IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

FORD MOTOR COMPANY,	)	
	)	**Appeal No. A13A0453**
Defendant/Appellant.	)	
	)	
v.	)	
	)	
JORDAN CONLEY, et al.,	)	
	)	
Plaintiffs/Appellees.	)	
	)	

BRIEF OF AMICUS CURIAE THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF APPELLANT

Chilton Davis Varner
Georgia Bar No. 725450
Stephen B. Devereaux
Georgia Bar No. 219791
Susan M. Clare
Georgia Bar No. 262830
KING & SPALDING LLP
1180 Peachtree Street N.E.
Atlanta, GA 30309
(404) 572-4600
(404) 572-5100 (facsimile)

Attorneys for Amicus Curiae

TABLE OF CONTENTS

I. INTEREST OF THE AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 975 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.[1]

[1] A list of PLAC's current corporate membership is attached as Appendix A to this brief.

Many of PLAC's members do business in the State of Georgia and have been defendants in product liability cases tried in this State's courts. These members have a direct interest in the outcome of this case because the trial court's ruling, if allowed to stand, would undermine the finality of verdicts entered in Georgia. PLAC urges this Court to secure the finality of Georgia judgments by affirming the strict requirements applicable to extraordinary motions for new trial under Georgia law.

II. SUMMARY OF ARGUMENT

Deeply rooted in our jurisprudence is the principle that the judgment of a court, and especially one entered after the decision of a jury, must become final on some definite date. "*Interest rei publicae ut sit finis litium* [It is of advantage to the public that there be an end of litigation] is a maxim so old that its origin is hidden in a remote antiquity, and the policy which it inculcates is so essential as not to admit of question or dispute." *Harris v. Hull*, 70 Ga. 831, 838 (1883). This principle of finality is of such fundamental importance to the concept of justice that Georgia courts have recognized final judgments cannot be altered or modified except pursuant to highly restrictive exceptions, even at the risk of occasional error. *Cf.* O.C.G.A. § 9-11-60; *see also Glover v. State*, 274 Ga. 213, 214 (2001)

("[T]rial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean . . .").

In direct conflict with the principle of finality, Plaintiffs ask this Court to affirm the trial court's decision to vacate a nearly two-year old jury verdict. Plaintiffs' extraordinary motion for new trial is based on Ford's allegedly improper response and objections to a discovery request regarding its insurance coverage. *See* O.C.G.A. § 5-5-41(a). According to Plaintiffs, this discovery response resulted in the jury not being qualified as to Ford's excess insurers, as permitted by Georgia law. It is undisputed, however, that Plaintiffs initiated and then *voluntarily abandoned* their challenge to Ford's response and objections to this request. In this respect, this case is materially different than *Ford Motor Co. v. Reese, et al.*, Case No. A12A1953, in which the First Division affirmed the trial court's decision granting the plaintiffs' extraordinary motion for trial on the basis that Ford's insurance-related discovery response was misleading. Here, there is no basis for finding that Plaintiffs were somehow misled by Ford's discovery responses. Instead, the objections Plaintiffs initially lodged to Ford's responses show that Plaintiffs did not interpret Ford's discovery responses as indicating an absence of

insurance, but rather as non-responses. Plaintiffs, however, made the decision not to further pursue discovery on the issue of Ford's insurance.

Compounding matters, Plaintiffs then did not ask the trial court to qualify the jury as to the parties' insurers at the trial. Plaintiffs also failed to present any evidence of an actual disqualifying relationship between any juror and one of Ford's excess insurers. In short, it is Plaintiffs' position that their belated "discovery" of an allegedly deficient answer to a discovery request (which answer they had challenged but then failed to pursue during the discovery period) on an issue that would not even have been admissible at trial is sufficiently "extraordinary" to justify throwing out a jury verdict nearly two years after the judgment.

In granting Plaintiffs' motion, the trial court did not recognize the important distinction under Georgia law between an extraordinary motion for new trial and an ordinary one. As a result, the trial court did not apply the strict standard Georgia courts have established for extraordinary motions based on newly discovered evidence, which would have required Plaintiffs to show that they acted with sufficient diligence (they did not) and that the newly discovered evidence

would probably produce a different verdict (it would not).[2] Instead, the trial court applied the far more lenient standard from *Atlanta Coach Co. v. Cobb*, 178 Ga. 544, 551 (1934), where the Supreme Court considered an ***ordinary*** motion for new trial based on the trial court's refusal to qualify a jury as to the parties' insurers after a timely request. The trial court erred because it applied *Atlanta Coach* even though Plaintiffs' motion was an extraordinary, not an ordinary, one, and even though Plaintiffs never asked the trial court to qualify the jury on the parties' insurers.

