you where I am, is *I believe the issue has been addressed and I had excluded it.*

Id. at 8/10-11; 10/2-4.

Ford repeatedly defied the Court's Orders by attempting to blame Mr. Hill. Those violations started during *voir dire* with questions whose only purpose was to insinuate that Mr. Hill was at fault,[18] and continued throughout the trial. Ford also

[18] The record is replete with instances during *voir dire* where Boorman asked improper questions of jurors regarding tire failures they experienced and/or witnessed. The purpose was to plant the seed early in the jurors' minds that Mr. Hill must be at fault for causing the wreck because he did not control the truck after the tire failure. *See, e.g.*, 3/20/18 TT (am) at 21/23-22/1 (Q: "Did that vehicle end up in an accident? A: No, sir. Q: They were able to recover? A: Yes."); 61/4-6 ("Q: And although, you know, it took a little bit, but you were able to get control and pull over to safety? A: Yes."); 3/20/18 TT (pm) at 62/11-13 (Q: "So no accident as a result of that? A: No, no accident."); 78/19-21 (Q: "When you had other tire failures, did any of those result in accidents? A: No.").

attempted to blame Mr. Hill during its cross-examination of Mr. Buchner by injecting hearsay statements from the April 3, 2014 police report:

> BY MR. BOORMAN:
> Q. Have you taken into account what the police officer found *about driver actions* at the time of the crash?
> MR. PEAK: This is plaintiffs' motion in limine 22. The Court has ruled on it.

3/23/18 TT (pm) at 121/1-5. In response, the Court reiterated its prior Orders and instructed Ford—*again*—that Ford was prohibited from blaming Mr. Hill. 3/23/2018 TT (pm) at 126/20-23 ("[The Court]: "I think this is an attempt [by Ford] to try to get into stuff *we weren't going to be able to get into otherwise.")* (emphasis added).

Ford's response was to keep it up – to keep trying to inject into the trial things the Court had ruled out. On March 26, Boorman tried to get into the toxicology reports in his cross examination of Plaintiffs' accident reconstruction engineer Buchner—the fifth or sixth time Ford had tried to do so, despite the Court's Orders. 3/26/18 TT (am) at 3/5-8/25 (The Court ruled "[s]o my rulings stand. . . . ***I'm not going to hear about the toxicology***" (*Id.* at 8/20-25 (emphasis added))).

Ford kept right on violating the Court's Orders. On Friday, March 30, Ford's lawyer Evans blatantly *and repeatedly* violated the Court's Orders by telling the jury that Mr. Hill was impaired by drugs. First, Evans tried to hide what

he was planning to do, by being coy about what exhibits he was going to use to cross examine Dr. Eisenstat. 3/30/18 TT (pm) at 59/6-12. The reason became clear when Evans flashed the GBI toxicology report on the screen for the jury to see. *Id.* at 92/6-18, 112/16-23. Evans blurted out references to the GBI *"toxicology report."* *Id.* at 61/18-62/4. Evans referred to "the chemicals, the medicines that were in Mr. Hill from the GBI." *Id.* at 73/1-12. Then Evans flat said Mr. Hill was impaired:

> [Y]ou would agree with me that some of those medicines, like Valium, can have an effect even within a therapeutic dosage; is that correct?

Id. at 73/5-7.

> So like, for example, if I take Ambien to sleep at night, even though it's within my therapeutic limit, **I don't need to get in a car, do I?**

Id. at 73/10-12 (emphasis added).

Challenged by an objection that "[t]he Court's ruled on this and Mr. Evans has violated the Court's Order" (*Id.* at 73/13-16), Evans response was to *repeat his violation* of the Court's Orders—***in the presence of the jury***:

> [T]hese medications within their therapeutic dosages **can impact performance whether or not you are driving a truck** or walking down the road.

3/30/18 TT (pm) at 74/9-11 (emphasis added).

The Court recognized what was happening. Plaintiffs made a motion. *Id.* at 74/22-23, 90/25-91/1, 92/23-95/2. The Court told Evans "What you asked was if

somebody should get in the car and drive after taking it is what you said." *Evans denied that. Id.* at 93/11-17. Evans denied that he suggested Mr. Hill was impaired (*Id.* at 93/9-10) *despite having just said in the presence of the jury* that the medicines "*can impact performance [if] you are driving a truck.*" *Id.* at 74/9-11.

There can be no doubt that Evans's inflammatory comments were made in deliberate violation of multiple Court Orders, *including* the Court's Order prohibiting Ford's lawyers from "making inflammatory comments in front of the jury." 3/20/18 TT (am) at 87/10-12 (Court admonition in response to Boorman's accusation of "racism").

There can be no doubt that Ford's repeated violations of the Court's Orders barring Ford from suggesting Mr. Hill was at fault, or was impaired, or was guilty of "driver error" were not merely "willful," they were carefully pre-planned and calculated. Evans confessed that fact—"I was very careful. I wrote the question down . . . ." *Id.* at 93/15-17. *A trial is not supposed to be an exercise in cunning deception and trying to pull things over on the Court.*

Evans also confessed that injecting the toxicology report was "inconsequential" to the point he was trying to make in cross examination of Dr. Eisenstat.[19] Evans was flashing the toxicology report, and asking about it purely to

[19] *See* 3/30/18 TT (pm) at 112/18-113/11:

further Ford's illicit agenda of imputing blame to Mr. Hill. Evans' 'excuse' that he was exploring a supposed 'conflict' was total artifice. Evans' antics were also part and parcel of Ford's plan to force Plaintiffs to continuously object in the presence of the jury to make it appear as if Plaintiffs were hiding something.[20]

Evans *also* violated the Court's Orders when he attempted to mislead the jury into believing that Mr. Hill was to blame for the wreck because "alcohol" was supposedly "involved":

> Q In this system, you saw that the GBI had sent a blood-alcohol kit?
> A. No, the GBI didn't send it, but there was a blood-alcohol kit.
> Q. ***So it was involved?***

> MR. BUTLER: He flashed it up on the screen. Your Honor, for the record, Mr. Evans flashed this up on the screen without handing it to us, which is trial by ambush.
> THE COURT: It's a toxicology report. ***Ask him about it. Don't publish it to the jury.***
> MR. EVANS: okay. Thank you, your Honor.
> THE COURT: ***Ask him if it exist because that's really the issue, is it not?*** Is the issue not did the GBI did work and the policy is he's not supposed to be involved if the GBI did work?
> MR. EVANS: ***Yes.***
> THE COURT: ***so the details of that report are inconsequential to that analysis.***
> ***MR. EVANS: Yes, your Honor.*** Except he tried to trivialize the alcohol kit, and I was trying to point out how detailed –
> THE COURT: ***I don't want them to look at that. I want it -- it's out of evidence. Don't bring it up again.***

[20] *Prior* to Evans' cross-examination of Dr. Eisenstat, Plaintiffs warned the Court that Evans' intent was to mislead the jury into believing Plaintiffs were hiding something. 3/30/18 TT (am) at 17/3-7 ("MR. BUTLER: We object to any attempt to insinuate that plaintiffs' lawyers in this were trying to hide evidence, ***which is what this is all about***, Your Honor." (emphasis added)).

Id. at 62/23-63/2. That was particularly obnoxious since it is undisputed that Mr. and Mrs. Hill did not drink alcohol—a fact *known to Ford* from Kim Hill's deposition (Kim Hill Dep. at 74/3-6) and confirmed by Kim Hill at trial. 4/2/18 TT (pm) at 104/10-14.[21] That was also willful.

Yet Evans kept it up, insinuating that "alcohol" was involved. 3/30/18 TT (pm) at 109/19-25; 110/15-16; 113/7-8 (Evans—*in front of the jury*: "[Eisenstat] tried to trivialize the alcohol kit"). *That's four times Evans tried to mislead the jury into thinking "alcohol" was "involved"* ***when he knew*** *that insinuation was totally false*—all in an attempt to blame Mr. Hill. That insinuation was unsupported by any evidence and was made in direct violation of this Court's Orders.

