IN THE SUPREME COURT
OF THE STATE OF GEORGIA

No. _____

COOPER TIRE & RUBBER COMPANY,
Petitioner,

v.

RENEE KOCH et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This petition asks whether, as the Court of Appeals held, Georgia should have a double standard for spoliation. That is, does Georgia law punish defendants based on constructive notice of potential litigation but afford plaintiffs a more forgiving standard with subjective components that permits sanctions only if the plaintiff admits to "contemplating litigation" at the time the evidence was destroyed?

In this case, Plaintiff Renee Koch alleged that a tire made by Cooper Tire & Rubber Company failed, resulting in the fatal accident that injured her husband. Mr. Koch — from his hospital bed — told his wife to "save the tires" because "something might have been wrong." Mrs. Koch, however, saved only a portion of one of the tires, the "carcass." She instructed the wrecker service that was storing the wrecked vehicle to destroy the rest of the evidence from the accident, including the allegedly defective tire tread and the wheel of the subject tire, along with the other three tires and the rest of the vehicle.

Due to Mrs. Koch's knowing destruction of this material evidence, it is impossible to tell whether the accident was caused by a defective tire (as she alleges) or was due to a worn-out tire, a broken wheel, a problem with the vehicle's steering, suspension, or braking, driver error, or some other cause that would exonerate Cooper Tire. Nonetheless, the trial court refused to impose spoliation

sanctions. And the Court of Appeals affirmed, finding that, as a plaintiff, Mrs. Koch was not subject to the same objective spoliation standard that this Court applied to a defendant in Phillips v. Harmon, 297 Ga. 386 (2015).

In Phillips, this Court used a number of constructive notice factors to determine whether the defendant violated a duty to preserve evidence, such as "the type and extent of the injury," "the extent to which fault for the injury is clear," "the potential financial exposure if faced with a finding of liability," "the relationship and course of conduct between the parties," "the frequency with which litigation occurs in similar circumstances," what the plaintiff and defendant "did and did not do after the injury and before the evidence in question was lost or destroyed," and "the initiation and extent of any internal investigation." 297 Ga. at 397. And the Court overruled a line of decisions using a subjective, "actual notice" test. Id. at 398. But now the Court of Appeals has adopted a different test for the other side of the v. — a plaintiff spoliator — and held that the Phillips constructive notice factors do not apply to a plaintiff like Mrs. Koch.

The case warrants certiorari for several reasons. First, as the Court of Appeals recognized, this is a question of first impression. The issue is the mirror image of the one addressed in Phillips, and thus it raises exactly the same public concern, gravity, and importance. Moreover, the decision below creates a rift in Georgia law with other courts, including the Eleventh Circuit, by eliminating

considerations such as the prejudice caused by the spoliation and whether the prejudice can be cured. In sum, this Court should grant review to explain that the spoliation rules are the same for all parties litigating in Georgia.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

1. The accident, the subject tire, and spoliation of the evidence.

The one-car accident at issue occurred on April 24, 2012, on Interstate 16 in Twiggs County, Georgia. While driving east at highway speeds, the left rear tire of Gerald Koch's 2000 Ford Explorer allegedly suffered a tread detachment. Mrs. Koch alleges that the tire failed due to defects in its design or manufacture, and that the tire failure caused her husband's Explorer to leave the roadway and crash, injuring Mr. Koch, who died nearly two months later. Compl. Vol.I (R-13); Accident Report Vol.II (R-461–64). Mrs. Koch alleges that the left rear tire on the Explorer was a size P235/75R15 Mastercraft Courser HTR tire, manufactured by Cooper Tire. Compl. (R-14) ¶ 15. She sued not only Cooper Tire but also Hubbard & Spinks Garage (who allegedly installed the tire) and NAPA Auto Parts (who allegedly gave tire installation training to Hubbard & Spinks). Compl. (R-14–15). She did not sue Ford Motor Company.

Immediately after the accident, the Explorer and all four of its tires were towed from the accident scene to Brown's Wrecker Service, where it was stored.

