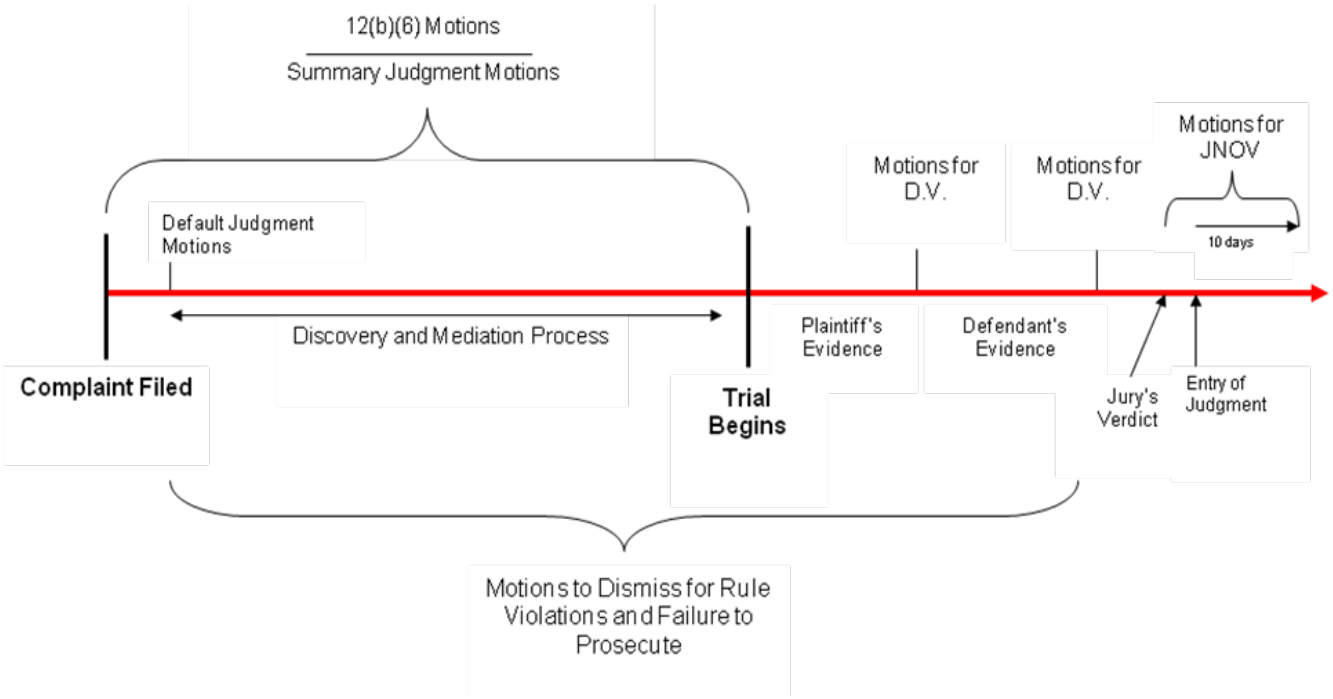
Dispositive Motions: 5 Things to Know
North Carolina Conference of Superior Court Judges
Fall Educational Conference 2010

REFERENCE MATERIALS

Ann M. Anderson
UNC School of Government

DISPOSITIVE MOTIONS:
A Simplified Timeline



Rule 41(b) Dismissals for Failure to Prosecute

Ann M. Anderson, School of Government (September 2010)

1) The Rule

   a) A trial court is authorized by Rule 41(b) of the Rules of Civil Procedure to dismiss an action or claim (original, cross-claim, counterclaim, or third party claim) due to the failure of the claimant to prosecute its case.

   b) Rule 41(b):

      "For *failure of the plaintiff to prosecute* or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. …Unless the court in its order for dismissal otherwise specifies, a dismissal under this section…operates as an adjudication upon the merits." (emphasis added)

   c) The Court May Act on Its Own Motion

      Although the Rule specifies that "a defendant may move" for dismissal, the Court of Appeals has held that a court may dismiss a claim or action on its own motion. *Perkins v. Perkins*, 88 N.C. App. 568, 569, 364 S.E.2d 166, 167 (1988); *Blackwelder Furniture Co. of Statesville, Inc. v. Harris*, 75 N.C. App. 625, 627, 331 S.E.2d 274, 275 (1985) (limiting the holding in *Simmons v. Tuttle*, 70 N.C. App. 101, 318 S.E.2d 847 (1984)).

   d) Certain Findings are Required

      Dismissals, however, "are viewed as the harshest of remedies in a civil case and should not be imposed lightly." *Page v. Mandel*, 154 N.C. App. 94, 101, 571 S.E.2d 635, 639 (2002). Whether dismissing on defendant's motion or *ex mero motu*, the court must make certain findings (section 2, below) and should closely examine whether the situation constitutes "failure to prosecute" as that term has been interpreted by the appellate courts (section 3, below).