By applying the standard in *Atlanta Coach*, the trial court took the unprecedented step of granting an extraordinary motion for new trial based on what — viewed in the light most favorable to Plaintiffs — amounts to a technical violation of the discovery rules, despite waiver of the issue by Plaintiffs and without requiring any showing of diligence or materiality. Even assuming for the sake of argument that the discovery response in question was inadequate, this goes

[2] The First Division also failed to recognize an appropriately strict standard in its decision in *Ford Motor Co. v. Reese, et al.*, Case No. A12A1953, and instead applied only a "good reason" standard to an extraordinary motion for new trial.

too far and imposes a penalty that does not fit the alleged crime. Moreover, by lowering the bar for extraordinary new trial motions in this way, the trial court's decision threatens to substantially undermine the finality of judgments entered by Georgia's courts. With respect, the trial court's order should be reversed.

III. ARGUMENT AND CITATION OF AUTHORITIES

A. Plaintiffs' Extraordinary Motion For New Trial Should Be Denied Because Plaintiffs Cannot Meet The Strict Requirements Applicable To Such Motions Under Georgia Law.

1. Georgia Courts Have Established Strict Requirements Applicable To Disfavored Extraordinary Motions For New Trial.

Because extraordinary motions for new trial are in conflict with the important end of finality in judgments, such motions "are not favored." *Harper v. Mayes*, 210 Ga. 183 (1953). As their name implies, extraordinary motions are permitted only in the most exceptional of circumstances. The Supreme Court has explained "cases contemplated by this statute are such as do not ordinarily occur in the transaction of human affairs; as, when a man has been convicted of murder, and it afterwards appears that the supposed deceased is still alive, or when one is

convicted on the testimony of a witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like character." *Patterson v. State*, 228 Ga. 389, 390 (1971). Particularly important for purposes of this case, the "extraordinary state of facts must have been unknown to the movant or his counsel at the time when an ordinary motion for a new trial could have been filed, ***and must have been impossible to ascertain by the exercise of proper diligence for that purpose.***" *Id.* (emphasis added). It is no accident that a substantial portion of the statute permitting extraordinary motions sets forth the procedures to be used for motions based on post-conviction DNA testing. Indeed, the post-verdict discovery of DNA evidence proving the innocence of a wrongfully convicted criminal defendant is exactly the type of "extraordinary" circumstances such motions are intended to address. *See* O.C.G.A. § 5-5-41.

Consistent with the principle that motions under O.C.G.A. § 5-5-41 are both disfavored and limited to extraordinary circumstances, Georgia case law has established strict requirements that must be satisfied in every case before such motions will be granted. *Drane v. State*, 291 Ga. 298, 300 (2012) ("The statutes authorizing extraordinary motions for new trial provide no guidance regarding the

specific procedures that should be applied; therefore, 'the procedural requirements for such motions are the product of case law.'"). Put another way, "***a stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly available evidence than to an ordinary motion on that ground.***" *Id.* at 300-01 (emphasis added) (stating also that "an extraordinary motion for a new trial, as contrasted with a motion for a new trial made within 30 days of a judgment, is 'not favored.'"). To prevail on an extraordinary motion for new trial based upon the discovery of new evidence, the movant must show each of the following six requirements:

> (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Id.

The trial court apparently overlooked this standard and did not hold Plaintiffs to their burden of establishing that each of these requirements had been met. This was, itself, an abuse of discretion, requiring reversal. *See Sayers v. Artistic Kitchen Design, LLC*, 280 Ga. App. 223, 227 (2006) ("The court's application of the wrong legal standard was an abuse of discretion.").

2. The Trial Court Erred In Applying *Atlanta Coach's* Far More Lenient Standard, Which Is Applicable To Ordinary Motions For New Trial Made After A Timely Request To Qualify The Jury, And Not To Extraordinary Motions Made In The Absence Of Any Such Request.