Dep. of Edwin Thomas Brown Vol.IV (R-852–53). A few days later, Mr. Koch spoke from his hospital bed and told his wife to preserve the tires:

> Q: All right. You were telling me that a couple of days after the accident you were caused to have a telephone call with Edwin Brown, right?
> A: Correct.
> Q: In answering that question you said in connection with having that call that your husband had done something with reference to that call; is that accurate?
> A: Yes.
> Q: What was that?
> A: When he was conscious and he was very lucid, he told me that I needed to get Mr. — he didn't know who it was, but he said, you need to get — **save the tires**.[*] And so I didn't care about the tire, but that's what he wanted. I wanted him to live. He wanted a tire. So I called and had Mr. Brown save the tire.
> Q: I think I understand what you are telling me. You knew that your husband had thought that was important enough to tell you and so you wanted to do what Jerry had told you to do?
> A: Right.
> Q: And your estimate for the timing of this conversation with your husband, Jerry, was within a couple of days after the accident?
> A: Yes.

Dep. of Renee Koch Vol.IV (R-1056–57) (emphasis added). She testified that Mr. Koch wanted the tires saved because "he felt like something might have been wrong." Id.

[*] It is unclear why the Court of Appeals says there is "some question" whether Mr. Koch told his wife to save "the tires" (slip op. at 3 n.1), when the transcript clearly says "tires" (plural). See Dep. of Renee Koch Vol.IV (R-1056–57).

Mrs. Koch then called Brown's Wrecker Service to discuss the $280 bill for towing and storing the wrecked truck. Koch Dep. Vol.IV (R-1058–59); Brown Dep. Vol.IV (R-889, 892–93). She told Mr. Brown that she did not have the money to pay the bill, and directed him to sell the Explorer and its companion tires for scrap. Brown Dep. (R-892–94); Koch Dep. (R-1058–59). Mrs. Koch only asked Mr. Brown to remove the part of the left rear tire still on the wheel and hold it for someone to collect later. Brown Dep. (R-894); Koch Dep. (R-1059).

> Q: And after those things were returned to you, you understood that with your permission the vehicle was going to be sold for salvage and it was going to be crushed and gone forever?
> A: Yes. But honestly I didn't know, what I understood is that he would take the title for the bill. It, you know, it didn't matter, I didn't care.
> Q: You understood that as far as you were concerned, you would have no more control over the vehicle and it would be gone?
> A: Yes, I was giving him the car and the title for the bill.

Koch Dep. (R-1059–60). As instructed, Brown's Wrecker Service sold the Explorer and all the other tires and wheels, including the rim of the subject tire, for $214 to a company that crushed it for scrap. Brown Dep. (R-894–97, 934).

What facts are known show the tires and the Explorer were well used and had experienced abuse. The Kochs purchased the Explorer used in August 2011. Koch Dep. Vol.IV (R-986). It had 171,153 miles on it, with two prior accidents. Id. (R-986, 1035). At the time of the purchase, the Kochs noticed that the truck needed a new set of tires; the ones on it were "getting pretty thin" and were "well worn."

Id. (R-990, 1001). Mrs. Koch thinks that her husband bought a new set of Cooper Tire tires in 2011, but she admitted that she has no first-hand knowledge that new tires were ever installed. Id. (R-1002, 1004, 1061) ("Q. Do you yourself have any firsthand knowledge or evidence that in fact Cooper tires were on your husband's Explorer? A. No.").

More important, Mrs. Koch conceded that due to the destruction of the vehicle, the mileage and maintenance records in the glove compartment, the wheels, the rims, and the companion tires, Cooper Tire cannot discover any evidence about alternative causes of the accident, such as the truck's suspension, steering, braking, or the tires' age, tread wear, fit, abuse, misuse, etc. Koch Dep. Vol.V (R-993–95, 1022–23, 1033–34). Mrs. Koch admitted she did not actually look at the tread or the condition of the tires on the Explorer at any time after her husband bought it. Id. (R-1005–06).

Mr. Koch died on June 3, 2012. Compl. Vol.I (R-14) ¶ 13. His daughter first contacted a lawyer on June 21, 2012. Estimated Timeline Vol.III (R-603). Mrs. Koch hired counsel on August 31, 2012. Id. (R-604). On September 26, 2012, Plaintiff's counsel picked up the subject tire carcass from Mr. Brown, who was storing it. Aff. of Tracey Dellacona Vol.III (R-601); Brown Dep. Vol.IV (R-898).

Mrs. Koch did not contact Cooper Tire at any time before she filed suit. She destroyed physical evidence to save less than $280 in storage fees, yet she is suing

to recover significant damages for wrongful death. Her complaint alleges the tire was the sole cause of the accident. She alleges that the "tread separation of the subject tire caused the Explorer to swerve out of control, overturn multiple times[,] and leave the roadway." Compl. Vol.I (R-13) (emphasis added).

