IN THE SUPREME COURT
OF THE STATE OF GEORGIA

COOPER TIRE & RUBBER COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. S17C0654
	)	
RENEE KOCH et al.,	)	
	)	
Respondent.	)	

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING COOPER TIRE & RUBBER COMPANY'S PETITION FOR A WRIT OF CERTIORARI

Brian D. Boone
Georgia Bar No. 182354
ALSTON & BIRD LLP
101 S. Tryon Street
Charlotte, NC 28280
(704) 444-1000 (phone)
(704) 444-1111 (fax)
brian.boone@alston.com

Counsel for Amicus Curiae
The Chamber of Commerce of the
United States of America

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

ENUMERATION OF ERROR 2

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE COURT OF APPEALS' DECISION CREATES A CONFLICT WITHIN THE GEORGIA COURTS, WITH FEDERAL COURTS, AND WITH OTHER STATES 5

II. THE COURT OF APPEALS' DOUBLE STANDARD WOULD ENCOURAGE SHARP TACTICS. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases **Page(s)**

Adkins v. Wolever,
554 F.3d 650 (6th Cir. 2009).....9

Azad v. Goodyear Tire & Rubber Co.,
No. 2:11-cv-290, 2013 WL 593913 (D. Nev. Feb. 14, 2013) 8

Bridgestone/Firestone North American Tire, LLC v. Campbell,
258 Ga. App. 767 (2002) 5, 7, 9

Cumberland Ins. Grp. v. Delmarva Power,
226 Md. App. 691 (Md. Ct. Spec. App. 2016) 1, 9

Fines v. Ressler Enters., Inc.,….....8
820 N.W.2d 688 (N.D. 2012)

Flury v. Daimler Chrysler Corp.,
427 F.3d 939.....6, 7-8, 9

Goldberg v. Kelly,
397 U.S. 254 (1970).....10

Grannis v. Ordean,
234 U.S. 385 (1914).....10

Kambylis v. Ford Motor Co.,
338 Ill. App. 3d 788 (Ill. App. 2003).....8

Kronisch v. United States,
150 F.3d 112 (2d Cir. 1998).....8

Lindsey v. Normet,
405 U.S. 56 (1972).....10

Phillips v. Harmon,
297 Ga. 386 (2015) .....*passim*

Silvestri v. Gen. Motors Corp.,
271 F.3d 583 (4th Cir. 2001).....8

United States v. Armour & Co.,
402 U.S. 673 (1971).....10

Vodusek v. Bayliner Marine Corp.,
71 F.3d 148 (4th Cir. 1995).....9

Other Authorities

Ga. Const. art. VI, § 6, ¶ V.....4, 5

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. Boasting over 300,000 members, the Chamber represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. One of the Chamber's important functions is to represent its members' interests in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases of concern to the Nation's business community.

This is one of those cases. With some frequency, the Chamber's members face litigation in Georgia state courts, and like any party to a judicial proceeding, they expect those courts to apply evidentiary rules (including the spoliation doctrine) fairly. Indeed, the spoliation doctrine is, as one appellate court explained, "grounded in fairness and symmetry": "[A] party should not be allowed to support its claims or defenses with physical evidence that it has destroyed to the detriment of its opponent." *Cumberland Ins. Grp. v. Delmarva Power*, 226 Md. App. 691, 696-97 (Md. Ct. Spec. App. 2016).

Georgia courts have long agreed with that proposition. But after the Court of Appeals' decision below, Georgia threatens to become the first State with a double standard for spoliation—holding defendants to an objective standard based on

constructive notice while judging plaintiffs' conduct under a forgiving, subjective-seeming standard that eschews constructive notice in favor of what some might call an actual-contemplation standard. This Court should put an end to that threat.

Just two years ago in *Phillips v. Harmon*, 297 Ga. 386 (2015), this Court held that an objective test—one that focuses on reasonable foreseeability and constructive notice—governs the spoliation analysis. The *Phillips* Court did not suggest (let alone hold) that a different standard would apply to plaintiffs. The Court of Appeals below nevertheless introduced a double standard for spoliation, breaking not only from this Court's *Phillips* decision but also from the Eleventh Circuit, other federal courts, and other States. It leaves companies facing litigation in Georgia guessing about which spoliation standard will apply—this Court's *Phillips* standard, the more subjective-oriented standard announced below, or some mishmash of the two. It also casts a shadow on the fairness and integrity of proceedings in Georgia state courts.[1]

