No. S17C0654

In the
SUPREME COURT OF GEORGIA

Cooper Tire & Rubber Company, Inc.
Petitioner,

v.

Renee Koch, Individually and as Administrator of the Estate of Gerald Raymond Koch, deceased
Respondent.

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States.

NAM has an interest in this case because it and its members are concerned with the predictability and fairness of Georgia's civil justice system. *Amicus* has an interest in ensuring that the civil litigation and liability laws affecting manufacturers in Georgia are balanced, reflect sound public policy, and respect due process. Allowing plaintiffs to destroy key evidence without repercussion—including when litigation is reasonably foreseeable to an objective person in the plaintiff's situation—violates these principles and can impede the search for justice. The result would adversely impact NAM's members and the State's manufacturing climate, and could contribute to litigation gamesmanship.

STATEMENT OF FACTS

Amicus adopts Petitioner's Statement of Facts and Proceedings Below to the extent relevant to *amicus's* arguments in this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents the Court with the opportunity to provide needed clarity on Georgia's spoliation law in the wake of *Phillips v. Harmon*, 297 Ga. 386 (2015), which set forth objective factors for when the duty to preserve evidence arises. The main question this case presents is whether there are objective factors for when litigation is "reasonably foreseeable" to a plaintiff such that the duty to preserve evidence arises before he or she says the litigation was actually contemplated. If so, what are the factors? Are the factors for plaintiffs the same as for defendants? Are they based on a reasonable person in the plaintiff's situation, or is the inquiry specific to the plaintiff and include his or her level of sophistication, knowledge of the legal system, or other such factors? If not, does the duty to preserve evidence arise only when a plaintiff admits to contemplating litigation, regardless of what transpired before that point? This last question is not Georgia law as expressed in *Phillips*, but is how spoliation law was applied here.

In the ruling below, the Court of Appeals openly admitted that it did not know the answers to these questions. It observed that this Court "did not expressly

address how the objective 'reasonably foreseeable' test set out in *Phillips* should be applied when it is the plaintiff who has failed to preserve evidence." Slip op. at 3. It then posited that it did "not *believe* that the Supreme Court intended those specific factors to apply in determining whether litigation was reasonably foreseeable to the plaintiff." *Id*. (emphasis added). This confusion led the court to allow Plaintiff to avoid any sanctions even though she destroyed the evidence most pertinent to this case—most of the tire she claims was defective, the companion tires on the car, and the car itself—*after* preserving the piece of evidence her husband told her was important. Plaintiff made a choice that prejudiced her pursuit of justice for her own claim, and the courts should not "undo" that choice by allowing her to unabatedly pursue this claim in a way that harms the Defendant's pursuit of justice.

The evidence she destroyed is needed for the courts to perform their basic function here of assuring that this product liability case can be adjudicated fairly. Without this evidence, the court cannot determine with any degree of probability whether the crash was caused by a defect in the tire or something else, including vehicle-related issues, driver error, or a foreign object. This case also raises important public safety concerns. Under Georgia's risk-utility test for design defects, an alleged defect must be balanced against benefits that a design provides

to the public. If liability is premised on wrong data or conclusions about whether and how a product failed, a manufacturer may be charged with redesigning a beneficial product in ways that make the product less safe for the public at-large.

NAM urges the Court to grant this Petition because the issues presented here are of great concern and importance to the public. The Court should clarify plaintiff spoliation standards so that a plaintiff's destruction of evidence does not lead to injustices and less safe products.

ARGUMENT

The Court should grant this Petition to provide objective spoliation standards that can be applied equally, regardless of which party destroys evidence. In *Phillips*, the Court started from the neutral premise that a person has a duty to preserve evidence for potential litigation when the litigation is "contemplated or pending." 297 Ga. at 393. There was no litigation pending in *Phillips* or here when the evidence was destroyed. Therefore, the key issue in both cases is determining when litigation has been "contemplated" such that the duty to preserve evidence arises. In *Phillips*, the Court held that this duty can arise before the Plaintiff is actually contemplating litigation, that is whenever the litigation "is reasonably foreseeable to that party." *Id.* at 396. The Court set forth objective factors for when litigation is "reasonably foreseeable" to guide the lower courts.