2. The trial court held Mrs. Koch had no duty to preserve evidence.

Based on the undisputed destruction of material evidence, Cooper Tire filed a motion to dismiss or limit the evidence due to spoliation. Vol.II (R-538–52). In response, Mrs. Koch argued that, as a plaintiff, she had no duty to preserve the evidence. Vol.III (R-569–87). Although she conceded that her husband told her to save the tires because they could be important, she claimed she did not think it was reasonable to foresee litigation at the time she asked the wrecker service to destroy the evidence. According to Mrs. Koch, despite her husband's death-bed instructions, she and her family did not consider hiring a lawyer until 6 or 7 weeks after the evidence was destroyed. (R-575–78). Cooper Tire replied that, under Phillips, Mrs. Koch's subjective thoughts are not controlling because a reasonable person under the circumstances should have known that litigation could ensue. Indeed, it is undisputed that Mrs. Koch herself preserved part of one tire while allowing the rest of the evidence, including the portion of the tire alleged to be defective, to be destroyed. Vol.III (R-782–87).

The trial court denied Cooper Tire's motion. Order Vol. III (R-821–23). It held that Mrs. Koch did not have a duty to preserve evidence, so there was no spoliation. (R-822–23). Relying on Mrs. Koch's deposition testimony, and viewing the evidence subjectively from her perspective, the court concluded that she could not reasonably foresee litigation when she decided to destroy the vehicle.

> While her husband asked her to save the left rear tire, Plaintiff testified that she did not know the reasons therefor, and the record does not support a reasonable inference that Plaintiff began or should have begun contemplating litigation at that point or at any point prior to her husband's death. In light of the fact that Plaintiff's decedent carried only liability insurance for the vehicle, the costs for towing and storage of the vehicle would have been an out of pocket expense for the Plaintiff. The Court finds that her testimony regarding her concerns about the accruing debt for a totaled vehicle is consistent with her testimony as to the reasons for her decision to transfer the vehicle's title to Brown. Viewing the evidence from the perspective of the party having control over the subject vehicle, this Court does not find that the facts and circumstances give rise to litigation being reasonably foreseeable or that it should have been reasonably contemplated by the Plaintiff so as to trigger the duty to preserve the subject vehicle.

Vol.III (R-823). The trial court did not cite or apply any of the constructive notice factors from Phillips. Compare id. (R-821–23) with 297 Ga. at 397–98.

The trial court certified an immediate appeal, which was granted. Vol.III R-837–38; Vol. I (R-1–3); Vol.VI (R-1591).

3. The Court of Appeals held there was no duty to preserve.

The Court of Appeals affirmed but in doing so limited the holding in Phillips. Slip op. (attached for the Court's convenience) at 2, 8–12. First, the court

recounted this Court's holding in Phillips that "the duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence and is triggered not only when litigation is pending but when it is reasonably foreseeable to that party." Id. at 6 (quoting 297 Ga. at 396). It agreed that, under Phillips, "notice may be actual and constructive" and quoted the constructive notice factors this Court used to test whether litigation is "reasonably foreseeable." Id. at 7 (citing 297 Ga. at 396–97). But it found that Phillips left open the question presented here: "[T]he 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." Id. at 8.

The Court of Appeals rejected Cooper Tire's position that "the inquiry should be the same whether [the spoliator] is the plaintiff or the defendant" and that the Phillips objective constructive notice factors equally govern spoliation by a plaintiff. Slip op. at 8. It also declined to follow the "federal case law and cases from other states" that Cooper Tire cited. Id. "We do not agree that the Court in Phillips intended that the list of factors from which it might be derived that a party constructively knew it should anticipate a lawsuit was intended to be applied in every case to either party," the court said. Id. at 8–9. The court did not read Phillips

to apply in the same way to plaintiff spoliators: "But the issue of whether litigation was reasonably foreseeable to the plaintiff is separate and distinct from whether a defendant actually or reasonably should have foreseen litigation by the plaintiff, and thus we do not believe that the Supreme Court intended those specific factors to apply in determining whether litigation was reasonably foreseeable to the plaintiff." Id. at 9.