After the above deliberate violations by Evans, the Court stated that it was considering imposing sanctions. *See* 3/30/18 TT (pm) at 90/22-95/2 ("The Court:

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[21] There is no doubt that Ford lawyer Evans had read Kim Hill's deposition; Evans' "cross examination" of Kim Hill proves it. For example, Evans knew from that deposition that Kim Hill had worked at the Blue Bird Body Company (in Ft. Valley). *Compare* 11/10/15 Kim Hill Dep. at 12/8. 14/11-18 *to* Evans' cross examination - 4/2/18 TT (PM) at 140/6-8. (Evans even claimed to have worked there too, and doing the same job Kim Hill did there—about which he'd learned from reading Kim Hill's deposition. *Compare* 11/10/15 Kim Hill Dep. at 14/11/18 *to* Evans' cross examination—4/2/18 TT (PM) at 140/12-13.) Evans even pretended to know Pastor Mark Poole, the Hill family's pastor at Pleasant Grove Baptist Church. *Id.* at 139/16-21. Evans knew of Pastor Poole only because he was on Plaintiffs' witness list for trial.

The [Plaintiffs'] motion is under consideration. You'll have a ruling Monday morning.").

What was Ford's response to that? On Monday morning, April 2, Ford handed to Plaintiffs' counsel an inches-thick stack of "exhibits" Ford said it planned to use to cross examine Mr. Herbst. The stack included exhibits Ford knew the Court had ruled out of evidence, including the Malibu stuff, the Exponent horizontal platen 'test', supposed 'tests' done on Chevrolet and Dodge trucks, *and others*, all in violation of this Court's March 16 Order *excluding* Ford's exhibits that were not produced as required by the Court's Standing Order and had never been produced in discovery. 4/2/18 TT (AM) at 3/11-21/5. Eighteen pages of debate then ensued about things *the Court had repeatedly ruled out*. Plaintiffs renewed their motion, right then, to strike all of Ford's exhibits. Ford's *entire trial strategy* was to ignore and violate the Court's Orders, by subterfuge and deceit.

Evans was unrepentant—his view was that *he ruled* what the jury would hear and see. *Id.* at 74/15-18 ("I just want to make sure this jury has everything they want to know, *that I think I would want to know*....") (emphasis added). Although at least three times during the trial other Ford lawyers made Evans sit down, not this time—no one for Ford interfered with the continuing efforts to insinuate to the jury that the deaths of Mr. and Mrs. Hill were Mr. Hill's fault.

Ford kept it up. Ford's lawyers had the Ford accident reconstruction expert, Germane, testify that the wreck was a "controllable event." 4/3/18 TT (pm) at 112/6-8. That testimony was calculated to mislead the jury into believing that Mr. Hill was to blame for failing to control the truck. That was willful, cooked up between Ford's lawyers and expert.

It got worse. Despite Germane's sworn deposition testimony to the contrary, he testified at trial that Mr. Hill might have wrecked his truck on April 3, 2014 *even if there was no tire failure—because of supposed "**other factors**."* 4/3/18 TT (pm) at 110/24-111/3. This was yet another deliberate attempt by Ford to blame Mr. Hill for supposedly being "impaired" by "other factors" such as drugs or alcohol, something Evans told the jury just two days earlier.

3. Ford deliberately sought to inject criticisms of Plaintiffs' counsel regarding the exhumations and autopsies, in violation of multiple Court Orders and rulings.

Few subjects took up more of this Court's time than Ford's attempts to criticize Plaintiffs' counsel for not 'inviting' Ford to the autopsies of Mr. and Mrs. Hill—despite the *undisputed* fact Ford could have conducted its own autopsies but chose not to do so. Ford even filed a motion accusing Plaintiffs' *counsel* of "spoliation." Ford even opposed Plaintiffs' motion to amend the Scheduling Order to substitute for Dr. Joseph Burton another biomechanics expert after Dr. Burton was indicted for allegedly trading opioids for sex. Ford explicitly told this Court it

wanted to hang Dr. Burton around Plaintiffs' 'neck' like a "living skunk"—and called that "the gift that keeps on giving"—despite the fact Plaintiffs (and Plaintiffs' counsel) had nothing whatever to do with Dr. Burton's alleged misconduct. 10/30/17 Hg. Tr. at 143/24-144/4.

This Court granted Plaintiffs' motion to amend the Scheduling Order, issued an Order granting Plaintiffs' motion to prevent accusations and insinuations against Plaintiffs regarding the exhumations and autopsies,[22] and, after the United States Attorney held a press conference about the charges against Dr. Burton, generating massive press coverage right before trial, this Court entered an Order that there be no mention of Dr. Burton at trial. 3/2/18 Order. Ford repeatedly tried to get around this Court's Orders with insinuations in front of the jury.

During the cross-examination of Dr. Eisenstat, Ford insinuated that others, *including Plaintiffs' lawyers*, were present for the autopsies:

> Q. [BY MR. EVANS] when you were in the room, you knew that there were nobody there for anybody *other than Mr. Butler's firm*?
> A. That's correct, yes.
> Q. And you were --
> MR. BUTLER: Now, he's insinuated the same thing Mr. Boorman said once before, that we were. The court has already addressed this and that insinuation. We were not there. We do not go to autopsies.

[22] 1/19/18 Order on Pls.' MIL to Prevent Defense Argument and Insinuation about Exhumations & Autopsies.

3/30/18 TT (pm) at 99/18-25. That particular willful violation of the Court's Orders was particularly pernicious: insinuating to the jury that 'ghoulish' Plaintiffs' counsel showed up for the autopsies. That is especially egregious *since all Ford counsel knew*, from depositions taken in the case, that the insinuation was *wholly false.*

Ford kept it up—insinuating that "somebody else" was present during the autopsies, in attempt to make it appear that Plaintiffs and Dr. Eisenstat were hiding something—obviously the involvement of another person (Dr. Burton):

> Q. [BY MR. EVANS] Except that, if there was somebody else in the room who felt it, we would know what they said, right?
> A. I guess so, if you asked them, yes.
> Q. But if you look at your autopsy report, that is a detail that you left out.

3/30/18 TT (pm) 35/11-15. Those statements by Ford lawyer Evans could have no purpose other than to try to bait Dr. Eisenstat into saying Burton's name—in violation of the Court's Orders, or leading the jury to believe Plaintiffs were hiding a witness.

Those were deliberate, though crafty, violations of this Court's repeated Orders that nothing be said or implied about Dr. Burton, and *came **after** Evans had argued once again* that he should be able to sneak in "the living skunk" he wanted to "hang" around Plaintiffs' "necks" (3/30/18 (am) Trial Tr. at 7/17-17/16), and

after this Court reiterated *at least three times* that mention of Dr. Burton was excluded "in total." 3/30/18 TT (pm) at 4/20-25, 12/6-8, 15/22.

4. Ford violated this Court's Order prohibiting Ford from making any reference "to the possibility" that the Hills were not properly belted.

The Court Ordered Ford not to suggest that the Hills were not properly belted. *See* 1/19/18 Order Granting Pls.' MIL re Seat Belts; 2/14/18 Order Denying Ford MFR re Seat Belts. Defying the Court's Order, in opening statement Ford's lawyer displayed to the jury a large exhibit instructing the jury that over 97% of "*belted occupants*" are *not* injured or killed in rollover wrecks.[23] That was done deliberately by Ford to insinuate that, since Mr. and Mrs. Hill both were killed in this rollover, they were *not* wearing their seatbelts.

That insinuation was Ford's intent. That was made clear during Mr. Krishnaswami's testimony: when asked about the large exhibit used by Ford during Opening Statements, Mr. Krishnaswami, as if rehearsed and without skipping a beat, told the jury "***and good for them*** [those *uninjured* in rollover wrecks] ***for using their safety belts.***" 3/27/18 TT (pm) at 27/9-16. Mr. Krishnaswami admitted Ford's lawyers had discussed the Court's Orders with him prior to him testifying. 3/27/18 TT (pm) at 60/23-61/1. Thomas, however, refused

[23] Mr. Thomas referred to and published the large exhibit referencing "belted" occupants several times during Ford's Opening Statement to the jury. *See, e.g.,* 3/22/18 TT (pm) at 13/17-24; 30/3-10.

to allow Mr. Krishnaswami to tell the Court what Ford's lawyers instructed the witness on this topic:

> Q. Mr. Krishnaswami, Mr. Thomas just said he instructed you about seatbelts. What did he tell you?
> MR. THOMAS: *We're not going to get into what I told him, your Honor.*

3/27/18 TT (pm) at 67/24-68/3 (emphasis added).

After Mr. Krishnaswami violated the Court's Order regarding seatbelts, the Court reiterated its prior ruling to preclude Ford from repeating its misconduct:

> THE COURT: The Court's ruling was, unless the effectiveness of the seatbelt system was being directly challenged, that we weren't going to get into it. Unless there was an allegation there was a defect in the seatbelt, which there's not been, ***we were going to stay away from it.***

3/27/18 TT (pm) at 64/2-7 (emphasis added).

