IN THE SUPREME COURT
OF THE STATE OF GEORGIA

COOPER TIRE & RUBBER COMPANY,	)	
	)	
Appellant-Defendant,	)	
	)	
v.	)	Case No. S17G0654
	)	
RENEE KOCH, et al.,	)	
	)	
Appellee-Plaintiff.	)	

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the largest business federation in the world. 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. It does so in matters before Congress, the executive branch, and the courts, regularly filing *amicus curiae* briefs in cases of concern to the Nation's business community.

The Chamber has a strong interest in this case. 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 fairly. That includes the spoliation doctrine, which, as one appellate court explained, is "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 (2016). Before the decision below, there was no reason to think that Georgia took a different view.

But with the 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

standard that eschews constructive notice in favor of actual notice (or something close to it). That double standard has no basis in Georgia law.

Indeed, just two years ago in *Phillips v. Harmon*, 297 Ga. 386 (2015), this Court held that an objective test—one focused on reasonable foreseeability and constructive notice—governs the spoliation analysis. The *Phillips* Court did not suggest (let alone hold) that a different standard applies to plaintiffs. The Court of Appeals below nevertheless created a different spoliation standard that applies only when a plaintiff destroys evidence. In doing so, the Court of Appeals broke not only from this Court's *Phillips* decision but also from the rule in the Eleventh Circuit, other federal courts, and other States.

That decision leaves companies facing litigation in Georgia guessing about which spoliation standard will apply—this Court's *Phillips* standard, the subjective-seeming 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. This Court should reverse the Court of Appeals' decision.[1]

ENUMERATION OF ERROR

Under Georgia law, a party must preserve relevant evidence when litigation is reasonably foreseeable—that is, when the party knows or objectively should know

[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.

that litigation could ensue. In *Phillips*, this Court listed a number of objective factors for determining whether a party had constructive notice of possible litigation and thus a duty to preserve evidence. Those factors 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 internal investigation." 297 Ga. at 397.

If the Court of Appeals had applied those factors, it would have reached a different result below. The plaintiff's husband died from injuries suffered in a car accident. Following the accident, the plaintiff's husband told her—from his hospital bed—to "save the tires" because he thought that "something might have been wrong." At that point, the plaintiff knew or objectively should have known that litigation was reasonably foreseeable, so under *Phillips*, she had a duty to preserve evidence from the accident—including the wrecked vehicle and its wheels and tires. Instead of preserving the evidence, she ordered the salvage yard to destroy everything except one tire's "carcass." In legal parlance, she spoliated the evidence, conduct that should have led the Trial Court or the Court of Appeals to dismiss the case.

Instead, the Court of Appeals adopted a different spoliation test for plaintiffs—one that does not track *Phillips*'s "objective 'reasonable foreseeability'

test" (*see Cooper Tire & Rubber Co. v. Koch*, 339 Ga. App. 360–61 (2016))—and excused the plaintiff's spoliation. The question presented is whether the Court of Appeals erred in discarding the *Phillips* factors in favor of a different test that applies only to plaintiffs.

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.

339 Ga. App. at 360–61.

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 likely anywhere in the country). In so holding, the Court of Appeals broke with this Court's *Phillips* decision, with the Eleventh Circuit's and other federal courts' approach to spoliation, and with other States' spoliation rules. Affirming the Court of Appeals' double standard could undermine public confidence in the fairness and integrity of judicial proceedings in Georgia. This Court should confirm that Georgia applies the same spoliation standard to both sides of the *v*.

ARGUMENT

Spoliation shouldn't turn on whether the party who destroyed evidence is a plaintiff or defendant, and yet that is the rule that emerged from the proceedings below. That rule clashes with this Court's decision in *Phillips*. It's also unfair, and the public will perceive it as such.

I. THE DECISION BELOW CONFLICTS WITH *PHILLIPS*.

In adopting a special spoliation rule for plaintiffs, the Court of Appeals undermined this Court's *Phillips* decision.[2] *Phillips* governs the spoliation analysis whether the alleged spoliator is a plaintiff or defendant. Nothing in the decision suggests otherwise.

On the contrary, the *Phillips* Court assumed that the reasonable-foreseeability test (with its focus on constructive notice) applies to "parties"—which, of course, includes both plaintiffs and defendants. *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

[2] The Court of Appeals resisted the notion that it was endorsing a "subjective" test for plaintiffs (339 Ga. App. at 362), but it's hard to call what the Court of Appeals did anything other than a subjective test: It didn't apply the *Phillips* constructive-notice factors and instead endorsed the Trial Court's reliance on the plaintiff's subjective testimony. *See id.* at 360–62.

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 conclude otherwise.

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

There, the plaintiff, who had been in a car accident, 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 alleged failure to deploy. *Flury,* 427 F.3d at 941. A month later, when Daimler Chrysler asked to inspect the vehicle, the plaintiff's counsel did not respond. The plaintiff's insurer had already taken the vehicle—which earlier had been moved to the plaintiff's parents' home—and sold it for scrap. *Id.* at 941–42. 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. *Id.* at 940.

The Eleventh Circuit reversed the jury verdict and ordered dismissal. The circuit court held that dismissal was proper because the plaintiff's "failure to preserve the vehicle resulted in extreme prejudice to" Daimler Chrysler. *Flury*, 427 F.3d at 945. It prevented Daimler Chrysler from "put[ting] on a complete defense," the Eleventh Circuit explained, with "[t]he resulting prejudice to defendant . . . 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. 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, by contrast, never reached the sanctions question because it held that the plaintiff had no duty to preserve the wrecked vehicle and tires.

So far as we can tell, that new standard is unique to Georgia. Other state and federal courts apply an objective standard (focused on constructive notice) to both plaintiffs and defendants.[3]

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[3] *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 (2003) (approving of *Silverstri*); *Azad v. Goodyear Tire & Rubber Co.*, No.

II. DOUBLE STANDARDS ARE UNFAIR AND ENCOURAGE SHARP TACTICS.

Spoliation rules are "intended to prevent unfair prejudice to litigants and to [e]nsure 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." *Flury*, 427 F.3d at 946 (internal quotation marks omitted); *see also Cumberland Ins. Grp.*, 226 Md. App. at 696–97 (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 promoting fairness in evidentiary matters, the Court of Appeals' double standard puts a thumb on the scale in plaintiffs' favor. It relieves plaintiffs of their duty to preserve evidence when they have constructive notice of potential litigation while requiring defendants to preserve evidence in the same circumstances. Enshrining that double standard would encourage opportunistic plaintiffs to destroy

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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)).

potentially unfavorable 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 in many cases unfairly deprive defendants of their constitutional right 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). In "almost every setting where important decisions turn on questions of fact," due process requires an opportunity to confront and examine relevant evidence. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

Those constitutional concerns go to the integrity of and public trust in our judicial system. Double standards erode confidence in the courts. 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. Due process demands no less.

CONCLUSION

This Court should reverse the Court of Appeals' decision and should direct the trial court to dismiss the case.

Respectfully submitted August 1, 2017.

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