Noting that the trial court had cited Phillips, the Court of Appeals held that the trial court "applied the correct legal concepts in denying Cooper [Tire]'s spoliation motion." Slip op. at 11. The court approved the trial court's "reliance on testimony from Plaintiff about what Mr. Koch intended when he asked her to save the left rear tire and why she decided to transfer the vehicle to Brown." Id. It held that this testimony, though entirely subjective, could support a determination on "whether [Mrs. Koch] was actually contemplating litigation" or "whether litigation was reasonably foreseeable to someone in Plaintiff's position at the time." Id. And, like the trial court, the Court of Appeals decided not to consider any of the constructive notice factors from Phillips. See id. at 11–12. In parting the court observed, "Nothing in this opinion . . . should be construed to mean that the circumstances under which the tire was saved and the remainder of the vehicle was destroyed is irrelevant or immaterial to Cooper [Tire]'s defense of this case." Id. at 12 n.4. The court did not explain, however, how those circumstances will come

into play if Mrs. Koch had no legal duty to preserve the evidence that was destroyed.

The Court of Appeals issued its decision on November 9, 2016, and Cooper Tire filed this petition within 20 days. See GA. S. Ct. R. 38(2).

ENUMERATION OF ERROR

In Georgia, a party has a duty to preserve relevant evidence when litigation is reasonably foreseeable, that is, when that party knew or objectively should have known litigation could result. Following the accident here, Mr. Koch told his wife to "save the tires" because he thought "something might have been wrong," but Mrs. Koch told the salvage yard to save only part of the tire and ordered the destruction of all other relevant evidence, including the other tires, the wheels, the rims, and the wrecked vehicle. By concluding the Plaintiff did not spoliate evidence because she did not in her own mind contemplate litigation until later, the trial court held and the Court of Appeals affirmed that Mrs. Koch did not have a duty to preserve the evidence when it was destroyed. Did the Court of Appeals err in its interpretation and application of Phillips and by concluding that a plaintiff's duty to preserve evidence should be judged under a different standard than a defendant's in Georgia?

ARGUMENT AND REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The Court of Appeals applied the wrong standard of review.

The Court of Appeals only reviewed the trial court's decision for an abuse of discretion. Slip op. at 5, 11–12. That is the wrong standard. Cooper Tire challenged the trial court's legal conclusion that Mrs. Koch had no duty to preserve evidence, arguing that the court misapplied the objective test required by Phillips v. Harmon. Phillips itself held that when the court applies the wrong legal standard to determine the duty to preserve evidence in a spoliation case the standard of review is de novo. See 297 Ga. 386, 397 (2015) ("Certainly a trial court has wide discretion in adjudicating spoliation issues, and such discretion will not be disturbed absent abuse. However, an appellate court cannot affirm a trial court's reasoning which is based upon an erroneous legal theory.") (citations omitted). The Court of Appeals has applied the correct de novo standard in two recent cases. See Sheats v. Kroger, 336 Ga. App. 307, 310–11 (2016); Loehle v. Ga. Dept. of Public Safety, 334 Ga. App. 836, 843 (2015). It erred in not doing so here.

In Georgia, duty is a pure issue of law. See City of Rome v. Jordan, 263 Ga. 26, 27 (1993); Holcomb v. Walden, 270 Ga. App. 730, 731 (2004). The decision that Mrs. Koch had no duty to preserve evidence should be reviewed de novo, as it was in Phillips.

2. The Court of Appeals erred in failing to apply the constructive notice factors equally to plaintiff spoliators.

The Court of Appeals acknowledged that this case presents an issue of first impression. Slip op. at 8. "The 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," the court said. Id.

The spoliation in Phillips occurred when the defendant hospital destroyed fetal monitoring strips. 297 Ga. at 394. On appeal, the Court of Appeals court held that the defendant had no duty to preserve the evidence because it did not have actual notice of litigation from the plaintiff. Id. at 398. But this Court reversed on the legal issue of duty, holding the hospital should have "reasonably foresee[n]" litigation under the circumstances ("severe injuries to a newborn child after an unexpectedly difficult delivery"). Id. at 396, 398. The Court did not specifically address how the objective test should apply in a case like this where the plaintiff, not the defendant, destroyed material evidence. It outlined actual notice but did not explore constructive notice from the plaintiff's perspective. See id. at 396 ("In regard to the injured party, usually the plaintiff, the duty arises when that party contemplates litigation, inasmuch as litigation is obviously foreseeable to the plaintiff at that point."). Nonetheless, the Court outlined a number of factors used

to test whether the party had constructive notice that litigation was reasonably foreseeable, including "the type and extent of the injury," "the extent to which fault for the injury is clear," "the potential financial exposure" if liability is found, "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 internal investigation." Id. at 397.