In this case, Plaintiffs filed an extraordinary motion for a new trial under O.C.G.A. § 5-5-41 based on their alleged "discovery" some two years after verdict that Ford had excess insurance coverage. The trial court erred because rather than apply the stricter standard applicable to extraordinary motions, it applied the same standard applied by Georgia courts to an ***ordinary*** motion for new trial when the trial court has denied a party's timely request to have the jury qualified as to a party's insurers. This standard for ordinary motions was established by the Supreme Court's decision in *Atlanta Coach Co. v. Cobb*, 178 Ga. 544, 551 (1934).

The trial court believed it was required to apply *Atlanta Coach's* holding to Plaintiffs' extraordinary motion. As a result, the trial court found that because the jury was not qualified as to Ford's excess insurers, a new trial was required. In making this determination, the trial court did not require Plaintiffs to show the existence of any actual disqualifying relationship between any of the jurors and Ford's excess insurers. The trial court held instead that the harm was presumed under *Atlanta Coach*. *See* Ford's Br. at 10.

Atlanta Coach did not mandate this result, and the trial court's ruling is in conflict with Georgia cases establishing the requirements for extraordinary motions for new trial based on newly acquired evidence. *See, e.g.*, *Drane*, 291 Ga. at 300-01. *Atlanta Coach* supplies the standard applicable to an ordinary motion for new trial when a trial court has rejected a party's timely request to qualify the jury on the parties' insurers. Plaintiffs' motion was an extraordinary, not an ordinary, motion for new trial. And it is undisputed Plaintiffs did not ask trial court to qualify the jury on the parties' insurers — neither their own insurers, nor the dealership's insurers, nor Ford's insurers. *See* Ford's Br. at 8. *Atlanta Coach* simply does not apply to the circumstances of this case.

No reported Georgia case has applied the presumption of harm established by *Atlanta Coach* in the absence of a timely request to qualify the jury, and this Court should not be the first. On multiple prior occasions, this Court, while finding it is constrained by the Supreme Court's holding in *Atlanta Coach*, has rightly recognized "the unreasonableness of questioning and disqualifying prospective jurors on the basis of such an interest in a non-party insurer, since in most cases it will simply inform jurors that liability insurance exists, and that they are a policyholder of the potentially liable insurance company -- facts of which they previously had no knowledge, and which would have had no influence on their consideration of the case." *Patterson v. Lauderback*, 211 Ga. App. 891, 896 n.2. (1994), *overruled on other grounds*; *see also Byrd v. Daus*, 218 Ga. App. 145, 146 (1995); *Arp v. Payne*, 230 Ga. App. 840, 841 n.2. (1998); *Dalton v. Vo*, 230 Ga. App. 413, 414 (1998); ; *Franklin v. Tackett*, 209 Ga. App. 448, 450 (1993) (Beasley, J. concurring).

Given these policy considerations and the importance of reaching finality in Georgia judgments, this Court should refuse Plaintiffs' request to expand *Atlanta Coach's* holding. This Court should limit the reach of *Atlanta Coach* to its specific facts — harm is presumed only when the trial court has refused a timely request to

qualify the jury as to the parties' insurers and a party files an ordinary motion for new trial on that basis. *Cf. Byrd*, 218 Ga. App. at 146 (stating the rule as "[t]he refusal of the court, upon request by plaintiffs' counsel, to so qualify the jurors creates a presumption of harmful error, which unless in some way rebutted, requires the grant of a new trial").

3. This Court Should Apply The Strict Requirements Applicable To Extraordinary Motions For New Trial To Plaintiffs' Extraordinary Motion.

With respect to Plaintiffs' extraordinary motion, this Court should apply the six established requirements applicable to an extraordinary motion for new trial based on the discovery of new evidence. *Drane*, 291 Ga. at 300-01. Application of this standard results in two critical showings the trial court did not require of Plaintiffs here, which are dispositive of Plaintiffs' motion.

First, Plaintiffs are required to show that it was not due to a lack of diligence that information about Ford's excess carriers was not discovered sooner. *See Goodwin v. State*, 240 Ga. 605 (1978) ("The law is clear that any errors which could have been discovered through the exercise of proper diligence cannot form the basis for an extraordinary motion for new trial."); *see also Drane*, 291 Ga. at

304 (noting that "[t]he diligence requirement ensures that cases are litigated when the evidence is more readily available to both the defendant and the State, which fosters the truth-seeking process" and that "[t]he obvious reason for this requirement is that litigation must come to an end").

