No. 23P25 DISTRICT 16

SUPREME COURT OF NORTH CAROLINA

****

SHEILA MARTIN SESSOMS,
Administratrix of the ESTATE OF
MATTHEW GIBSON SESSOMS,

Plaintiffs,

v.

TOYOTA MOTOR SALES, U.S.A.,
et al.,

Defendants.

From the Court of Appeals
No. COA24-265

From Robeson County
No. 21-CVS-3104

****

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NORTH CAROLINA CHAMBER LEGAL INSTITUTE IN SUPPORT OF THE TOYOTA DEFENDANTS' PETITION FOR DISCRETIONARY REVIEW

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INTRODUCTION

This Court should accept the petition for discretionary review to remind trial courts and litigants that cases should ordinarily be decided on the merits—not with discovery gamesmanship.

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1 No person or entity (other than amici curiae, their members, or their counsel), helped write the brief or contributed money for its preparation.

An emerging concern for businesses is the tactic of litigation-by-sanction. When only one side in a case has meaningful discovery obligations, the other side can impose onerous discovery burdens, especially regarding electronically stored information (ESI) held by large corporations. Because large businesses must manage such giant amounts of data, it's not hard for a plaintiff to manufacture a dispute about unpreserved documents.

Many discovery disputes are legitimate and essential to development of the factual record. But some litigants increasingly deploy discovery tactics, not to push the case towards resolution on its merits, but to abusively seek avenues for sanctions or create pressure to accept *in terrorem* settlements. This case exemplifies the dangers of litigation-by-sanction because the trial court accepted the plaintiff's invitation to make the litigation about the litigation—and not the merits. In a case where a state actor ran a stop sign, the plaintiff brought a tenuous product defect claim against the manufacturers of the decedent's small car for failing to protect the decedent against a loaded dump truck. The plaintiff set out to carry her burden through discovery sanctions rather than through trial.

This case follows a concerning trend from the Court of Appeals. That court has slowly enabled and encouraged the weaponization of the discovery rules. This Court should grant the defendants' petition, reject litigation-by-sanction, and affirm

that North Carolina has fair civil discovery rules aimed at uncovering the truth and enabling a trial on the merits.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae have important interests in clear rules of litigation procedure that lead to a fair resolution of a dispute on the merits.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases like this one, which raise issues of concern to the nation's business community. The U.S. Chamber has filed many amicus briefs in state and federal courts on discovery questions.

The North Carolina Chamber Legal Institute is a nonpartisan, nonprofit affiliate of the North Carolina Chamber of Commerce, the leading business advocacy organization in North Carolina. The N.C. Chamber is organized to provide a medium through which persons having a common business interest in the improvement of conditions favorable to the economic development of North Carolina may promote

their common business interest by: (i) identifying, investigating, studying, researching, and analyzing in a nonpartisan manner those aspects of the legal environment and legal system in North Carolina that enhance the business climate, workforce development, and quality of life of the State, including the prospects for the creation and retention of jobs for the State's citizens; (ii) educating and instructing the business community and general public by disseminating and publishing the knowledge gained as a result of those activities; and (iii) serving as a champion for job providers on potentially precedent-setting legal issues with broad business climate, workforce development, and quality-of-life implications before state and federal courts. Throughout the state, the N.C. Chamber's member businesses employ citizens from every walk of life.

ARGUMENT

Litigation By Sanction

Litigation is expensive, and most of the expense is discovery. In any given case, discovery accounts for 50 to 90 percent of total litigation expenses. U.S. Chamber of Commerce Inst. for Legal Reform, *101 Ways to Improve State Legal Systems* 52 (8th ed. Dec. 2024), https://dub.sh/XCr2W6A [hereinafter *101 Ways*]. Those discovery costs have ballooned with the ever-growing amount of ESI involved in modern litigation. Businesses—particularly large corporations—bear the brunt of this burden, as

they must manage vast quantities of data while navigating increasingly complex discovery demands.

Unfortunately, some plaintiffs' attorneys have turned this burden into a weapon. By exploiting liberal discovery rules, they demand ESI not to uncover the truth, but to punish defendants and avoid a trial on the merits. This tactic is especially prevalent in cases where the discovery burdens are lopsided, like this case. The plaintiff-estate has virtually no discoverable evidence, while the defendants—under the plaintiffs' theory—hold all the relevant information. This imbalance creates a perverse incentive: plaintiffs' attorneys may seek to manufacture the appearance of discovery misconduct, then pursue sanctions to force settlements or otherwise avoid trial on weak claims.