The Court of Appeals held the Phillips factors do not apply equally to a plaintiff spoliator. Slip op. at 8–9. The court believed that was this Court's intent in Phillips. Id. at 9 ("We do not believe that the Supreme Court intended those specific factors to apply in determining whether litigation was reasonably foreseeable to the plaintiff."). Instead, the court (as did the trial court) focused only on Mrs. Koch's actions in destroying the evidence before she and her family decided to file suit, without analyzing the other objective circumstances. See id. at 2–4, 11–12. The Court of Appeals provided no reason for why the objective test in Phillips should be interpreted or applied differently to a plaintiff. That limitation on the precedential effect of Phillips is error that deserves this Court's review.

3. The constructive notice factors show Mrs. Koch had a duty to preserve evidence.

The Court of Appeals erred in focusing on Mrs. Koch, rather than on a reasonable person, and what she knew (whether she was "actually contemplating litigation"), not what an objective person should have known. See slip op. at 11.

The test applied by the Court of Appeals would require Mrs. Koch to admit she had decided to file a lawsuit before she purposefully acted to destroy evidence for there to be sufficient evidence of spoliation. Such a test places the existence of the duty in a plaintiff's exclusive control. As long as the evidence was destroyed before the plaintiff says (through self-serving testimony or discovery responses) that he or she decided to hire a lawyer or decide to sue, there is no duty to preserve evidence and thus no sanction for its destruction. That is not Georgia law. This Court in Phillips made clear that actual or express knowledge is not dispositive; constructive knowledge is sufficient. Id. If the Court of Appeals had applied all the constructive notice factors from Phillips here, Mrs. Koch would have had a duty to preserve the evidence she destroyed.

The "type and extent of the injury" (297 Ga. at 397) was severe. The accident was a multiple rollover accident at interstate speeds.

The "damages that can flow from such injuries" (297 Ga. at 397–98) were high. This is a wrongful death case. Mr. Koch suffered life-threatening injuries, including a broken neck and a de-gloving injury to his arm and hand, that required multiple surgeries and amputation of some of his fingers. Dep. of Renee Koch (R-1051–53); Dep. of Laura Powell (R-1150–51, 1154).

Products liability litigation "frequen[tly] . . . occurs in similar circumstances." 297 Ga. at 397. Accidents like Mr. Koch's result in litigation of similar

frequency, as precedent from Georgia state and federal courts demonstrates. See, e.g., Bridgestone/Firestone v. Campbell, 258 Ga. App. 767 (2002); Firestone Tire & Rubber v. Jackson Transp., 126 Ga. App. 471 (1972).

"[A]fter the injury and before the evidence in question was . . . destroyed," the Georgia State Patrol initiated an "investigation" of the accident. 297 Ga. at 397. That investigation identified "equipment failure" as the cause, specifying a "blown tire" or "brake failure" as possible causes. (R-461) (all caps removed).

Most important, "what the plaintiff did or did not do after the injury" (297 Ga. at 397) was to preserve some evidence, namely, the tire carcass. Mrs. Koch did not preserve the tread of the tire that detached, which is the portion of the tire alleged to be defective and obviously a critical piece of the tire for purposes of rebutting the product defect claims. Because of Mrs. Koch's actions, Cooper Tire is left to defend a tread detachment case without the tread. Nor did she save the companion tires, which could have shown that Mr. Koch never replaced the worn out tires that were on the Explorer when he bought it. Examination of the companion tires and the vehicle is also critical to determine whether the accident was caused by product misuse or driver error. The companion tires are the best evidence of the life of the subject tire. By destroying the vehicle, she prevented Cooper Tire from determining whether the State Patrol's report was correct that

brake failure or one of a myriad of other vehicle-related factors caused the accident.