Second, Plaintiffs are required to show that the newly acquired evidence was so material that it probably would have produced a different verdict. *See Chapel v. State*, 270 Ga. 151, 153 (1998) (noting "high materiality" requirement to warrant a new trial on the basis of newly discovered evidence). Evidence of Ford's insurance coverage would not even have been admissible in evidence at this trial. *Simmons v. Edge*, 155 Ga. App. 6, 10 (1980) ("Generally, in automobile personal injury cases, any suggestion made in the presence of the jury at the instance of the plaintiff that the defendant is protected against responding in damages by liability insurance has been held to be highly prejudicial to the defendant and would require that a mistrial be declared."). Therefore, to prove materiality, Plaintiffs must show an actual disqualifying relationship between a juror and one of Ford's excess insurers that could have affected the verdict.

Application of the foregoing standard would be consistent with other Georgia cases involving extraordinary motions for new trial based on juror

disqualification. *See, e.g.*, *Rogers v. State*, 143 Ga. App. 306, 308 (1977) (denying extraordinary motion for new trial and stating that "jury prejudice cannot be presumed, and appellants have the burden of showing its existence"); *Reece v. State*, 208 Ga. 690, 692 (1952) (denying extraordinary motion for new trial where no disqualifying relationship was shown). Application of this strict standard to Plaintiffs' extraordinary motion for new trial would also be consistent with this Court's longstanding recognition that extraordinary motions must be treated differently than ordinary motions for the same purpose, and would appropriately secure the finality of Georgia's judgments.

4. Plaintiffs Cannot Meet The Strict Requirements Necessary To Prevail On An Extraordinary Motion For New Trial.

The parties' briefing establishes Plaintiffs cannot meet their burden of showing the six requirements necessary for an extraordinary motion for new trial based on newly discovered evidence. *See Drane*, 291 Ga. at 300 (holding that "[a]ll six requirements must be complied with to secure a new trial" and that the "[f]ailure to show one requirement is sufficient to deny a motion for a new trial").

Plaintiffs cannot satisfy the diligence requirement. To meet this requirement, Plaintiffs must show "that it was not owing to the want of due

diligence that [they] did not acquire [evidence regarding Ford's insurance coverage] sooner." *Id*. at 300*; Patterson*, 228 Ga. at 390 (holding evidence "must have been impossible to ascertain by the exercise of proper diligence"). Plaintiffs cannot make this showing because they would have learned of Ford's insurance coverage had they followed the procedures set forth in the Georgia Civil Practice Act for challenging a perceived inadequate discovery response or improper objection. *See* O.C.G.A. § 9-11-37. Instead, they raised an issue with the sufficiency of Ford's insurance-related discovery responses and then, for reasons known only to Plaintiffs, made the decision to abandon the effort. *See* Ford's Br. at 6. Having done so, Plaintiffs cannot credibly assert that they were somehow misled by the responses or anything else Ford did or said. On the contrary, the record reveals that they simply chose to focus on other alleged discovery deficiencies they considered more material to their claims.

Beyond that, Plaintiffs would have learned the identity of Ford's excess insurers had they simply requested qualification as to Ford's insurers at the time of trial, as the plaintiffs in the *Young* case did. Thus, far from being "impossible to ascertain," information about Ford's excess insurers was well within Plaintiffs' reach. Plaintiffs' failure to identify Ford's insurance coverage cannot therefore

serve as a basis for an extraordinary motion for new trial. *Goodwin v. State*, 240 Ga. 605 (1978) ("The law is clear that any errors which could have been discovered through the exercise of proper diligence cannot form the basis for an extraordinary motion for new trial.").

Plaintiffs also failed to show materiality. Plaintiffs have the burden of proving "that [evidence of Ford's insurance coverage] is so material that it would probably produce a different verdict." *Drane*, 291 Ga. at 300. Plaintiffs have not shown any actual disqualifying relationship between a juror and Ford's excess insurers that is likely to have affected the verdict here. Plaintiffs have provided absolutely no evidence that any juror had an affiliation with any of Ford's excess insurers. Under established Georgia case law, Plaintiffs' extraordinary motion for a new trial should have been denied.

B. This Court Should Also Reverse The Trial Court's Decision Because Plaintiffs Waived The Right To Have The Jury Qualified As To Ford's Insurers.