This practice, often called "litigation by sanction," allows plaintiffs with weak claims to bypass the merits of a case entirely. As noted by practitioners, "by racking up enough sanctions, the merits of the case might never be reached at all." Phil Goldberg & Kathryn Constance, *The U.S. Supreme Court Reins in Discovery Sanctions*, Appellate Practice Newsletter (Int'l Ass'n of Def. Counsel), Sept. 2017, at 4, https://dub.sh/gruDRUe. Savvy plaintiffs' counsel may make copious ESI demands, not because they are material to the case, but because they hope to secure sanctions when the opposing party cannot comply with the demands in full. John H. Beisner,

U.S. Chamber Inst. for Legal Reform, *"The Centre Cannot Hold"—The Need for Effective Reform of the U.S. Civil Discovery Process* 16 (May 2010), https://dub.sh/6Nf7tTA. This strategy hands plaintiffs' attorneys a "nuclear weapon" to force large organizations to settle even frivolous claims. *Id.*; *see also* Linzey Erickson, *Give us a Break: The (In)Equity of Courts Imposing Severe Sanctions for Spoliation Without a Finding of Bad Faith*, 60 Drake L. Rev. 887, 925 (2012) ("In many instances, the cost of litigation may be so high that companies are unwilling to try the case on the merits.").

The Problem of Overbroad Sanctions

Trial courts unfamiliar with the challenges of managing ESI may inadvertently enable this tactic. No matter how diligently a corporate defendant preserves electronic data, plaintiffs can almost always allege that some document or file was not produced. Goldberg & Constance, *supra*, at 4. Yet, under precedent from the Court of Appeals, case-ending sanctions may be imposed even when evidence is lost or destroyed accidentally; no intent is required. Kara A. Millonzi, Univ. of N.C. Sch. of Gov't, *Electronic Discovery in North Carolina* 26 (2009), https://dub.sh/KVz35of; *see also McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 184, 527 S.E.2d 712, 716 (2000) (proof of intent not required for spoliation sanction). This creates perverse

incentives for parties to demand information that they suspect may not, through no misconduct of the party opponent, be available.

But this isn't how civil litigation should work. The approach of the Court of Appeals stands in contrast to the rules in federal court. Federal courts are required "to balance the severity of sanctions for failing to preserve ESI against the intent of the party that lost the evidence and any prejudice experienced by other parties." *101 Ways*, *supra* at 52; Fed. R. Civ. P. 37(e). Under the federal rules, sanctions for lost ESI are limited to curing prejudice unless there is a specific finding of intent to deprive. Fed. R. Civ. P. 37(e)(1)-(2); *Wall v. Rasnick*, 42 F.4th 214, 222-23 (4th Cir. 2022) (reversing district court for failing to follow the Rule 37(e) framework before imposing "the most severe sanctions"). This balanced framework ensures that sanctions are compensatory, not punitive, and the discovery process plays its intended role of facilitating the resolution of cases on their merits.

Regrettably, North Carolina's lower courts have not adopted this even-handed approach. The Court of Appeals has explicitly rejected the federal policy "favoring deciding cases on the merits," instead allowing cases to proceed based on discovery sanctions rather than substantive evidence. *Dunhill Holdings, LLC v. Lindberg*, 282 N.C. App. 36, 89, 870 S.E.2d 636, 673-74 (2022). This Court, however, has taken a more principled stance, emphasizing that procedural rules should encourage

resolution on the merits, not through sanctions. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198-99, 657 S.E.2d 361, 365-66 (2008) (applying the Rules of Appellate Procedure). Indeed, our Rules of Civil Procedure are supposed to protect litigants who lose ESI based on "routine, good-faith" document retention systems. *See* N.C. R. Civ. P. 37(b1). The petition for discretionary review presents this Court with a much-needed opportunity to provide further direction to the lower courts.

The Court of Appeals' approach is not only misguided, but also ripe for abuse. As one commentator notes, litigation-by-sanction is most effective "where there arguably are few or no facts to support liability." John Pion & Stephanie Hersperger, *The Weaponization of the Spoliation of Evidence Doctrine*, USLAW Magazine, Winter 2021/2022, at 13 https://dub.sh/vqUqPOJ. The tactic lets a case proceed when it is "otherwise legally or factually deficient." *Id.*

Here, litigation-by-sanction has operated to eliminate consideration of most of the elements of the plaintiff's product defect claims through normal trial procedures. The purpose of discovery is to build an evidentiary record that will allow the court at summary judgment, or a jury at trial, to conclude whether the plaintiff has carried its burden. But here the plaintiff and the lower courts shifted the inquiry from the merits of their claim to the defendants' alleged discovery misconduct. Through litigation-

by-sanction, parties are able to obscure the weakness of their legal theory while snatching the merits away from a jury's scrutiny.

The regrettable approach by the Court of Appeals should be reviewed by this Court. Businesses, like all other litigants, should be able to expect that courts will seek to resolve legal disputes on the merits, not through discovery games.