All of these factors show Mrs. Koch "reasonably should have anticipated litigation" under Phillips. 297 Ga. at 397. The central flaw in the Court of Appeals' decision is in failing to follow Phillips to determine whether a reasonable plaintiff should have contemplated litigation under these circumstances. In failing to apply the Phillips constructive notice factors here, the Court of Appeals improperly limited the scope of Supreme Court precedent. What is worse, the Court of Appeals failed to recognize that Mrs. Koch voluntarily assumed a duty to preserve some evidence, that is, the carcass of the subject tire. That is a powerful objective factor that has proven dispositive in other courts. See, e.g., Kambylis v. Ford, 788 N.E.2d 1, 6 (Ill. App. Ct. 2003) ("There can be little question that plaintiff and his family recognized that the preservation of the Escort was of crucial relevance to the case they intended to file against defendant because plaintiff's father went to the automotive pound to photograph the Escort prior to its destruction."); Sylla-Sawdon v. Uniroyal Goodrich Tire, 47 F.3d 277, 280–81 (8th Cir. 1995) (affirming spoliation sanction where the plaintiff removed seat belt assemblies from wrecked car but did not preserve the tires before salvage, and holding plaintiff "knew or should have known that all of the tires would be relevant and should be preserved as evidence" because "only an examination of all four tires would conclusively

establish the date of purchase of the failed tire and the mileage that was on it at the time of the accident"). Having taken on the duty to preserve some evidence, the Court of Appeals should have held Mrs. Koch had a duty to preserve all of it.

4. The Court of Appeals created a split of authority with other courts on a plaintiff's duty to preserve evidence.

Spoliation is the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." West v. Goodyear Tire & Rubber, 167 F.3d 776, 779 (2d Cir. 1999) (citing BLACK'S LAW DICTIONARY). The doctrine assures that spoliators do not "benefit from their wrongdoing" (omnia praesumuntur contra spoliatorem). Id. (citations omitted). Spoliation is especially prejudicial in a products liability case where the most critical piece of evidence is the product itself. "Preservation of the allegedly defective products in product liability cases is of the utmost importance to both the proof and defense of such cases." Shelbyville Mut. Ins. v. Sunbeam Leisure Prods., 634 N.E.2d 1319, 1323 (Ill. App. Ct. 1994). Sanctions for spoliation "are intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process." Flury v. Daimler Chrysler, 427 F.3d 939, 944 (11th Cir. 2005) (applying Georgia law). When spoliation prevents a party from putting on a full defense of its case, exclusion of evidence or dismissal of the case may be warranted. Id. at 945 (citing Bridgestone/Firestone, 258 Ga. App. 767).

The Court of Appeals avoided discussing the incurable prejudice caused by the spoliation of the vehicle and its companion tires by holding that Mrs. Koch did not have a duty to preserve evidence. To determine whether dismissal for spoliation is warranted, the Court considers (1) whether the defendant was prejudiced by the destruction of evidence, (2) if the prejudice could be cured, (3) the practical importance of the destroyed evidence, (4) whether the plaintiff acted in good or bad faith, and (5) the potential for abuse if expert testimony about the evidence is not excluded. See Phillips, 297 Ga. at 399 n.12; Flury, 427 F.3d at 945. In failing to address whether the prejudice caused by spoliation warranted dismissal, the Court of Appeals departed from its decision in Bridgestone/ Firestone, which examined the prejudice caused by a products liability plaintiff's destruction of a truck and its tires. See 258 Ga. App. at 768–69. In Bridgestone/ Firestone, the court held the tire manufacturer was incurably prejudiced because, without the truck and its tires, alternative causes of the accident could not be examined and thus "a full defense [was] impossible." Id. at 769.

The decision below also creates a split of authority with the Eleventh Circuit's decision in Flury. That was a products liability case also involving a one-car accident in Georgia at highway speeds. 427 F.3d at 940. The plaintiff allowed the wrecked vehicle to be sold for salvage before he sued Chrysler, alleging that the airbag system in his pickup was defective and failed to deploy. Id. at 941. The

Eleventh Circuit reversed a jury verdict for the plaintiff and held that the case should have been dismissed due to the "extraordinary nature of plaintiff's actions" in destroying the vehicle "coupled with [the] extreme prejudice to the defendant." Id. at 943. Applying Georgia law, the court found "[n]o lesser sanction will suffice." Id. at 944. The "plaintiff should have known that the vehicle, which was the very subject of his lawsuit, needed to be preserved and examined as evidence central to his case." Id. at 945. "Without the vehicle, defendant lost a valuable opportunity to test plaintiff's theory that the airbag was indeed defective" and "defendant could not determine whether [the vehicle] remained in its 'condition when sold' at the time of the accident, as required by Georgia law." Id. at 946. Because spoliation deprived the manufacturer of its opportunity "to put on a complete defense," the Eleventh Circuit held dismissal was the only sanction sufficient to prevent a "trial by ambush." Id. at 947–48. The Eleventh Circuit reaffirmed Flury in Graff v. Baja Marine, 310 F. App'x 298, 301–02 (11th Cir. 2009) (applying Georgia law), another plaintiff spoliation case, that this Court cited with approval in Phillips, 297 Ga. at 396.