The Court may have created confusion, or at least a perceived imbalance that needs to be corrected here, because of how the Court explained the "reasonably foreseeable" standard in *Phillips*. On one hand, the Court stated this inquiry is supposed to be specific to each case, looking at objective factors for when it is reasonably foreseeable that "the injured party, the plaintiff, is *in fact* contemplating litigation." *Id.* at 396-397 (emphasis added). On the other hand, when enumerating the factors for courts to consider, the Court included objective standards on "other circumstances" upon which a lawsuit could be reasonably *anticipated*, having nothing to do with whether the potential plaintiff in the case was *in fact* contemplating litigation. *Id.* It directed courts to include the "frequency with which litigation occurs in similar circumstances," reasons for alerting counsel and insurers, and other measures businesses regularly take after becoming aware of an incident causing harm. *Id.* Thus, regardless of whether there is objective information that a specific person is *in fact* contemplating litigation, it will be argued that a defendant's duty to preserve evidence arises whenever it can be anticipated that a person could be contemplating litigation.

By contrast, under the case below, the plaintiff could be held to far more lenient standards with the duty to preserve evidence arising only after a plaintiff admits to *in fact* contemplating litigation. The existence of clear, objective factors

making the litigation "reasonably foreseeable" would be irrelevant. Consider the implications here. Under any "reasonably foreseeable" standard, Plaintiff's duty to preserve all evidence for this lawsuit arose when her husband told her to "save the tires" because "something might have been wrong." An objective person in Plaintiff's shoes would understand that Mr. Koch thought the tires were to blame for his crash and was contemplating a claim for damages. Supporting a legal claim is the only reason he would ask her to save the tires.

There is little doubt under *Phillips* that had a Cooper Tire representative heard Mr. Koch tell his wife to save the tires because they might be important and then destroyed key evidence for this lawsuit, the court could impose sanctions on Cooper Tire, potentially taking away its defenses. Ironically, Cooper Tire has also been effectively stripped of its defenses here; it cannot investigate the physical evidence from the crash, determine whether its tire was defective as alleged, or find out whether the crash was caused by something else. The result is essentially the same, yet it was Plaintiff and not Cooper Tire that destroyed the evidence.

The Court should not allow the lower courts to impose a spoliation law that so heavily skews the scales of justice toward the plaintiff. The plaintiff, not the defendant, is the one who decides which evidence is relevant to a case by choosing whether to sue, whom to sue, and under which theories to sue. *See*, *e.g.*,

Caterpillar Inc. v. Williams, 482 U.S. 386, 398-99 (1987) ("[T]he plaintiff is the master of the complaint"); *Georgia-Pacific, LLC v. Fields*, 293 Ga. 499, 501 (2013) (Ga. 2013) (Plaintiff chooses the pleading strategy.). A plaintiff should not be able to make his or her burden of proof easier by destroying evidence after litigation is reasonably foreseeable to an objective person. As here, this moment may be well before the plaintiff says he or she was *in fact* contemplating litigation.

I. The Court Should Not Allow a Plaintiff's Selective Retention of Evidence to Impede the Proper Adjudication of a Claim

The Court should grant this Petition because allowing a plaintiff to avoid spoliation sanctions for destroying evidence after litigation was reasonably foreseeable irreparably harms the ability of courts to ensure that legal standards for liability can be met. Here, Plaintiff must prove the tires were defective under the State's risk-utility test, which requires a comprehensive, objective means for evaluating whether a product is unreasonably dangerous and that this defect caused the crash. *See Jones v. NordicTrack, Inc.*, 274 Ga. 115 (2001) (explaining the risk-utility test for design defect claims). Plaintiff's destruction of the physical evidence here makes these determinations highly unreliable.