ENUMERATION OF ERROR

Under Georgia law, a party has a duty to preserve relevant evidence when litigation is reasonably foreseeable—that is, when the party knows or objectively should know that litigation could ensue. In *Phillips v. Harmon*, this Court set out a number of objective factors for determining whether a party has constructive notice

[1] No party or party's counsel authored this brief in whole or in part, and no one except the Chamber, its members, or its counsel funded the brief's preparation.

of possible litigation and thus a duty to preserve evidence. They include "the type and extent of the injury," "the extent to which fault for the injury is clear," "the potential financial exposure" if liability is proven, "the frequency with which litigation occurs in similar circumstances," "what the plaintiff did or did not do after the injury," and "the initiation and extent of any external investigation." 297 Ga. at 397.

Those factors should have produced a different outcome below. Respondent Renee Koch's husband died from injuries that he suffered in a car accident. Following the accident, Mrs. Koch's husband told her—from his hospital bed—to "save the tires" because he thought that "something might have been wrong." At that point, Mrs. Koch knew or objectively should have known that litigation was reasonably foreseeable, so under this Court's decision in *Phillips*, she had a duty to preserve the evidence from the accident—including the wrecked vehicle and its wheels, tires, and rims. Instead of preserving that evidence, Mrs. Koch ordered the salvage yard to destroy everything except one tire's "carcass." If the Court of Appeals had faithfully applied this Court's decision in *Phillips*, it would have held that Mrs. Koch had a duty to preserve the evidence from her husband's accident. Instead, the Court of Appeals adopted a different spoliation test for plaintiffs—one that does not apply the "objective 'reasonable foreseeability' test" (slip op. at 3) and its attendant constructive-notice factors.

The question presented is whether the Court of Appeals erred in discarding the *Phillips* constructive-notice factors in favor of a more forgiving test that applies only to plaintiffs. *See* Ga. Const. art. VI, § 6, ¶ V ("The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance.").

INTRODUCTION AND SUMMARY OF ARGUMENT

> [T]he [Supreme] Court in *Phillips* did not expressly address how the objective "reasonably foreseeable" test . . . should be applied when it is the plaintiff who has failed to preserve evidence and did not address whether the concept of "constructive notice" applies to a plaintiff who is alleged to have spoliated.
>
> * * *
>
> [W]e do not believe that the Supreme Court intended those specific [constructive-notice] factors to apply in determining whether litigation was reasonably foreseeable to the plaintiff.

Slip op. at 3.

With those words, the Court of Appeals created a different, more lenient spoliation standard for plaintiffs—one that previously did not exist in Georgia (or perhaps anywhere in the country). In so holding, the Court of Appeals broke with this Court's *Phillips* decision, with other Georgia Court of Appeals' decisions, with the Eleventh Circuit's and other federal courts' approach to spoliation, and with other States' spoliation rules. If the Court of Appeals' decision stands, trial courts and litigants in this State will be left guessing about which rule applies—the *Phillips* rule or the *Cooper Tire* rule. (Plaintiffs' counsel will always argue for the *Cooper*

Tire rule.) Equally important, allowing the Court of Appeals' double standard to live on in the State's precedents could undermine public confidence in the fairness and integrity of judicial proceedings in the State.

This Court should grant review to confirm that Georgia applies the same spoliation standard on both sides of the v.

ARGUMENT

I. THE COURT OF APPEALS' DECISION CREATES A CONFLICT WITHIN THE GEORGIA COURTS, WITH FEDERAL COURTS, AND WITH OTHER STATES.

In adopting a special spoliation rule for plaintiffs that discards objective factors and constructive notice in favor of a subjective standard that seems to focus on actual contemplation, the Court of Appeals created multiple conflicts: (1) with this Court's (and indeed other States') spoliation jurisprudence; (2) with the Court of Appeals' prior decision in *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 258 Ga. App. 767 (2002), and (3) with the Eleventh Circuit's approach to spoliation. The Court of Appeals' double standard is unfair and the public will perceive it as such. That is enough to warrant certiorari review. *See* Ga. Const. art. VI, § 6, ¶ V.