The Court further instructed Ford: "we've kept [seatbelts] out" and "***we're going to stay away from it.***" *Id.* at 61/21-25 (emphasis added). Plaintiffs' counsel predicted Ford would continue to disregard and violate the Court's Orders:

> MR. BUTLER: What you're going to hear is Ford continually trying to slip out the insinuation [that Mr. and Mrs. Hill were not wearing their safety belts]. I've told the Court that before. I'll repeat it again. That's what's going to happen.

3/27/18 TT (pm) at 62/1-6. ***That's exactly what did then happen.*** During the cross-examination of Mr. Herbst, Ford continued to reference the same large seatbelt exhibit to make the jury believe that Mr. and Mrs. Hill were not wearing their seatbelts:

> Q [MR. THOMAS:] Okay. Number two, out of that 2 percent that's down there, the studies have shown that 97.4 percent received no serious injuries ***while they're wearing seat belts***, right?

4/2/18 TT (am) at 42/4-6 (emphasis added). These are but a few examples of Ford's repeated violations of that particular Order regarding seatbelts. *See, e.g.*, 4/2/18 TT (am) at 4/11-15 (Plaintiffs' counsel forced to object to Ford's attempt to inject improper exhibits violating the Court's Order regarding seatbelts). Ford's violations of the Court's Order regarding seatbelts were all willful.

5. Ford violated the Court's 2/12/18 Order prohibiting Ford from disputing "that there was an available feasible alternative design and Ford could have made the roof in the 2002 F-250 stronger."

The Court prohibited Ford from disputing that it was feasible to design a stronger and safer roof. Defying those Orders, Ford had its expert Vogler repeatedly testify contrary to the Court's Order, under the guise of discussing supposed "problems" with implementing any alternative designs:

> [BY MS. VOGLER] Where the problems come is when you try to implement that and you have to turn to new materials or new technologies, and you just don't have experience with it. So to an engineer, *if you ask someone, yes, they certainly may say that,* but the problem comes in with implementing.

4/4/18 TT (pm) at 48/15-20. Who were Ford's lawyer and witness talking about – "someone . . . certainly may say that"? It was this Court that Ordered that Ford could not dispute "that there was an available feasible alternative design and Ford could have made the roof in the 2002 F-250 stronger." 2/12/18 Order granting Pls.'

MIL No. 17. That Court Order was surely based in part on Ford's own stipulation to this Court that "[a]bility to increase roof strength not disputed." PX 115 (Boorman 5/12/17 PowerPoint presentation to the Court). Ford deliberately had Vogler attempt to mislead the jury into thinking the exact opposite of what this Court Ordered and Ford stipulated to. That is devious. That was yet another direct and willful violation of the Court's Order.[24]

Vogler's direct testimony is chock full of additional and similar violations, all of which are contrary to Ford's prior statements that "[it] does not intend to dispute it could have built a stronger roof." 5/1/17 Ford's Resp. Pls.' Mot. for Sanction at 14.

6. Ford violated the Court's Orders that certain "testing" was out of evidence.

The so-called "Malibu" and "CRIS" 'testing' had been a subject debated at *two* pretrial hearings, including direct and cross examination of Ford 'expert' witnesses, and was the subject of *two* Court Orders. 12/15/17 Order; 2/14/18 Order on Ford's MFR. Prior to the start of Mr. Herbst's April 2 cross-examination, Plaintiffs warned the Court that Ford intended to violate the Court's Order:

> MR. BUTLER: Ford intends to violate others of the Court's orders and to continue to make us object in the presence of the jury to Ford's

[24] Vogler's testimony on direct examination was also the exact opposite of her deposition testimony. *See* 6/16/17 Vogler Dep. 91/23-92/2 ("Q: Do you deny that Ford had the ability to increase the roof strength on these trucks, trucks like Mrs. Hill's F-250? A: No, I do not deny that.").

> blatant violations of the Court's orders. And we object to that. For example, there are, within these documents that Ford says it's going to use with Mr. Herbst, is defense Exhibit 279.2, which is the Malibu study the Court's ruled out of evidence long ago.

4/2/18 TT (am) at 3/25-4/7. Ford's lawyer Thomas then represented to the Court that Ford would not reference the excluded Malibu testing unless for impeachment purposes:

> [MR. THOMAS:] Your Honor, we have issues like the Malibu test, things like that. *I don't intend to try to offer that into evidence*, Your Honor, unless Mr. Herbst doesn't agree with something I need to impeach him about.

4/2/18 TT (am) at 7/10-13. Thomas then directly violated the Court's Order:

> [MR. THOMAS:] But there have been various studies through the years that have looked at that sort of thing? *For example, the Malibu series that happened earlier in the 1980's*, you've looked at those studies, correct?
> MR. BUTLER: Objection, Your Honor. The Court specifically ruled that stuff from early eighties out of evidence.

4/2/18 TT (am) at 45/20-46/1.[25] That violation was also willful.

What's at least as bad is this: Thomas' representation to this Court was knowingly false. There was a pattern at trial: repeatedly Ford lawyers represented to this Court that Ford was not going to do something, then did that very thing.

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[25] That was clearly not "impeachment," and even "impeachment" may not be used as a smokescreen for violating clear Court Orders.

7. **Ford violated the Court's Order regarding dissimilar incidents.**

Ford deliberately violated the Court's Orders regarding other incidents. For example, the Court's 2/12/18 Order on Plaintiffs' MIL to Exclude Evidence of Dissimilar Incidents and Statistics required Ford to lay a foundation *before* introducing NHTSA data and statistics. *See* 2/12/18 Order (allowing Ford to question its own experts about certain NHTSA data, but only *after* Ford lays a proper foundation proving the "existence of actual knowledge of its [Ford's own] engineers, concerning referenced rollover rates."). Ford deliberately violated that Court Order in cross examination of Plaintiffs' expert witness Herbst:

> Q [Mr. Thomas:] And then, finally, in Defendant's Exhibit 1048, when we look at the severity of crashes by number of rolls, we can see in general -- *this is what Ford knew when they were designing* this vehicle, that --
> MR. BUTLER: Objection, Your Honor. That's testifying. There's no evidence of that. *There's no evidence that Ford knew this stuff when it was designing this vehicle.* There's a Court order on that. I mean, if he wants to get into this stuff, he's got to prove –
> ...
> THE COURT: I'm inclined to agree with Mr. Butler. Ford's not putting up its case yet, so I haven't heard a single utterance in this regard.

4/2/18 TT (am) at 43/2-19.

To understand just how devious and deceitful that particular violation was requires that one examine the 'rest of the story.' Ford wanted to insinuate that "Ford" supposedly "knew" certain things as an excuse for Ford building and

selling 5.2 million trucks with such a weak roof.[26] But as Plaintiffs' counsel repeatedly noted before and during trial, Ford had no witnesses who could testify to "*what Ford knew when they were designing*" the roof. *Ford had no witnesses from Ford* who were involved in the design of the roof; *Ford had no witnesses from Ford* who actually made any pertinent decisions about the roof and also supposedly "knew" any of those 'things' Ford's lawyers and professional testifiers wanted to insinuate would excuse Ford's conduct. Ford had no such witnesses *because there are no such witnesses*; it was all just made up stuff. The violations were not merely willful; they were calculated and purposeful—and completely devious.

8. Ford violated the Court's Order prohibiting references to Plaintiffs' decision to hire a lawyer.

This Court's 2/12/18 Order granting Plaintiffs' MIL No. 35 prohibited Ford from making "*[a]ny reference to Plaintiffs' decision to hire a lawyer or file suit* or

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[26] That was the entire basis for Ford trying to get in its "roof crush don't matter" argument (using, for example, "Malibu" and "CRIS"). The problem was, as the Court noted, Ford could not prove any connection between design decisions—or between the Ford executives' "cost containment" decisions that materially weakened an already weak roof—*and* all the stuff Ford claims suggests that "roof crush don't matter." (The "roof crush don't matter" argument is nonsense, anyway—not to mention contrary to law. No one in the world professes to believe it, except automakers' lawyers and professional testifiers.)

to Plaintiffs' contractual arrangement with counsel."[27] *Ford did not oppose that MIL.* 9/22/17 Ford Resp. to Pls.' Omn. MILs at 62. Ford deliberately violated that unopposed Order in an attempt to depict Adam and Kim Hill as greedy ghoulish plaintiffs who rushed out and hired lawyers to profit off their parents' deaths:

> Q. [MR. EVANS:] *And then right after, or shortly after the accident, is when you then reached out and contacted attorneys, or did they contact you?*
> MR. DAVIDSON: Your Honor, I object that. That is not an admissible line of questioning, when he hired lawyers.