A. A Plaintiff's Destruction of Evidence Can Make Product Defect Claims Impossible to Prove or Defend

With technical or complex products, such as tires, expert analysis of the physical evidence can be necessary for fact-finders to make competent risk-utility decisions. *See* 1 Owen & Davis on Prod. Liab. § 6:5 (4th ed. 2016) (stating "technical issues… typically lie at the heart of a products liability case"); Berens, Thorsen & Shaw, Pretrial Challenges to the Qualifications and Opinions of Expert Witnesses, 9 J. Prod. Liab. 133, 133 (1986) ("[M]odern products liability litigation has become far more complex, both as a matter of law and question of science."). The inability to examine an allegedly defective product substantially impairs the experts' ability to express reliable opinions. *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1222 (9th Cir. 1995); *Unigard Sec. Ins. v. Lakewood Eng'g & Mfg.*, 982 F.2d 363, 368 (9th Cir. 1992) (explaining that inspecting physical evidence can be needed to determine whether a product is defective).

In today's litigation, experts have available to them new, highly accurate tools for reconstructing incidents through physical evidence. Litigation over tires is no exception. *See*, *e.g.*, Thomas R. Giapponi, *Tire Forensic Investigation: Analyzing Tire Failure* (SAE Int'l 2008); R. W. Rivers, *Tire Failures and Evidence Manual: For Traffic Accident Investigation* (Charles C. Thomas Pub Ltd. 2001);

see also Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 Yale L.J. 1535, 1677 (1998) (discussing "the startling advances in scientific methods" and their impact on expert testimony). These analytical tools can reverse engineer a defect from physical evidence, and, when applied properly, can assure that liability is grounded in facts and science. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 28 cmt. c (2010) (observing that scientific methods continue advancing, which "better facilitate[s] causation determinations").

Here, scientific analysis is particularly important because the accident is unexplained. It was a single-car accident with a lone driver who is now deceased. All that exists is the physical evidence. Plaintiff and defense experts need to be able to analyze the tire that allegedly blew-out, its companion tires, and the entire vehicle, including its suspension and braking systems to determine what happened. Analysis of the tire treads could provide specific information as to whether the tires were simply old and worn out, improperly installed or maintained, or defectively designed as alleged. Such analysis could also include other potential factors that could have caused the tire to blow out, such as whether there was anything in the wheel well that punctured the tire or driver error. Component parts must be considered "in the context of the overall operation of the machine" and not in isolation. Am. L. Prod. Liab. 3d § 112:6 (2016 Supplement). Context is critical.

The opportunity for injustice here is particularly high because Plaintiff chose to preserve only one piece of the physical evidence. Even the best experts cannot shine a light on a single object in a dark room and describe the entire room. If Plaintiff alleged that a defect in a seat belt, not a tire, caused the injuries and preserved only five inches of the seat belt, it also would not be possible to determine whether the seat belt failed or performed as expected. Analysis of the entire seat belt, seat belt mechanisms, and area surrounding the seat may produce evidence that the plaintiff was not wearing a seat belt at all or was not wearing it properly. *See Moyers v. Ford Motor Co.*, 941 F. Supp. 883 (E.D. Mo. 1996) (dismissing a lawsuit because plaintiff destroyed the car and her allegations that the seat belt failed could not be proven). "The car itself may be the best witness about conditions at the time of the accident." *Pries v. Honda Motor Co.*, 31 F.3d 543, 544 (7th Cir. 1994).

