

## Proper Notice is Key to a Proper Sanction: New Opinions

The Court of Appeals has issued two very recent opinions that remind us that parties may not be sanctioned without proper notice. The party must have notice not only of the fact that sanctions are on the table but also of the specific basis for those sanctions.

In both cases, the defendant was given a severe sanction that effectively decided the issue of liability in the plaintiffs' favor. In neither case did the Court of Appeals suggest that the sanctions themselves were out of proportion to the conduct. The sanctions were reversed because due process demands a degree of notice not provided in either situation.

### No Sanction without Prior Notice

In [\*OSI Restaurant Partners, LLC v. v. Oscoda Plastics, Inc.\*](#), decided earlier this week, Defendant allegedly withheld a trove of documents stored on its backup tapes. First citing expense and inconvenience, and then later claiming that the files were encrypted, Defendant managed to prolong turning over the material for a year or more. The trial court then issued a Spoliation Order finding that Defendant's delays were intentional and ordering that, unless the documents were produced within 120 days of trial, the jury would be given a spoliation instruction. Defendant soon produced 5000 pages of the documents. In their review of the documents, Plaintiffs discovered references to additional material that should have been produced. After Plaintiffs made another motion to compel, Defendant produced further documents. Defendant then represented that it had fully complied with discovery and moved the court to set aside the spoliation instruction.

But then, in their review of emails produced by Defendant's sister company, Plaintiffs discovered "smoking gun" emails that should also have been among Defendant's production. Plaintiffs then moved to amend the complaint to add new allegations related to this development.

Defendant's motion to set aside the spoliation order came on for hearing in December 2017. Plaintiffs' motion to amend was not before the court at that hearing. At the hearing, Plaintiffs surprised Defendant by arguing, among other things, that Defendant should be sanctioned in the form of default judgment. The court entered an order denying Defendant's motion to set aside the spoliation instruction and sanctioning Defendant pursuant to Rule of Civil Procedure 37(b)(2) "and its inherent powers." The court struck Defendant's answer and entered default judgment against it as to liability for negligence, breach of implied warranty, and breach of express warranty.

The Court of Appeals reversed the sanction, holding that Defendant had not received notice that the court would consider sanctions. Because the only matter before the court at the hearing—and for which Defendant received notice—was Defendant's motion to set aside the spoliation instruction, the sanction was in violation of Defendant's due process rights. The Court of Appeals was sympathetic to the Plaintiffs' and trial judge's frustration, but emphasized the importance of due process even for a party not playing by the rules itself. The opinion notes that,

“the trial court exhibited abundant patience in this matter. Patience runs thin when a party repeatedly delays compliance with discovery requests and court orders. However, because Defendant received no notice whatsoever that it might be subject to sanctions based upon the facts alleged in Plaintiffs’ motion to amend prior to the...hearing, we must reverse the trial court’s order.”

### **The Basis for the Sanction Order Must Match the Notice**

In [\*Walsh v. Cornerstone Health Care, P.A.\*](#), issued last month, the problem was a bit different—the Defendant in fact had notice of and defended itself at the sanctions hearing. But when the trial court issued the sanction, the order was based on *different* conduct than what was cited in the notice. Plaintiffs alleged that Defendant had “intentionally withheld a vast number of highly relevant and damaging documents” while representing in supplemental discovery responses that no such documents existed. Plaintiffs therefore moved for sanctions pursuant to Rule of Civil Procedure 26(g) (similar to Rule 11 but specific to discovery), arguing that Defendant’s responses were “interposed for the improper purpose of intentionally withholding a substantial cache of damaging documents, which has served to harass plaintiffs, cause unnecessary delay, and has needlessly and exponentially increased the cost of litigation.”

Five months after the hearing, however, when the trial court entered its order, the court noted that Plaintiffs’ motion was filed “specifically for failure to supplement as required under Rule 26(e) of the N.C. Rules of Civil Procedure.” The trial court concluded that “Defendant’s failure to appropriately supplement its responses to the discovery requests of the Plaintiffs justifies the imposition of sanctions.” The court then struck Defendant’s answer, leaving only damages to be decided.

The Court of Appeals vacated the sanction and remanded. The opinion noted that, “[i]t is well established that “[w]hile North Carolina does not require notice of the precise type of sanctions sought, a party is nevertheless entitled to (1) notice of the bases of the sanctions and (2) an opportunity to be heard thereon.” The court concluded that, because Defendant was not advised that the sanction might be based on failure to supplement—that is, Rule 26(e) rather than 26(g)—notice of the sanction the court imposed was not sufficient.

As the Court of Appeals noted, the North Carolina Supreme Court has long emphasized the importance of prior notice and has instructed that “in order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him.” *Griffin v. Griffin*, 348 N.C. 278, 280 (1998).