1. Under Georgia Law, Juror Qualification On Insurers Is Waivable.

As a separate basis for reversing the trial court, this Court should hold that the trial court erred in abandoning the long-standing rule that a party can waive an issue of juror qualification. For more than 90 years, it has been the law in Georgia that a party has the right to ask to have the jury qualified on the parties' insurers because affiliation with an insurer represents a disqualifying interest. *See City of Sandersville v. Moye*, 25 Ga. App. 64 (1920); *Bibb Mfg. Co. v. Williams*, 36 Ga. App. 605, 607 (1927)*; Atlanta Coach Co. v. Cobb*, 178 Ga. 544, 551 (1934). However, it has also long been the rule that a party waives the right to qualify jurors as to a disqualifying interest if such qualification is not pursued during *voir dire*. *See Citizens & S. Nat'l Bank v. Haskins*, 254 Ga. 131, 138 (1985) (holding challenge to jurors' qualifications waived, even though issue was raised in pre-trial order, where party failed to pursue qualification during *voir dire*); *Reid v. State*, 204 Ga. App. 358, 360 (1992) ("The disqualification of a juror … may be expressly or impliedly waived by a party having cause to complain, and if expressly or impliedly waived, it is conclusively presumed that no harm or benefit to either party resulted from the disqualification . . . ."); *Williams v. State*, 206 Ga. 107, 110 (1949) (holding juror disqualification waived if counsel knew of the

relationship or could have discovered it by the exercise of ordinary diligence); *see also* cases cited in Ford's Br., at 13-17.

This waiver rule is not unique to the issue of juror qualification. It is the general rule in Georgia that a party who fails to raise an issue at the time it is presented at trial waives any resulting error. The waiver rule has been applied to issues at every phase of trial, including those involving judicial bias, *In the Interest of C.C.C.*, 188 Ga. App. 849, 850 (1988), fact and expert testimony, *Crosby v. Cooper Tire & Rubber Co.*, 240 Ga. App. 857 (1999), exhibit tenders, *Ahmed v. Clark*, 301 Ga. App. 426 (2009), and form of the verdict, *Castillo v. State*, 263 Ga. App. 772, 774 (2003). So critical is the waiver rule to protecting the finality of judgments that Georgia courts have typically recognized exceptions in civil cases only where one is expressly provided for by statute, *see* O.C.G.A. § 5-5-24 (c).[3]

[3] Although Georgia courts have recognized a "plain error" exception to the waiver rule in criminal cases where the error is "so clearly erroneous as to result in a likelihood of a grave miscarriage of justice: or which seriously affects the fairness, integrity or public reputation of a judicial proceeding," the Supreme Court has clarified that this "the 'plain error' rule has no application in the context of [a] civil

The waiver rule not only serves serve the interests of finality, but it is also an easy to apply rule that provides litigants with predictability and appellate courts with clarity in deciding issues on appeal.

The cases holding that a disqualifying juror relationship can be waived establish that there is not, as Plaintiffs contend, any absolute requirement under Georgia law that a juror be free all disqualifying interests in order to render a lawful verdict. *Cf. Lewis v. State*, 291 Ga. 273, 275 (2012) ("[T]he mere fact that the juror was disqualified, standing alone, is not sufficient to require the grant of a new trial. . . ."). Indeed, Plaintiffs must have recognized that insurer qualification was waivable because they did not ask the trial court to qualify the jury as to the dealership's insurers or as to their own insurers. Ford's Br. at 8.

That insurer qualification is waivable, as opposed to essential for a valid judgment, is a critical distinction. If this Court were to accept Plaintiffs' argument,

---

case." *Dasher v. Dasher*, 283 Ga. 436, 437 (2008) (citing *Brooks v. State*, 281 Ga. 514, 516 (2007)) (plain error limited to death penalty cases and criminal cases wherein the trial court is alleged to have violated O.C.G.A. § 17-8-57); *see also Smith v. State*, 288 Ga. 348, 349 (2010) (same).

it would threaten to undo hundreds, if not thousands, of judgments entered in Georgia courts. Plaintiffs and defendants alike could go back and open every case where jurors were not qualified on a party's insurers, even if a party chose not to qualify the jury on the other party's insurers for strategic or other reasons. In doing so, this Court would establish an imprudent exception to the waiver rule never before recognized by Georgia courts. Because Plaintiffs failed to timely ask the trial court to qualify the jury as to the parties' insurers, Plaintiffs waived the issue and it cannot now form the basis for a new trial.