B. False Findings that a Product is Defective Can Lead to Redesigns of Products in Ways that Are Less Safe

The inability to make scientifically accurate determinations from a plaintiff's destruction of evidence has implications far beyond whether a plaintiff is awarded compensation in a given case. The core element of proving defect under Georgia's risk-utility test is showing that a reasonable alternative design exists that the

manufacturer should have adopted that would have resulted in a safer product, both for the plaintiff and for others. *See Banks v. ICI Americas, Inc.*, 264 Ga. 732, 735 (1994) ("[I]n determining whether a product was defectively designed, the trier of fact may consider evidence establishing that at the time the product was manufactured, an alternative design would have made the product safer than the original design and was a marketable reality and technologically feasible."). Thus, product litigation is not only about compensation, but charging manufacturers with changing product designs in ways that have overall risk-utility benefits.

In product liability cases generally, reasonable alternative designs also need to be properly vetted by expert analysis of the physical evidence. When the plaintiff has destroyed physical evidence of the product at issue, the defendant cannot assess whether a plaintiff's proffered alternative design would actually enhance safety without compromising benefits, properly balance the risks among an entire user populations, and keep products affordable for the consuming public. Further, basing redesigns on parts of the physical evidence could lead to wrong conclusions; a plaintiff's "fix" could jeopardize the safety of many other people.

The Court should grant this Petition to ensure that a plaintiff's destruction of evidence does not produce unreliable product liability decisions that leads to injustices in the courtrooms and less safe products for all Georgians.

II. Allowing Plaintiffs to Destroy Evidence After Litigation is Reasonably Foreseeable Can Lead to Litigation Mischief

If the Court does not grant this Petition, the scales of justice will be skewed from the outset of a case. Plaintiffs will be afforded subjective spoliation standards in stark contrast to the objective standards this Court set forth in *Phillips* for defendants. When courts do not have objective tests to guide them, the concern is that judges and juries will make decisions on improper factors, including sympathy for a plaintiff or, worse, as the result of purposeful manipulation of the evidence. Whenever such legal outcomes are inconsistent with justice, confidence in the civil litigation system is undermined among the public and for manufacturers who rely on courts to administer even-handed justice when a user of a product is injured.

The Court should grant this Petition to prevent trial courts from wittingly or unwittingly favoring sympathetic plaintiffs, such as the one at bar, either on the initial spoliation ruling or when filling the gaps from the lack of physical evidence. Experience has shown that when sympathy overcomes reason and rules, courts may require a perceived deep-pocketed corporate defendant to pay an unfounded claim. Defendant and other *amici* point to numerous automobile cases where a plaintiff's destruction of physical evidence led to unfounded verdicts, many of which were overturned. Nationally, case law is littered with examples of where

unfounded expert testimony has facilitated recovery for sympathetic plaintiffs. *See*, *e.g.*, *Holiday Motor Corp. v. Walters*, 790 S.E.2d 447 (Va. 2016) (overturning a $20 million verdict based on the plaintiff's expert testimony that failure of a ragtop convertible to provide rollover protection was an unreasonably dangerous design defect); *Goodyear Tire & Rubber Co. v. Kirby,* 156 So. 3d 281 (Miss. Ct. App. 2009) (invalidating jury awards for minors in a product defect case when the minors were intoxicated, not using seat belts, and going 90mph into a tree).

Further, the subjectivity of the Court of Appeals' test creates opportunities for litigation gamesmanship. *See Flury v. Daimler Chrysler*, 427 F.3d 939, 946 (11th Cir. 2005) (explaining that the "destruction of the vehicle leaves potential for abuse"). Under such a rule, a plaintiff can too easily control which evidence is available for litigation—choosing to keep only the evidence favorable to his or her case and disposing of evidence not helpful to his or her case—so long as it is done before the Plaintiff admits to "contemplating litigation." Existence of a duty to preserve evidence should not be solely in the hands of the plaintiff.

While there are no allegations of intentional manipulation here, the potential for such malfeasance exists whenever a plaintiff could destroy evidence without fear of sanctions. Objective spoliation standards that apply equally to plaintiffs and defendants will guard against these misuses of the State's legal system.

CONCLUSION

For these reasons, this Court should grant the Petition.

Respectfully submitted,

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