4/2/18 TT (pm) at 142/5-10 (emphasis added). Evans did *exactly* what the Court had Ordered that Ford could *not* do.[28]

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[27] The very first sentence of Plaintiffs' MIL No. 35, which this Court granted, stated that Ford was not "permitted to make *any comment about the time, circumstances, or manner under which Plaintiffs hired their attorneys*." 9/1/2017 Pls.' Omn. MIL No. 35 at p. 55 (emphasis added).

[28] That type of misconduct, unfortunately, is nothing new for Mr. Evans. That same lawyer has a documented history of such misconduct—indeed, his misbehavior was "captured in a transcript" and is the subject of multiple court opinions. *See, e.g.*, 3/22/2006 Order, Pennsylvania Court of Common Pleas (revoking Evans's pro hac vice admission and finding he "manifested a lack of familiarity with the decorum, candor, and fairness expected of attorneys"); 2/8/2007 Order, Pennsylvania Court of Common Pleas (describing Evans's conduct as "improper" and noting, "[a]s evidenced by the record, such conduct included racial pandering, misstatements of the law, circumvention of the rulings of the court, attempts to unfairly portray the defendants' actions as racially motivated, improper attempts to personalize the case, and other unprofessional conduct."); 8/7/2008 Opinion, Pennsylvania Court of Common Pleas (noting Evans's statement on the record that "he ha[d] no intention of behaving similarly in any future case…").

That wasn't the end of it. Despite Plaintiffs' objection, Evans then tried to inject into the trial the fact Plaintiffs' lawyers would get paid if they won.

> BY MR. EVANS:
> Q. You did end up with attorneys, which you've talked about it, *that need to get paid*; is that right?
> A. Do what?
> Q. *You did end up with attorneys that need to get paid, right*?
> MR. DAVIDSON: Your Honor, obviously he's got lawyers. But there's a motion in limine, also.
> MR. EVANS: That's all.
> MR. DAVIDSON: Your Honor --
> MR. [DAVIDSON]: Let me finish, Mr. Evans. Motion in limine Number 35, any reference to plaintiffs' decision to hire a lawyer or file suit or plaintiffs' contractual arrangement with counsel, this motion is granted.
> MR. EVANS: Your Honor --
> MR. DAVIDSON: Mr. Evans just violated that order, your Honor.

4/2/18 TT (pm) at 142/19-143/10. Evans then sat down—"I have nothing further." *Id.* at 143/14-15. That proved his only point was to plant insinuations in the minds of the jurors. Ford did not merely violate this Court's Orders; its antics are flat prohibited by Georgia law.[29]

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[29] *See, e.g., Stoner v. Eden*, 199 Ga. App. 135, 137 (1991) ("Defense counsel's remarks [regarding plaintiffs' counsel's fees] were totally improper" and "[t]he source of payment of attorney fees is irrelevant to the issue of damages. Evidence of it would be inadmissible, and argument on it is doubly wrong."); *Turner v. W.E. Pruett Co., Inc.*, 202 Ga. App. 287, 288, 414 S.E.2d 248, 249 (1991) (holding that the timing of the initiation of a lawsuit is irrelevant as long as the plaintiff has satisfied the applicable statute of limitations).

9. Ford violated the Court's Order precluding Ford from making argument or soliciting testimony "that Ford's roof was better or stronger than other automakers' roofs in other vehicles."

See 2/12/18 Order on Pls.' MIL No. 19. During the cross-examination of Mr. Herbst, Ford attempted to introduce a document displaying the roof strength of *hundreds* of other automakers' cars and trucks—in the presence of the jury. Use of that document was a direct violation of *both* this Court's 2/12/18 Order granting Plaintiffs' MIL No. 19 (*see* 3/29/18 TT (pm) at 92/14-97/19) *and* this Court's 3/16/2018 Sanctions Order precluding Ford from using documents not produced during discovery.

Ford also violated the Court's 2/12/18 Order on Plaintiffs' MIL No. 19 by trying to present to the jury photographs of trucks manufactured by other automakers that had been involved in rollovers. *See* 4/2/18 TT (am) at 35/25-36/8. Those were other incidents, obviously, so that attempt by Ford also violated paragraph 5 of the Court's 2/13/17 Scheduling Order—Ford had done nothing required by that Order before OSI evidence could be tendered. That conduct also violated the Court's Standing Order and this Court's 3/16/18 Sanctions Order—Ford had not disclosed those exhibits on March 12, as required by the Standing Order, so Ford knew those exhibits were barred by this Court's 3/16/18 Sanctions Order. That conduct by Ford also violated this Court's 2/13/18 Order regarding OSI evidence—before trying to inject those exhibits into the trial, Ford made no

attempt to prove the other incidents met the 'touchstones' specified for admission of OSI evidence. *That's five Court Orders violated—just by one gambit attempted by Ford.*[30] *That says it all.*

ARGUMENT AND CITATIONS TO AUTHORITY

Georgia law is clear that this Court absolutely has the authority to enforce its Orders and impose upon Ford the just consequences of Ford's misconduct. That includes the authority to impose sanctions as a result of Ford's "wilful and repeated violations of this Court's orders and rules." *Wood v. UHS of Peachford, L.P. et al.*, 315 Ga. App. 130, 130 (2012) (affirming trial court's *dismissal with prejudice* as a sanction against the party that procured a mistrial by failing to comply with the court's orders and instructions); *In re Longino*, 254 Ga. App. 366, 368 (2002) ("intentionally introduc[ing] evidence in contravention of a ruling by a trial court" is sanctionable disobedience of a court order).

Georgia law is also clear that this court's inherent powers allow the striking of pleadings as a sanction for violation of court orders. *See, e.g., Pennington v.*

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[30] Two days later, during Vogler's direct, Ford again attempted to violate these *same* Court Orders when it tried to inject *additional* photographs of dissimilar vehicles involved in rollovers. *See* 4/4/18 TT (am) at 6/23-8/10; 10/3-11/5. After causing more delay, the Court instructed Ford again that it "will not allow the photographic evidence of these other crushed vehicles to be shown." *Id.* at 25/7-9; *see also, id.* at 11/15-16 ("[The Court:] why are we here now on the 13th morning seeing this for the first time?"); *id.* at 24/17-19 ("[The Court:] And it's just unfathomable that it's the 13th day of trial and I'm having to stop now [and] try to figure all of this out.").

Pennington, 291 Ga. 165, 166 (2012) ("A trial court *may strike a party's pleadings as a proper sanction* for willful refusal to participate in the proceedings *pursuant to a court's inherent power* to efficiently administer the cases upon its docket, as well as its power *to compel obedience to its orders and control the conduct of everyone connected with a judicial proceeding before that court.*") (emphasis added); *see also S. Ry. Co. v. Lawson*, 256 Ga. 798, 802 (1987) ("OCGA § 15–1–3 provides every court with the power to control the activities and processes in its cases. Trial courts are invested with wide discretion in the management of the business before them, and this discretion will not be interfered with on appeal unless manifestly abused."); *Wallace v. Wallace*, 225 Ga. 102, 111 (1969) ("[T]his court has long recognized the inherent power of the judiciary. That the courts possess certain inherent powers is a proposition which, so far as we know, *has never been questioned.*") (emphasis added).