This Court's decision in *Phillips*—which tracks the discussion from other jurisdictions—governs spoliation for all parties to litigation. Nothing in that decision suggests otherwise. On the contrary, the *Phillips* Court assumed that the reasonable-

foreseeability test (with its focus on constructive notice) applies to plaintiffs and defendants alike. *See* 297 Ga. at 397 ("the duty to preserve relevant evidence arises when litigation is reasonably foreseeable to the *party* in control of that evidence") (emphasis added). To be sure, in some passages, the *Phillips* Court spoke particularly about how defendants receive constructive notice, but that was because the defendants (not the plaintiff) were the alleged spoliators in that case. The *Phillips* Court did not suggest (much less hold) that a different spoliation standard governs plaintiffs. The Court of Appeals was wrong to suggest otherwise.

The resulting rift in Georgia spoliation law extends beyond the state courts. The decision below also conflicts with federal law in this Circuit. The Eleventh Circuit's decision in *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. (2005)—a products-liability case that drew on Georgia spoliation law—highlights the conflict.

There, the plaintiff was in a car accident and sued Daimler Chrysler for injuries that he claimed stemmed from a manufacturing defect in his truck's airbag system. Following the accident, a wrecker service towed the plaintiff's truck to a body shop. Two weeks after the accident, plaintiff's counsel sent a letter to Daimler Chrysler providing notice of the accident and of the airbag's failure to deploy. *Id.* at 941. When Daimler Chrysler asked roughly a month later to inspect the vehicle, the plaintiff's counsel did not respond. The plaintiff's insurer had already taken the

vehicle—which by that point had been moved to the plaintiff's parents' home—and sold it for scrap. *Id.* Because the plaintiff breached his duty to preserve the evidence, Daimler Chrysler asked the district court to sanction the plaintiff by dismissing the case. *Id.* The district court refused, and a jury ultimately awarded the plaintiff $250,000.00. *Id.* at 940.

The Eleventh Circuit reversed the jury verdict and ordered dismissal. Looking to the Georgia Court of Appeals' decision in *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 258 Ga. App. 767 (2002)—another suit about tires in which the court held that the plaintiff breached his duty to preserve evidence by discarding evidence from the accident—the Eleventh Circuit held that dismissal was proper because the plaintiff's "failure to preserve the evidence resulted in extreme prejudice to" Daimler Chrysler. *Flury*, 427 F.3d at 945. It prevented Daimler Chrysler from "put[ting] on a complete defense," and "[t]he resulting prejudice to defendant [was] incurable by any sanction other than dismissal." *Id.* at 947. The Eleventh Circuit never questioned whether the plaintiff had a duty to preserve the evidence. It was obvious to the Court that he did.

The contrast between *Flury* and the decision below could not be starker. Whereas the *Flury* court never questioned whether the plaintiff had a duty to preserve the evidence and spent most of its time discussing the appropriate sanction, the Court of Appeals never reached the sanctions question because it held that Mrs.

Koch had no duty to preserve the wrecked vehicle and tires. As a result, there are now dueling spoliation standards in Georgia: The objective standard that this Court and the *Flury* court would apply to plaintiffs and defendants alike and the new, seemingly subjective standard that the Court of Appeals would apply only to plaintiffs.

So far as we can tell, that new standard has no clear analog outside of Georgia. To determine whether a party had a duty to preserve evidence, most other state and federal courts apply an objective standard focused on constructive notice.[2] The Court of Appeals acknowledged some of those authorities but didn't address them. (slip op. 8).

[2] *See Silvestri v. Gen. Motors Corp.,* 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."); *Fines v. Ressler Enters., Inc*., 820 N.W.2d 688, 690 (N.D. 2012) ("When litigation is reasonably foreseeable, there is a duty to preserve evidence."); *Kambylis v. Ford Motor Co.*, 338 Ill. App. 3d 788, 794 (Ill. App. 2003) (approving of *Silverstri*); *Azad v. Goodyear Tire & Rubber Co.*, No. 2:11-cv-290, 2013 WL 593913, at *4 (D. Nev. Feb. 14, 2013) ("Litigants owe an 'uncompromising duty to preserve' what they know or should know will be relevant evidence in a lawsuit even though no discovery requests have been made and no order to preserve evidence has been entered.") (quoting *Kronisch v. United States*, 150 F.3d 112, 130 (2d Cir. 1998)).

II. THE COURT OF APPEALS' DOUBLE STANDARD WOULD ENCOURAGE SHARP TACTICS.

Spoliation rules are "intended to prevent unfair prejudice to litigants and to ensure the integrity of the discovery process." *Flury*, 427 F.3d at 939; *see also Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) (spoliation sanctions "serve both fairness and punitive functions"). They "level the evidentiary playing field" (*Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995)) and prevent "trial by ambush." *Bridgestone/Firestone*, 258 Ga. App. at 769; *see also Cumberland Ins. Grp. v. Delmarva Power*, 226 Md. App. 691, 696-97 (Md. Ct. Spec. App. 2016) (spoliation rules are "grounded in fairness and symmetry": "[A] party should not be allowed to support its claims or defenses with physical evidence that it has destroyed to the detriment of its opponent.").