Constitutional Concerns

The approach of the Court of Appeals, in this and other cases, also raises serious constitutional issues. In *Goodyear Tire & Rubber Co. v. Haeger*, the Supreme Court of the United States reversed a large sanctions award against a product manufacturer. 581 U.S. 101, 115 (2017). Although courts have the power to sanction abuses of the judicial process, sanctions imposed under civil procedures "must be compensatory rather than punitive in nature." *Id.* at 108. When sanctions exceed the harm caused by the misconduct, they punish the defendant without the procedural safeguards required in criminal cases, such as proof beyond a reasonable doubt. *Id.*

Other appellate courts, using similar reasoning, have reversed sanctions orders that led to nuclear verdicts. In a recent and highly publicized case, a Georgia trial court sanctioned Ford Motor Company for violating a pretrial order on a motion in limine by essentially striking Ford's answer. *Ford Motor Co. v. Hill*, 908 S.E.2d 748, 761 (Ga. Ct. App. 2024). The sanctions order led to a $1.7 billion verdict against

Ford. *Id.* at 753; Press Release, Am. Tort Reform Ass'n, *Georgia Grabs Unwanted Crown as America's Top Judicial Hellhole* (Dec. 5, 2023), https://dub.sh/N5bpi66. The Georgia Court of Appeals reversed, finding that the sanctions were totally disproportional: "[L]esser sanctions" that "stop short of foreclosing the presentation of the merits of one side of a controversy" would have sufficed. *Ford Motor Co.*, 908 S.E.2d at 761.

Below, the commonsense principles from *Goodyear* and *Ford* were missed. The trial court, as virtually affirmed by the Court of Appeals, set out to punish the Toyota defendants. The sanctions chosen by the trial court go far beyond remediation of any real or perceived defects in the defendants' discovery responses. The sanctions order deems all the central allegations of the complaint established, essentially striking the defendants' answers. (R pp 1895-97.) As the Supreme Court held in *Goodyear*, for sanctions to be appropriately compensatory, rather than punitive, the complaining party is only entitled to a remedy that fixes the harm actually caused by the sanctioned party. *Goodyear Tire & Rubber*, 581 U.S. at 108-09 (requiring but-for causation for sanctions). That didn't happen here; the orders below didn't even consider the prejudice to the plaintiff-estate, much less reach the necessary conclusion that the defendants' non-compliance was so prejudicial to plaintiff's claim to justify

"foreclosing the presentation of the merits" of the case. *See Ford Motor Co.*, 908 S.E.2d at 761.

It is true that the Court of Appeals vacated the sanctions order, since the trial court erred by requiring the translation of produced documents. But this Court's review remains necessary because the Court of Appeals invited the trial court to impose the same sanctions on remand. *Sessoms v. Toyota Motor Sales, U.S.A., Inc.*, 910 S.E.2d 395, 398 (N.C. Ct. App. 2024) ("Said sanctions may include those sanctions contained in the Sanctions Order (except the requirement to create English translations of discoverable documents)."). And the court remanded without ordering the trial court to limit its sanctions, if any, to just what is necessary to let the plaintiff legitimately pursue her claims. This Court should clarify that this is the standard to which discovery sanctions must always be tailored.

The Need for Clear Discovery Rules

Nor did the Court of Appeals correct the trial court's other serious errors. The sanctions order and underlying discovery order against the Toyota defendants rested on incorrect interpretations of the discovery provisions of the Rules of Civil Procedure. These legal issues should be settled because they are of recurring concern for all kinds of businesses and organizations.

For instance, businesses frequently receive overbroad notices for corporate depositions under Civil Rule 30(b)(6). The deponent's counsel typically serves objections, leaving it to the deposing party to move to compel if it disagrees with the objections. The trial court in this case, however, punished the Toyota defendants for that routine practice, finding that the defendants should instead have raised their objections through a motion for a protective order. North Carolina's rules provide no clear answer to that procedural dispute, and other jurisdictions have split on the question. Although this Court hears few discovery cases, businesses would greatly benefit from this Court's guidance on the question.

The same is true for the other issues raised in the petition for discretionary review. The Court of Appeals allowed the plaintiff to impose her own deadlines for discovery productions that differed from the deadlines set in the Rules of Civil Procedure. The court also blessed a discovery order compelling the Toyota defendants to provide information about documents that they don't even possess. And the Court let the plaintiff weaponize the Toyota defendants' document retention policies, punishing them for not finding documents that no longer exist or never existed.

This type of uncertainty in civil litigation is antithetical to this State's public policy interest in helping businesses to create jobs and foster economic growth. When choosing where to do business, companies seek out jurisdictions where rules of

liability are predictably and evenhandedly applied to all disputes. Nearly 90 percent of business executives and in-house counsel say that a state's litigation environment could affect their company's decisions about where to do business. U.S. Chamber of Commerce Inst. for Legal Reform, *Ranking the States: A Survey of the Fairness and Reasonableness of State Liability Systems* 3 (Sept. 2019), https://dub.sh/xO2GzyT. North Carolina's business climate may suffer if its lower courts continue to subject companies to inconsistent, and unconstitutional, applications of its discovery rules.

This case is not an ordinary discovery dispute. Rather, it presents questions going to the heart of modern discovery practice. Clarity on these fundamental questions will benefit businesses in the state, who depend on clear and fair rules for litigation.

CONCLUSION

Businesses operating in North Carolina, or selling products here, don't seek special treatment. Instead, they merely ask for clear discovery rules that are applied even-handedly. This case is a good example of an unfortunate trend at the Court of Appeals. The amici Chambers respectfully request that the Court grant the defendants' petition for discretionary review and restore fairness to the rules of civil discovery.

This the 11th day of February, 2025.

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CERTIFICATE OF SERVICE

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