Georgia is *not* an outlier: courts around the country recognize a trial court's inherent powers to impose a variety of sanctions against a party for violating court orders. Many of these courts have entered default judgment or struck pleadings as a sanction for violations of the court's orders *in limine*:

- *Adams v. Barkman*, 114 So. 3d 1021, 1023–24 (Fla. 5th DCA 2012) (affirming the trial court's decision to strike the defendant's pleadings as a sanction for his counsel "interject[ing] issues previously excluded by the court's rulings on the motions in limine.");
- *Livingston v. Isuzu Motors, Ltd.*, 910 F. Supp. 1473, 1484 (D. Mont. 1995) (striking all defenses mid-trial as a sanction for offering an exhibit

titled "Driver-Unbelted" in violation of the trial court's in limine order excluding evidence that the driver was not wearing a seatbelt);

- *Osborne v. Todd Farm Serv.*, 202 Cal. Rptr. 3d 84, 94-95 (Cal. Ct. App. 2016) (affirming dismissal with prejudice of offending party's case where counsel "repeatedly disregarded the trial court's orders" by asking questions and mentioning excluded matters);
- *Zantop Int'l Airlines, Inc. v. E. Airlines*, 503 N.W.2d 915, 922-24 (Mich. Ct. App. 1993) (affirming dismissal with prejudice where the offending party's counsel elicited testimony excluded in limine, violated other court orders, and frustrated the proceedings);
- *Lassiter v. Shavor*, 824 S.W.2d 667, 669 ("hold[ing] that a trial court may strike a party's pleadings as a sanction for violation of an order in limine if the circumstances warrant" (case remanded for the trial court to consider an intervening Texas Supreme Court case specifying standards for choosing an appropriate sanction));
- *Tennant v. Marion Health Care Found., Inc.*, 459 S.E.2d 374, 390 (W. Va. 1995) ("Like any other order of a trial court, in limine orders are to be scrupulously honored and obeyed by the litigants, witnesses, and counsel. It would entirely defeat the purpose of the motion and impede the administration of justice to suggest that a party *unilaterally may assume for himself the authority to determine when and under what circumstances an order is no longer effective.* [That is precisely what Evans *admitted* Ford did. 4/5/18 TT (PM) at 18/3-19/6.] *A party who violates a motion in limine is subject to all sanctions legally available to a trial court* . . . when a trial court's evidentiary order is disobeyed.") (emphasis added);
- *In re R.N.*, 356 S.W.3d 568, 575 (Tex. Ct. App. 2011) ("When a trial court issues an order granting such a motion in limine, the opposing party has a duty to comply with that order and to instruct the witnesses to do the same, and noncompliance with that order may lead to … sanctions the trial court deems appropriate.").

This Court undoubtedly has the authority to strike Ford's answer in its entirety. Plaintiffs respectfully request in the alternative that the Court impose the aforementioned issue preclusion sanctions.

A. Ford's Willful Violations of Court Orders and Other Misconduct Would Justify the Striking of Ford's Answer in Its Entirety.

While the sanctions this Court chooses to impose against Ford is within the Court's discretion, there can be no doubt that Ford's repeated and willful violations justify and warrant the striking of Ford's answer in its entirety.

Georgia trial and appellate courts have addressed similar situations where a party's misconduct or violation of court orders resulted in a mistrial. Those courts have imposed harsher consequences as a sanction in response to far less egregious misconduct than that demonstrated by Ford in this case.

In *Wood v. UHS*, a mistrial was declared as a result of Wood's counsel disregarding the judge's order by asking prohibited questions to potential jurors during *voir dire*. 315 Ga. App. at 131. After the mistrial was declared and the jury was released, UHS filed a motion requesting that Wood's case be dismissed with prejudice. *Id.* The trial court granted the post-mistrial motion and entered the ultimate sanction dismissing the offending party's case with prejudice. *Id.*

Affirming the trial court's post-mistrial sanction of dismissal, the Court of Appeals noted the offending party's repetitive objectionable behavior in open disregard for the trial court's orders, *Id.* at 131-32, and held that "*the trial court did not abuse its discretion in dismissing the case based on Wood's counsel's blatant and wilful disregard for the authority of the court.*" *Id.* at 132 (emphasis added).

Ford's misconduct in this case is *incomparably worse* than that addressed by the trial court and Court of Appeals in *Wood*. Ford deliberately defied *multiple* Court Orders and instructions over and over again, even after the Court had *repeatedly* warned Ford that doing so would result in "very serious sanctions." *See, e.g.,* 3/22/18 TT (am) at 16-21; 4/2/18 TT (am) at 20/6-10; 4/2/18 TT (am) 60/14-16; 4/5/18 TT (am) 68/3-8. Ford's misconduct was calculated to either procure a mistrial or poison the jury and to thereby thwart justice.

That Ford's misconduct was a "blatant and wilful disregard for the authority of the court" is indisputable. Ford's lawyer admitted that the reason Ford willfully violated the Court's Orders is because *Ford* didn't agree with those orders. There can be no greater "disregard" of the Court's authority. Ford is not above the law and such abhorrent misconduct cannot be condoned. If Ford can get away with defying Court Orders, other parties in other cases will try the same approach. This Court has an obligation to the law, to justice, to other courts, and to the integrity of the judicial system and of the Bar to enter an Order that warns all "never again."

Ford and these same lawyers have been here before, several times, and are well-aware that a trial court can and will impose sanctions against a party whose misconduct procures a mistrial—as Ford deliberately did in this case. In *Young v. Ford*, another Georgia trial court was forced to declare a mistrial after Ford and

these same Ford lawyers—Thomas, Malek, and Boorman—made misrepresentations to the court regarding Ford's insurance coverage.

After the mistrial was declared in *Young*, the plaintiffs in that case filed a motion for sanctions requesting that the trial court strike Ford's answer. The court did not strike Ford's answer under the facts of that case, but found that "sanctions [were] appropriate and warranted" as a result of Ford's misconduct. *See* 6/24/2011 Order, attached as Exhibit 2. The trial court then imposed issue preclusion sanctions against Ford.[31] *Id.* Ford and its lawyers were obviously emboldened by that decision; their misconduct in this case has been far, far worse.

Just to use the most recent example from trial of Ford's misconduct, *after* this Court reiterated its ruling that McNish was not qualified to testify about cause of death, Ford's lead counsel Thomas *represented to this Court* that he would "talk to Dr. McNish and advise him about the court's rulings." 4/4/18 TT (pm) at 95/21-22. Thomas further represented to this Court he would abide by the Court's Order. 4/4/18 TT (pm) at 92/6-11. In direct contravention of those representations to this Court, Thomas then calculatedly led McNish to give the very testimony this Court had repeatedly ruled he was not qualified to give. ***That statement is irrefutable.***

[31] Ford filed a Motion for Reconsideration of the trial court's order granting issue preclusion sanctions. Ford's motion was denied. See 6/24/2011 Order denying Ford's MFR, attached as Exhibit 3.

As another example, Ford's lead counsel Thomas also represented to this Court that Ford would not violate the Court's Order precluding the Malibu testing. *See* 4/2/18 TT (am) at 7/10-13. Then Ford did just that. 4/2/18 TT (am) at 45/20-46/1.

The transcript is full of other Ford misrepresentations to this Court. For example, during Plaintiffs' examination of Dr. Eisenstat, Ford's lawyer Evans made multiple misrepresentations to the Court for the sole purpose of tainting the jury and prolonging the trial. ***In front of the jury,*** Evans accused Plaintiffs of "ambushing" Ford with "inappropriate" "new opinions" from Dr. Eisenstat. *See* 3/30/18 TT (am) at 63/11-68/11. Evans then represented to the Court that Dr. Eisenstat's opinion that the roof caused the deaths of Mr. and Mrs. Hill was being disclosed "for the first time" at trial. *Id.* ***Evans knew*** *those representations were false.* After a lengthy delay, the Court discovered that Evans's inflammatory accusations were outright lies:

> THE COURT: All right. The Court's reviewed Dr. Eisenstat's deposition. It is replete with instances of how this injury occurred. I'm allowing him to testify as to it. He was tendered as to cause of death. I'm allowing him to testify as to cause of death.

3/30/18 TT (am) at 67/10-15. Not only did Dr. Eisenstat provide those exact opinions in his deposition long before trial, Plaintiffs lead counsel said during opening statements that Dr. Eisenstat would testify to exactly what Mr. Evans later claimed was an "ambush." 3/22/18 TT (am) at 951-3 ("[BY MR. BUTLER: *Dr.*

Eisenstat] will testify these were both clearly flexion injuries clearly ***caused by the roof collapsing down on their heads***.”). Evans was just making things up—*in front of the jury.*

The issue preclusion sanctions imposed against Ford in the *Young* case resulted after *just one* misrepresentation to the court and *no* willful violations of the court's orders. That obviously emboldened Ford and its lawyers—and this Court and Plaintiffs are the victims. In this case Ford made *multiple* misrepresentations to the Court *and* willfully violated *multiple* Court Orders, including *multiple* Orders in limine, the Court's 2/13/2017 Scheduling Order,[32] the Court's Standing Order,[33] the Court's 4/4/2017 Order,[34] and the Court's 3/16/2018 Order on Plaintiffs' Emergency Motion For Sanctions.[35]

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[32] Ford violated the Scheduling Order when it attempted to dishonestly sneak into the record Ford's deposition designations of its pharmacist witness Buffington several months after the date required by the Court's Scheduling Order. (*See* Pls.' 3/16/18 Mot. to Enforce the Scheduling Order).