Instead of protecting fairness in evidentiary matters, the Court of Appeals' spoliation double standard tilts the playing field in plaintiffs' favor. It relieves plaintiffs of their duty to preserve evidence even when they have constructive notice of potential litigation while requiring defendants to preserve evidence in the same circumstances. To be sure, the Court of Appeals resisted the notion that it was endorsing a "subjective" test for plaintiffs (slip op. at 10), but its opinion reveals that it did just that: The Court of Appeals (1) rejected the *Phillips* constructive-notice factors and (2) explained that the injured party has a duty to preserve evidence from

the point when the "party actually contemplates litigation" (slip. op. at 9)—a quintessentially subjective inquiry.

Leaving the Court of Appeals' double standard in place would encourage opportunistic plaintiffs to destroy or discard evidence before filing suit. It would also remove incentives for injured parties to preserve the evidence required to test their claims. As important, it would unfairly deprive defendants of their constitutional due process rights to "present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted); *see also, e.g., United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (recognizing that the "right to litigate the issues raised" in a case is "guaranteed . . . by the Due Process Clause"); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (The "fundamental requisite of due process of law is the opportunity to be heard.") (citations omitted). More to the point, in "almost every setting where important decisions turn on questions of fact," due process requires an opportunity to confront and examine the relevant evidence. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

The fairness concerns that animate constitutional due process also inform how courts apply evidentiary rules; those concerns go to the integrity of and public trust in our judicial system. Double standards erode confidence in the courts while encouraging opportunism. The Chamber's members—and indeed the public at large—have a vested interest in ensuring that the rules are the same for all who come

before our courts. This Court should grant Cooper Tire's petition to correct the Court of Appeals' wayward holding. In so doing, the Court would remove the cloud that now hangs over Georgia spoliation law.

CONCLUSION

This Court should grant Cooper Tire's petition for a writ of certiorari and, having done that, should retire the Court of Appeals' opinion.

Respectfully submitted January 9, 2017.

/s/ Brian D. Boone
Brian D. Boone
Georgia Bar No. 182354
ALSTON & BIRD LLP
101 S. Tryon Street
Charlotte, NC 28280
(704) 444-1000 (phone)
(704) 444-1111 (fax)
brian.boone@alston.com

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

IN THE SUPREME COURT
OF THE STATE OF GEORGIA

COOPER TIRE & RUBBER COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. S17C0654
	)	
RENEE KOCH et al.,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I certify that I have served a true and correct copy of this Brief on all counsel of record electronically and by U.S. Mail at the following addresses:

George R. Neuhauser, Esq.
Clinton F. Fletcher, Esq.
NALL & MILLER, LLP
235 Peachtree Street, N.E., Suite 1500
Atlanta, GA 303030

Laurie Webb Daniel, Esq.
HOLLAND & KNIGHT LLP
1180 West Peachtree Street
Atlanta, GA 30309

Scott Burnett Smith, Esq.
BRADLEY ARANT BOULT CUMMINGS LLP
200 Clinton Avenue West, Suite 900
Huntsville, AL 35801

Attorneys for Petitioner Cooper Tire & Rubber Company

Katherine L. McArthur
Caleb F. Walker
Laura K. Hinson
KATHERINE L. MCARTHUR, LLC
6055 Lakeside Commons Drive
Suite 400
Macon, GA 31210

Tracey L. Dellacona
DELLACONA LAW FIRM
6055 Lakeside Commons Drive
Suite 420
Macon, GA 31213

Attorneys for Respondent Renee Koch

S. Christopher Collier, Esq.
HAWKINS, PARNELL,
THACKSTON & YOUNG
4000 SunTrust Plaza
303 Peachtree Street, NE
Atlanta, GA 30308

Attorneys for Napa Auto Parts

G. Lee Welborn, Esq.
DOWNEY & CLEVELAND, LLP
288 Washington Avenue
Marietta, GA 30060

Attorneys for Hubbard & Spinks Parts & Service

This 9th day of January, 2017.

/s/ Brian D. Boone
Brian D. Boone
Georgia Bar No. 182354