This Court should reject Plaintiffs' contention that juror qualification as to the parties' insurers is mandatory and affirm Georgia's long-standing case law establishing that a party waives a disqualifying juror relationship by failing to pursue the issue at *voir dire*.

2. The Trial Court Erred In Excusing Plaintiffs' Waiver And Granting A New Trial Based On Ford's Discovery Response, Which Plaintiffs Never Challenged.

The trial court also erred in excusing Plaintiffs' waiver based on its determination that Ford's response to Plaintiffs' discovery request was inadequate and its objections unfounded due to O.C.G.A. § 9-11-26(b)(2), the Georgia rule of

procedure permitting discovery of insurance information. Although Plaintiffs initially raised an issue by letter with Ford's discovery response, Plaintiffs never pursued this challenge, despite filing three motions to compel on different aspects of Ford's discovery responses. Ford's Br. at 6. In excusing Plaintiffs' waiver due to Ford's discovery response, the trial court improperly conflated two separate procedural rules of Georgia law and levied an unauthorized discovery sanction by granting Plaintiffs' extraordinary motion for a new trial.

O.C.G.A. § 9-11-26(b)(2) does not create an exception to the rule that a party can waive the right to jury qualification. To the contrary, the legislative history behind O.C.G.A. § 9-11-26(b)(2) demonstrates that the discovery rule was enacted to serve the entirely separate pre-trial purposes of facilitating case evaluation and settlement.

O.C.G.A. § 9-11-26(b)(2) was added to the Georgia Civil Practice Act in 1972 as part of the amendment that incorporated the Federal Rules of Civil Procedure into the Act generally. As this Court has emphasized:

> [t]he Georgia Civil Practice Act was taken from the Federal Rules of Civil Procedure and with slight immaterial variations its sections are substantially identical to corresponding rules. Because of this

> similarity it is proper that we give consideration and great weight to constructions placed on the Federal Rules by the federal courts.

Barnum v. Coastal Health Servs., 288 Ga. App. 209, 215 (2007) (citation and punctuation omitted). O.C.G.A. § 9-11-26(b)(2) is analogous to Fed. R. Civ. P. 26(A)(1)(a)(iv), and the Committee Notes to that rule do not mention juror qualification but provide the following justification for the rule:

> Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect.

See Committee Notes to Fed. R. Civ. P. 26(A)(1)(a)(iv). Indeed, Plaintiffs expressly recognized the rule's settlement evaluation purpose when they abandoned any further inquiry into the dealership's insurance coverage after Ford's affirmation that Ford would "agree[] to satisfy any judgment rendered against the dealership under the terms of the indemnification agreement." Ford's Br. at 7n.1.

The adoption of O.C.G.A. § 9-11-26(b)(2) was not related to Georgia's law regarding juror qualification on parties' insurers and did not alter the long line of

cases holding that disqualifying juror relationships are waivable. The waiver rule remains true regardless of whether (as alleged here) the defendant objects to or inadequately responds to discovery about insurance policies pursuant to O.C.G.A. § 9-11-26(b)(2). If this were not the rule in Georgia, parties in every case could go searching back through responses to hundreds of discovery requests to find, with the benefit of hindsight, some incomplete discovery response or unfounded objection to excuse their own waiver and vacate long-standing jury verdicts.

Protecting against such *ad hoc* challenges, the Georgia Civil Practice Act provides that the manner to address a perceived inadequate response or improper objection to a discovery request is through a meet and confer, and then, if the issue cannot be resolved, through a motion to compel, and an appropriate court order. Only if a party then fails to obey the court's discovery order is the court authorized to sanction the party. *See* O.C.G.A. § 9-11-37(b) (setting forth allowable sanctions if "a party fails to obey an order to provide or permit discovery"); *Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 438 (1979) ("[T]he party seeking discovery must first obtain an order under Rule 37(a) requiring the recalcitrant party or witness to make the discovery sought; it is only a violation of this order that is punishable under Rule 37(b)."). Here, Plaintiffs initiated the meet and confer

process with respect to the insurance-related discovery responses but decided, for whatever reason (perhaps because it was just not that important to them), to drop the issue and never brought it before the trial court on a motion to compel. The Georgia Civil Practice Act does not permit a trial court to levy a discovery sanction by granting an extraordinary motion for new trial on a discovery challenge voluntarily abandoned by Plaintiffs during the discovery period and "renewed" nearly two years after a jury's verdict in favor of the defendant. [4]

IV. CONCLUSION

The trial court erred because it failed to apply the established standard governing extraordinary motions for new trial under Georgia law. This error caused an inconceivable result — a Georgia jury verdict was vacated nearly two years after it was entered due to a defendant's perceived improper discovery response. More egregious, the jury's verdict was vacated despite the fact that

[4] The trial court also erred in excusing Plaintiffs' waiver because Ford did not list its insurers in the pre-trial order. As demonstrated in Ford's Brief, the preparation of a pre-trial order is an adversarial process, and policy dictates that it should remain such. Ford's Br. at 21-25.