[33] Ford violated the Court's Standing Order when it dumped hundreds of thousands of pages of documents on Plaintiffs the week before trial instead of providing pre-marked exhibits as required by the Court's Order.

[34] The Court Ordered Ford on April 4, 2017 to “take the lead role in scheduling the deposition of its former employee…Barthelemy.” Rather than complying with the Court's Order and facilitating the deposition, Ford hired Mr. Barthelemy a regular Ford lawyer to prevent Plaintiffs access to Mr. Barthelemy.

[35] The record is replete with instances where Ford violated the Court's 3/16/18 Sanctions Order precluding Ford from “introducing any exhibit” at trial that was not produced during discovery.

Plaintiffs' counsel, in their more than 100 years of collective experience, cannot recall any party more deserving of sanctions. Where, as here, a party openly defies the foundations of our judicial system and snubs its nose at the authority of the Court, swift, severe, and symbolic action must be taken.

B. Ford is not entitled to violate Court Orders just because Ford contends the Court was wrong.

In response to the Ford violation of Court Orders that 'broke the camel's back'[36]—the McNish Order, *Ford actually argued* that it was ***"entitled"*** to ignore and violate the Court's Order. 4/5/18 TT (pm) at 18/3-19/6 (Evans for Ford at 18/18-19: "Dr. McNish indeed was and is under Georgia law appropriately qualified to give all of those opinions."); *Id.* at 20/10-13 ("There was no evidence the witness was not qualified and we -- as I indicated before under 703 and 705, we were -- *we were then* ***entitled*** *to go there.*") (emphasis added).

That exchange is telling: Ford admits that it violated the rule of sequestration by sharing Dr. Eisenstat's testimony with McNish,[37] and that its

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[36] 4/2/18 TT (am) at 20/6-10, "The camel's back is strained, deeply strained at this point in this trial, and it's about to break. Keep playing around with it. You're going to find yourself in a situation you don't want to be in. I can promise you that."

[37] 4/5/18 TT (PM) at 17/17-25) ("And as a result of Dr. Eisenstat, a pathologist, talking about how the Hills hit the roof, something he admitted repeatedly was beyond his expertise, the question then became, okay, ***can we then take Dr. Eisenstat's testimony, provide that*** as contemplated under 703 ***to Dr. McNish so***

violation of the Court's Order was premeditated, pre-planned with the witness McNish, and deliberate—"willful," as the Court found. At ***no*** time did Ford or any of its lawyers share with the Court the fact they had decided they were "entitled" to violate the Court's Order ***and planned to do so***.

The Court of course rightly disagreed with Ford's view that it could do whatever it wanted, irrespective of the Court's Order. 4/5/18 TT (pm) at 23/2-6 ("THE COURT: My order was clear. The Court does not find that he has sufficient skill or expertise to provide that opinion as to the cause of death. Just because you think you got there, doesn't mean you were entitled to go blow right through it, which is what happened.").

This Court was irrefutably correct. Georgia law is clear that if a court has jurisdiction to enter an order, that order must be obeyed even if a party deems it erroneous or "wrong" on the merits. "[I]f a trial court has jurisdiction to issue an order, the order must be obeyed until it has been superseded, even if it is wrong." *Rockwood Int'l Sys. Supply v. Rader Cos.*, 255 Ga. App. 881, 884 (2002); *see also Holbrook v. James H. Prichard Motor Co.*, 27 Ga. App. 480, 482-83 (1921):

> The superior court of Forsyth county had jurisdiction both of the parties and the subject-matter of the case involving the seizure and title to the automobile in question, and any order passed by the judge of that court was within its jurisdiction, although the order might have been erroneous, and the only question for the sheriff, who was a party

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that Dr. McNish, who is a doctor, who does have an M.D., who has been a treating physician, ***could opine as to the evidence that was actually in the record.")***

> to the suit as well as a ministerial officer of the court, was one of obedience. The jurisdiction of a court depends upon its right to decide a case, and never upon the merits of its decision. ... [I]f the court has jurisdiction to make an order, it must be obeyed however wrong it may be. "The principle is of universal force, that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous." *People* v. *Sturtevant*, 9 N.Y. 263, 266 (59 Am. Dec. 536). Errors must be corrected by appeal, and not by disobedience. The [party] proceeded against-for disobeying an order of the court in a case in which it had full jurisdiction can never set up as a defense that the court committed an error in issuing the order.

III. FEES & EXPENSES – PLAINTIFFS' AND GWINNETT COUNTY'S

Ford's misconduct and procurement of a mistrial has imposed tremendous burdens on Plaintiffs, Plaintiffs' counsel, the Court, and Gwinnett County. "For every right there shall be a remedy; every court having jurisdiction of the one may, if necessary, frame the other." O.C.G.A. § 9-2-3 (part of the Georgia Code since 1863).

This Court has authority to require Ford to pay attorney's fees, costs of litigation, and other costs associated with the mistrial (like the county's juror costs) under O.C.G.A. § 9-15-14(b) and the Court's inherent authority.

Georgia law empowers the Court to sanction Ford because its "improper conduct" not only caused a mistrial but also "unnecessarily expanded the proceeding." O.C.G.A. § 9-15-14(b). The Court of Appeals affirmed a trial court's award of more than $70,000 in costs for trial preparation under § 9-15-14(b), where a party's "blatant disregard" of an Order in limine required a mistrial on the

second day of trial. *Corey v. Clear Channel Outdoor, Inc.*, 299 Ga. App. 487, 495-96 (2009).

The sanctions that trial courts may impose for misconduct that causes a mistrial include (a) the opposing party's costs of trial preparation (e.g., attorneys' fees), (b) the opposing party's trial-related costs (e.g., food, lodging, equipment rental), (c) the opposing party's expert witness fees, (d) jury costs to the county. *See, e.g.*, *Allied Prop. & Cas. Ins. Co. v. Good*, 919 N.E.2d 144 *passim* (Ind. Ct. App. 2009) (affirming sanctions of attorneys' fees, expert witness fees, hotels, costs for the jury where violation of an Order in limine caused a mistrial); *Turner v. Roman Catholic Diocese of Burlington, Vt.*, 987 A.2d 960, 967 (Vt. 2009) (affirming monetary sanctions of attorney's fees and expert witness fees where defendant "repeatedly and deliberately" violated Orders in limine and caused mistrial); *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1107, 1118 (9th Cir. 2005) (affirming sanctions of attorney's fees and costs of empaneling a jury where Ford's violation of an Order in limine during opening statements required a mistrial).

Plaintiffs pray that this Court's grant of this motion include requiring that Ford pay

(1) All Plaintiffs' attorneys' fees for trial preparation and trial time;

(2) All Plaintiffs' expenses relating to the mistrial;

(3) All costs incurred by Gwinnett County as a result of this trial.

Plaintiffs pray that this Court, after granting said remedies, direct Plaintiffs to document such fees and expenses and direct Gwinnett County to do the same, and then amend the Court's Sanctions Order to so provide.

IV. SUMMARY and RELIEF SOUGHT

Ford's violations reached nearly every issue the jury would have had to decide. The violations described in Section II above relating to effects on Ford employees, blaming Mr. Hill and insinuating he was impaired (II. 2), and about hiring lawyers (II. 8) were intended to prejudice the jury against Plaintiffs, generally, as to all issues. The violations described in II (5) (feasible alternative design), II (6) (inadmissible 'testing'), II (7) (dissimilar incidents), and II (9) (other automakers' roofs) were intended to prejudice the jury on the defect issue. The violations described in II (1) (McNish cause of death testimony), II (3) (criticism of Plaintiffs regarding exhumations and autopsies), and II (4) (insinuations the Hills were not properly seat belted) were intended to prejudice the jury on the causation issue. Issue preclusion sanctions are an appropriate remedy for Ford's misconduct, and warranted to prevent any future such misconduct, lest the Court have to order a third trial.

Accordingly, Plaintiffs request that the Court Order that the following facts shall be taken as established for purposes of this action and Ford Motor Company will be precluded from contesting said facts:

(1) That the roof on the subject 1999-2016 Super Duty trucks was and is defectively designed and dangerously weak;
(2) That the roof on the subject 1999-2016 Super Duty trucks was and is 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 acts and failures to act by Ford Motor Company in selling trucks with that weak roof amount to a willful, and a reckless, and a wanton disregard for life;
(4) 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 so warn the public; *and*
(5) 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 both Mr. and Mrs. Hill.