Without intervention by this Court, Georgia precedent on a plaintiff's duty to preserve product evidence following an accident will be in disarray. On the one hand, Bridgestone/Firestone and Flury hold that a plaintiff has a duty to preserve all the product evidence to permit the defendant manufacturer to put on a full and

complete defense. On the other hand, the Court of Appeals decision here holds that a plaintiff has no such duty if she destroys the product and all other physical evidence from the accident before she personally decides to hire a lawyer and file suit. More important, this Court's decision in Phillips imposes a duty to preserve evidence whenever the objective circumstances suggest a party should reasonably forsee litigation. But the Court of Appeals has held the constructive notice factors from Phillips do not apply to a plaintiff. The public's interest in civil justice and the integrity of the judicial process weigh heavily in favor of this Court's review to resolve whether Georgia law holds both defendants and plaintiffs to the same spoliation standard.

5. The Court of Appeals' decision sets bad precedent.

Finally, the Court of Appeals' rule is not workable. Reversal would make Georgia's spoliation standards equitable. It would also prevent false claims, preclude destruction of unfavorable evidence, and deter future spoliation.

The spoliation doctrine is designed to prevent false claims. "[P]ermitting claims for defective products where the product has been disposed of before defendant was given the opportunity to examine the product would encourage false claims and make the legitimate defense of valid claims more difficult." Schwartz v. Subaru, 851 F. Supp. 191, 193–94 (E.D. Pa. 1994) (granting summary judgment for defendant manufacturer where plaintiff inspected wrecked vehicle and then

allowed it to be destroyed, months before filing suit, "because he did not want to pay for the costs of storage").

Reversal would also prevent opportunism. A plaintiff controls the date when a lawsuit is filed. It would be a terrible rule to allow plaintiffs to preserve some evidence but freely destroy unfavorable evidence without consequences up until the moment they decide to file suit. Although dismissal is a stiff sanction, Mrs. Koch still has claims pending below against two other defendants. Sanctioning her for destroying the evidence critical to Cooper Tire's defense is the unavoidable consequence of her actions and is "outweighed by the need to remedy the unfair litigation practices employed in this case, and the benefit of deterring similar abuses in future cases." Stubli v. Big D Int'l Trucks, 810 P.2d 785, 788 (Nev. 1991). The Eleventh Circuit's decision in Flury correctly applied Georgia law to deter the potential for such abuse and remedy it through dismissal. See 427 F.3d at 944–47.

If a defendant must preserve evidence whenever litigation is "reasonably foreseeable," as this Court held in Phillips, 297 Ga. at 397, then a plaintiff must be held to the same duty. This is especially true where (as here) the plaintiff not only controls the evidence of all the products that potentially caused the accident but also controls which manufacturers to sue and not to sue. The plaintiff's own subjective decision to file suit cannot be the only trigger for the duty to preserve

evidence. When the nature and extent of the injuries, the damages caused, the frequency of similar litigation, the investigation of the accident, and the plaintiff's choice to preserve some evidence all show that litigation is reasonably foreseeable, the plaintiff cannot circumvent the duty to preserve other evidence by waiting to decide to sue until after evidence is lost or destroyed at her direction. To hold otherwise would set bad precedent by encouraging false claims in future cases.

CONCLUSION

The Court of Appeals improperly limited the scope of Phillips by applying a different standard to plaintiff spoliators than defendant spoliators. This is an issue of grave import to both the public and the judiciary. All parties to civil litigation have a duty to gather and preserve relevant evidence when litigation is reasonably foreseeable. The precedent that applies and the factors that govern that duty should be the same, whether the party is a defendant or a plaintiff. This case is a good vehicle for resolving this issue because the Court of Appeals expressly created a different spoliation rule for plaintiffs. Certiorari is warranted to correct that error and ensure that the spoliation standards are the same for all parties to civil litigation in Georgia.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the above and foregoing petition electronically through the Court's E-Fast System, which serves all parties of record by electronic means and by placing a true and correct copy of same in the United States Mail, first-class postage prepaid and addressed to the following counsel of record prior to filing:

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