Plaintiffs voluntarily abandoned the initial challenge they made to the sufficiency of the insurance-related discovery responses in question, waived the issue of juror qualification at trial, and made no showing whatsoever that any juror was actually affiliated with any of Ford's excess insurers.

Permitting a new trial under these less than extraordinary circumstances undermines the principle of finality and opens the door to a host of unintended and undesirable consequences, especially in pattern product liability litigation like this. In such cases, Georgia plaintiffs will be encouraged to seek new trials every time they hear about a new piece of evidence, a new theory advanced in another case, or an item which, in hindsight, appears to have been left out of a pretrial order or a discovery response. Civil litigation (including product litigation) is never perfect and there will almost always be some perceived deficiency or ambiguity in a representation made by one of the parties during the course of a case that the other party can try to exploit after the fact. Compounding matters further, future Plaintiffs will have a second bite at the apple even for tactical choices they make or evidence they fail to discover due to their own lack of diligence (rather than having to show that, through no fault of their own, they failed to discover the kind of game-changing evidence long required by O.C.G.A. § 5-5-41). For all of these

reasons, this Court should reverse the trial court, and preserve the finality of Georgia's judgments.

Respectfully submitted this 7th day of February, 2013.

KING & SPALDING LLP

By: /s/ Chilton Davis Varner

Chilton Davis Varner
Georgia Bar No. 725450
Stephen B. Devereaux
Georgia Bar No. 219791
Susan M. Clare
Georgia Bar No. 262830
1180 Peachtree Street N.E.
Atlanta, GA 30309
(404) 572-4600
(404) 572-5100 (facsimile)

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served all counsel of record in the within matter with a true and correct copy of this **BRIEF OF AMICUS CURIAE THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF APPELLANT** by depositing same in the United States mail with adequate postage affixed thereto and properly addressed to insure delivery, as follows:

Michael R. Boorman
Georgia Bar No. 067798
Audrey K. Berland
Georgia Bar No. 591485
Huff, Powell & Bailey LLP
999 Peachtree Street, Suite 950
Atlanta, Georgia 30309

Michael J. Bowers
Georgia Bar No. 071650
Christopher S. Anulewicz
Georgia Bar No. 020914
Balch & Bingham LLP
30 Ivan Allen, Jr. Blvd., NW, Suite 700
Atlanta, Georgia 30308

C. Allen Garrett, Jr.
Kilpatrick Townsend & Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4528

Adam H. Charnes
Kilpatrick Townsend & Stockton LLP
1001 West Fourth Street
Winston-Salem, NC 27101-2400

Benjamin E. Baker, Jr.
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.
218 Commerce Street
Montgomery, Alabama 36104

Andrew W. Jones
Andrew W. Jones, P.C.
701 Whitlock Avenue, Suite J-44
Marietta, Georgia 30064

/s/ Susan M. Clare
Susan M. Clare
Georgia Bar No. 262830

Corporate Members of the Product Liability Advisory Council

as of 2/6/2013

Total: 102

3M
Altec, Inc.
Altria Client Services Inc.
Anadarko Petroleum Corporation
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products, Inc.
BP America Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Chrysler Group LLC
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, LLC
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
General Electric Company
General Motors LLC
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.

Corporate Members of the Product Liability Advisory Council

as of 2/6/2013

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

PACCAR Inc.

Panasonic Corporation of North America

Pella Corporation

Pfizer Inc.

Pirelli Tire, LLC

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

RJ Reynolds Tobacco Company

SABMiller Plc

Schindler Elevator Corporation

SCM Group USA Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Techtronic Industries North America, Inc.

Teva Pharmaceuticals USA, Inc.

TK Holdings Inc.

The Toro Company

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Wal-Mart Stores, Inc.

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.