Remaining for jury determination would be (1) whether there is "clear and convincing evidence" that punitive damages should be imposed against Ford (O.C.G.A. §51-12-5.1(b)); (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. All evidence relevant to those issues would be admissible. With respect to punitive damages, the jury would first determine "whether an award of punitive damages shall be made" (O.C.G.A. §51-12-5.1 (d) (1)), and if so, then a second 'phase' of the trial would ensue "to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case." (O.C.G.A. §51-12-5.1(d)(2)). Then the jury would return a verdict as to the amount of punitive damages.

The second trial of this case should proceed pursuant to the Orders heretofore entered by the Court and the current Pretrial Order and exhibits thereto. Ford should not be rewarded for its misconduct and should not benefit from having had a 'look' at Plaintiffs' case by being allowed to name a new cast of witnesses.

V. CONCLUSION

Ford decided to derail the trial of this case and to willfully violate multiple Court Orders with knowledge that the Court had *explicitly and repeatedly warned* Ford that doing so would result in "very serious sanctions." Ford decided to deliberately procure a mistrial while knowing that doing so would waste the time and resources of this Court, the Court's staff, the jurors, the Plaintiffs, and witnesses.

If Ford is not severely sanctioned, the second trial will be no different than the first. Ford has proven time and again that it will not abide by this or any other Court's Orders. The issue preclusion sanctions requested by Plaintiffs are well deserved, are absolutely appropriate given Ford's repetitive and willful misconduct, are tailored to Ford's misconduct and the purpose and consequences of that misconduct, and are well within this Court's power.

Plaintiffs respectfully submit that any lesser sanction will not do justice in this case and will only encourage this defendant's misconduct to continue in future trials, and encourage other parties and other lawyers to engage in the same

misconduct. Our system of justice cannot stand that; the Bar should not have to stand that.

Based on the foregoing, Plaintiffs pray that this motion be granted.

Plaintiffs further pray that this case be specially set, again, for trial, ***as soon as possible.*** Ford's misconduct should not be rewarded by delaying the second trial.

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. Ford proved in *Gibson v. Ford* that it will do anything to delay trial in a case where it has no defense.[38]

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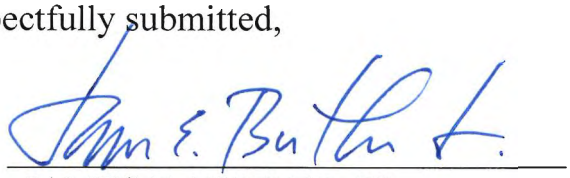
[38] *Gibson v. Ford* arose when Mrs. Anne Marie Gibson burned alive in a Ford vehicle with rear gas tanks after a rear impact in which the gas tank exploded and her seat back broke and her doors jammed shut. Trial was set for 3/23/04. Ford filed two motions for certificate of immediate review, which were denied. But trial was delayed. Ford contended the issue preclusion sanction was the same thing as "contempt," and appealed to the Court of Appeals. That appeal was dismissed. Ford then filed in the Superior Court of Clarke County a "petition for mandamus" against State Court Judge Kent Lawrence. That "petition" was denied on 8/4/04. Trial was then set for 9/13/04. Ford appealed the denial of its "petition for mandamus" to the Supreme Court. Trial was delayed. On 4/26/05 the Supreme Court unanimously affirmed the denial of Ford's "petition for mandamus." *Ford Motor Co. v. Lawrence,* 279 Ga. 284 (2005). Trial commenced in November 2005 resulting in a verdict and Final Judgment on 12/16/05. Ford's antics resulted in trial being delayed for 20 months. Ford appealed from that Final Judgment. The Supreme Court unanimously affirmed the Final Judgment on 3/28/08. *Ford Motor Co. v. Gibson,* 283 Ga. 398 (2008). Ford was represented by Evans' firm (it was then known as McKenna Long & Aldridge).

This 24th day of April, 2018.

Respectfully submitted,

BY: 

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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 the above and foregoing pleading via U.S. Mail and email, properly addressed to ensure delivery to:

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This 24th day of April, 2018.

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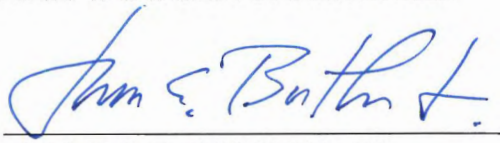
BY: 

JAMES E. BUTLER, JR.
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EXHIBIT 1

2011 WL 10903374 (Ga.State Ct.) (Trial Order)
Georgia State Court.
Cobb County

Donald R. YOUNG, II and Janice Young, Surviving Parents of Donald R. Young, Iii, Decedent and Donald R. Young, Ii, Administrator of the Estate of Donald R. Young, Iii, Plaintiffs,
v.
David Rondell BARRETT and Ford Motor Company, Defendants.

No. 2010A44154.
June 22, 2011.

***1** Civil Action

Order

Kathryn J. Tanksley, Judge.

The Court hereby memorializes the undersigned's June 14,2011, ruling from the bench regarding the Admission Pro Hac Vice of Mr. Paul F. Malek and Mr. D. Alan Thomas:

As it is relevant to the issues currently before the Court, the Court notes the pertinent procedural history of this case. In 2007, counsel for Plaintiffs submitted a Request for Production of Documents to Ford's counsel requesting the production of any insurance policies that would be applicable in this case. In response to the Request, Ford failed to disclose the applicable insurance policies, did not object, and never supplemented said response to disclose any insurance policies. After an extensive discovery period, in both the original action and the present case,[1] the parties prepared a proposed Pretrial Order. At that time, Ford did not list any insurance companies in enumeration number four, and in fact objected to Plaintiffs attempt to list an insurance company. The Pretrial Order specifically states, "Ford objects to any reference to an alleged insurer of Ford. Ford has sufficient resources to satisfy any judgment that reasonably could be expected to be awarded as damages in this action, if any." The Court specially set this case for a hearing on all pretrial motions for June 6 and 7, 2011, with a specially set two-week trial date to begin on June 13, 2011

In an effort to ensure that the Court had accurate information so as to properly qualify the jury pool, the Court, during the Pre-trial Hearings, inquired as to the existence of any insurance policies maintained by Ford. At that time, counsel for Ford objected to the request that the jury be qualified as to any insurer of Ford and Mr. Thomas specifically repeated the position that "Ford Motor Company essentially is self-insured to a point that it would satisfy any judgment in this case." See Transcript June 7, 2011. When pressed further, Mr. Thomas was equivocal, and therefore, the Court ordered Ford to determine if any insurance was in place in order to properly qualify the jury.

Subsequently, and pursuant to the Scheduling Order submitted by counsel, the Court and counsel began voir dire of the jury pool on June 13,2011. Immediately prior to beginning voir dire, Mr. Thomas again stated that there was no insurance; however, said discussion was not placed on the record at that time. After an entire day of voir dire, which included dismissing jurors for cause and releasing an entire panel of jurors, counsel for Ford, on the record, again stated that there were no insurance policies in effect in this case.[2]

***2** Prior to striking the jury on the morning of June 14, 2011, counsel for Ford, for the first time, revealed the existence of numerous[3] insurance policies that would apply in this case. As the Court had never been informed of said insurance policies (despite repeated inquiries to Ford's counsel and Mr. Thomas' statement on the record that no such policies applied) the jury pool had not been pre-qualified as to said policies and the Court was forced to declare a mistrial and release the entire jury pool.

Upon motion by counsel for Plaintiffs, and pursuant to Uniform State Court Rule 4.4 D.4, the Court hereby finds that the continued pro hac vice admission of both Mr. Thomas and Mr. Malek to this Court "may be detrimental to the prompt, fair and efficient administration of justice." Specifically, the Court finds that counsel have violated the following Georgia Rules of Professional Conduct: Rule 3.3 Candor Toward the Tribunal and Rule 3.4 Fairness to Opposing Party and Counsel. Accordingly, and pursuant to

Uniform State Court Rule 4.4 D.4, the Court hereby revokes the Admission Pro Hac Vice of Mr. Alan Thomas and Mr. Paul Malek.

SO ORDERED, this *22* day of June, 2011.

<<signature>>

STATE COURT OF COBB COUNTY

Footnotes

1 The single vehicle accident of which this product liability action arises occurred on April 18,2004. Subsequently, in 2005, Plaintiffs filed the initial action in Banks County, Georgia. The case was then transferred to the present Court and was filed in by the Cobb County State Court Clerk on March 22, 2007. At that time, the case was given the Civil Action File No. 07-A-3620-4. On May 28, 2009, prior to trial, Plaintiffs voluntarily dismissed the pending action and re-filed the case in Fulton County as a renewal action. After traveling through Fulton County (and the Superior Court of Cobb County), this case was eventually transferred back to this Court on April 26,2010, and was assigned the present Civil Action File No.oflO-A-4415-4.

2 The exact colloquy between the Court and counsel was:
"MR. LOWRY: There's one other issue if we're moving on.
This morning, when we talked about the insurance, you were going to make Mr. Thomas make a statement on the record about Ford's insurance coverage.
THE COURT: Yes. You can go ahead. I don't think that we got that on the record, did we, Madam Court Reporter?
MR. THOMAS: No.
COURT REPORTER: No, ma'am.
MR. THOMAS: No. The question had to do with insurance, Your Honor. 1 made inquiries over the weekend. My understanding is, just consistent with our discovery responses in here, that there is no insurance that would be applicable to satisfy a judgment in this case. And, as we said — I've got the exact language in the discovery responses, but that it would be inappropriate to qualify as to whatever this insurance policy was — that I still haven't seen yet.
THE COURT: And I'll follow up with that. But the Court then, based on the representation of Mr. Thomas, as an officer of the court, and he is able to bind his client, then, if any issue as to insurance comes up in the future, it would be a fatal error, because it was a legal challenge for cause that they were not qualified as to that. Thank you."

3 At that time counsel for Ford stated that there were six insurance policies; however, it appears that that number may be significantly less than the actual number of policies that apply in this case.

EXHIBIT 2

2011 WL 10903358 (Ga.State Ct.) (Trial Order)
Georgia State Court.
Cobb County

Donald R. Young, II and Janice Young, Surviving Parents of Donald R. Young, Iii, Decedent and Donald R. Young, Ii, Administrator of the Estate of Donald R. Young, Hi, Plaintiffs,
v.
David Rondell Barrett and Ford Motor Company, Defendants.

No. 2010A44154.
June 24, 2011.

***1** Civil Action

Order

Kathryn J. Tanksley, Judge.

The Court hereby memorializes its order from the bench that was entered on June 21, 2011. As the Court previously noted in the Order dated June 22, 2011, wherein the Court revoked the pro hac vice admissions of Mr. Alan Thomas and Mr. Paul Malek, the Court recites the following procedural history of this case, and specifically, the history as related to Ford's actions and representations in the discovery process and to this Court:

In 2007, counsel for Plaintiffs submitted a Request for Production of Documents to Ford's counsel requesting the production of any insurance policies that would be applicable in this case. In response to the Request, Ford failed to disclose the applicable insurance policies, did not object, and never supplemented said response to disclose any insurance policies. In the Consolidated Pretrial Order submitted by counsel, Ford did not list any insurance companies in enumeration number four, and in fact objected to Plaintiff's attempt to list an insurance company.[1]

In an effort to ensure that the Court had accurate information so as to properly qualify the jury pool, the Court, during the specially set Pretrial Hearing on June 6 and 7, 2011, queried Ford's counsel to determine the existence of all insurance policies maintained by Ford. At that time, counsel for Ford objected to the request that the jury be qualified as to any insurer of Ford and counsel for Ford specifically repeated the position that "Ford Motor Company essentially is self-insured to a point that it would satisfy any judgment in this case." See Transcript June 7, 2011. The Court overruled Ford's objection and advised Ford that the jury would be qualified as to all insurance companies having a potential financial interest in the outcome of the case. When pressed further, Mr. Thomas was equivocal, and therefore, the Court ORDERED Ford to definitively determine if Ford maintained insurance which would indemnify them for any potential verdict in this case by Monday, June 13, 2011, prior to the beginning of voir dire.

Subsequently, and pursuant to the Scheduling Order submitted by counsel, the Court and counsel began voir dire of the jury pool on June 13, 2011. Immediately prior to beginning voir dire, Mr. Thomas again stated that there was no insurance; however, said discussion was not placed on the record at that time. Upon the conclusion of voir dire, which included dismissing jurors for cause and releasing an entire panel of jurors, counsel for Ford, on the record, again stated that there were no insurance policies in effect in this case.[2]

***2** Immediately prior to striking the jury on the morning of June 14, 2011, counsel for Ford, for the first time, revealed the existence of numerous[3] insurance policies that would apply in this case. As the Court had never been informed of said insurance policies (despite repeated inquiries to Ford's counsel and Mr. Thomas' statement on the record that no such policies applied), the jury pool had not been pre-qualified as to said policies. The Plaintiffs and Defendant Barrett objected to the manner the jury had been qualified. The Court declared a mistrial and released the entire jury pool.

The Court hereby finds that the actions of Defendant Ford Motor Company frustrated the orderly process, prescribed in O.C.G.A. § 9-11-37, by failing to accurately respond to Plaintiffs' Request for Production of Documents or to supplement their discovery responses with the accurate information. This Court further finds that this failure misled Plaintiffs, such that Plaintiffs were prevented from compelling production of the requested documents.

Additionally, the Court finds that Defendant Ford, through its counsel, willfully and unreasonably misrepresented facts to this Court. Even when ordered to produce the requested information, Ford continued to mislead and offer material misrepresentations to this Court, Plaintiffs, and the co-Defendant. These misrepresentations so severely impacted this litigation that all affected parties were denied the right to a fair and impartial jury on the specially set trial date.

While Ford has offered the testimony of witnesses who claim that the admitted misrepresentations were made unintentionally, the Court finds said testimony, and the credibility of these witnesses, to be suspect. Moreover, the efforts by Ford and its counsel to comply with this Court's order were wholly insufficient, such that this Court finds that its actions are deemed to be consciously indifferent.

Accordingly, the Court hereby denies Plaintiffs' motion to strike Ford's answer as a sanction under O.C.G.A. § 9-11-37; however, the Court finds that alternative sanctions are appropriate and warranted in this case. Therefore, the Court orders that for purposes of this action, it is established, and Ford Motor Company is precluded from contesting, that Ford Motor Company failed to adequately warn consumers of the danger of a seatbelt during a rollover in a Ford Explorer. All other issues and defenses remain and may be pursued by Ford. Additionally, the Court orders that Ford shall pay reasonable expenses, including attorneys' fees and court costs to be determined by the Court in an evidentiary hearing subsequent to the trial of the case.

SO ORDERED, this *24* day of June,

<<signature>>

KATHRYN J. TANKSLEY, JUDGE

STATE COURT OF COBB COUNTY

Footnotes

1 The Pretrial Order specifically states, "Ford objects to any reference to an alleged insurer of Ford. Ford has sufficient resources to satisfy any judgment that reasonably could be expected to be awarded as damages in this action, if any."

2 The exact colloquy between the Court and counsel was:
MR. THOMAS: The question had to do with insurance, Your Honor.
I made inquiries over the weekend. My understanding is, just consistent with our discovery responses in here, that there is no insurance that would be applicable to satisfy a judgment in this case. And, as we said - I've got the exact language in the discovery responses, but that it would be inappropriate to quality as to whatever this insurance policy was— that 1 still haven't seen yet.
THE COURT: And I'll follow up with that. But the Court then, based on the representation of Mr. Thomas, as an officer of the court, and he is able to bind his client, then, if any issue as to insurance comes up in the future, it would be a fatal error, because it was a legal challenge for cause that they were not qualified as to that. Thank you."

3 At that time counsel for Ford stated that there were six insurance policies; however, it has now revealed that thirteen policies were in effect.

EXHIBIT 3

2011 WL 10903375 (Ga.State Ct.) (Trial Order)
Georgia State Court.
Cobb County

Donald R. YOUNG, II and Janice Young, Surviving Parents of Donald R. Young, Hi, Decedent and Donald R. Young, Ii, Administrator of the Estate of Donald R. Young, Iii, Plaintiffs,
v.
David Rondell BARRETT and Ford Motor Company, Defendants.

No. 2010A44154.
June 24, 2011.

***1** Civil Action

Order

Kathryn J. Tanksley, Judge.

This case is before the Court on "Defendant Ford Motor Company's Motion for Reconsideration of "Issue Preclusion' Sanction". Upon consideration of all pertinent matter filed of record, including the Motion and Brief filed in this Court on June 22, 2011, the Court enters this order as follows:

Defendant's motion is hereby denied and the stated sanction remains in place in this proceeding.

SO ORDERED, this *24 day* of June, 2011.

<<signature>>

KATHRYN J. TANKSLEY, JUDGE

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