2) Required Findings and Considerations

   a) Consideration of "Lesser Sanctions"

      i) Although Rule 41(b) does not itself contain such a requirement, North Carolina appellate cases require a trial court to examine the possibility of lesser sanctions when contemplating dismissal – "the most severe sanction available to the court in a civil case." *Page*, 154 N.C. App. at 101, 571 S.E.2d at 639 (citing *Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 158-59 (1993)).

ii) This consideration requires a three-part inquiry:

(1) Whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter;

(2) The amount of prejudice, if any, to the defendant; and

(3) The reason, if one exists, that sanctions short of dismissal would not suffice.

Wilder v. Wilder, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001).

b) The record must reflect the court's conclusion that lesser sanctions will not suffice. *Id.*

i) *Page*, 154 N.C. App. at 101-02, 571 S.E.2d 635. 640 (2002). Vacating order dismissing claims for failure to file a second amended complaint as ordered by the court. Noting that findings regarding lesser available sanctions were required regardless of whether dismissal was pursuant to 41(b) or another underlying rule.

ii) *Wilder*, 146 N.C. App. at 578, 553 S.E.2d at 428 (2001). Reversing and remanding a dismissal of an equitable distribution claim because the order did not sufficiently address whether less severe sanctions could properly deal with the party's delay.

iii) *Foy v. Hunter*, 106 N.C. App. 614, 619, 418 S.E.2d 299, 303 (1992). Remanding for reconsideration of lesser sanctions where trial court made a finding that plaintiffs had not cooperated with counsel in prosecuting the action, but the record showed no facts to support the finding.

3) What Constitutes Failure to Prosecute

a) General Guidance

i) "Intention to thwart progress" or "delaying tactic" required

"Dismissal for failure to prosecute is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion." *In Re Will of Kersey*, 176 N.C. App. 748, 751, 627 S.E.2d 309, 311 (2006); *Green v. Eure,* 18 N.C. App. 671, 672, 197 S.E.2d 599, 601 (1973) (citing 5 Moore's Federal Practice, para. 41.11(2)).

ii) "Mere passage of time" not enough

"Provided a plaintiff has not been lacking in diligence, the mere passage of time does not justify dismissal for failure to prosecute as our courts are primarily concerned with the trial of cases on their merits." *Kersey*, 176 N.C. App. at 751, 627 S.E.2d at 311 (citing *Butler Serv. Co. v. Butler Serv. Group,* 66 N.C. App. 132, 136, 310 S.E.2d 406, 408 (1984) ("Expedition for its own sake is not the goal.")).

b) Cases Holding No "Failure to Prosecute" As a Matter of Law

i) Where Actions of Attorney Could Not Be Imputed to Claimants

(1) *Barclays American Corp. v. Howell*, 81 N.C. App. 654, 657–58, 345 S.E.2d 228, 230–31 (1986). Reversing, in a strongly-worded opinion, the dismissal of plaintiff's action where his attorney had filed a motion to withdraw a few days before trial date and did not communicate to his client that trial date had been set. Rejecting the notion that the client was required to know of the trial date as a matter of ordinary prudence. Holding that the plaintiff's failure to attend trial was "excusable as a matter of law."

(2) *Simmons v. Tuttle*, 70 N.C. App. 101, 105–06, 318 S.E.2d 847, 849 (1984). Holding that dismissal of an action because counsel failed to attend a clean-up calendar—where plaintiff's first attorney had withdrawn and the calendar notice still reflected the first attorney as counsel of record—was improper as a matter of law. Stating that, even if plaintiff's substituted counsel was negligent in not obtaining the calendar notice, the negligence was not imputable to the plaintiff, certainly not to "the drastic extent of dismissing his case."

ii) Where Another Court Action Prevented Attorney's Attendance

(1) *Butler Serv. Co. v. Butler Serv. Group,* 66 N.C. App. 132, 136, 310 S.E.2d 406, 408 (1984). Reversing dismissal of plaintiff's action where plaintiff's attorney (sole practitioner) had been called to trial in both plaintiff's matter and in two district court matters in the same courthouse at the same hour and had timely attempted to reconcile the issue with the respective judges, both of whom apparently rejected the idea that the attorney could not physically be in two places at the same time and ordering him to try the three cases as calendared. Reflecting obvious distaste for the trial judges' management of the situation and its effect on the innocent plaintiff and holding that the "harshness of a Rule 41(b) dismissal with prejudice is seldom more apparent than on the facts of this case."

iii) Where Party's Attorney/Trustee Was Prepared to Proceed

(1) *Terry v. Bob Dunn Ford, Inc.*, 77 N.C. App. 457, 458, 335 S.E.2d 227, 228 (1985). Reversing dismissal based on failure of plaintiff to be in court when case was called for trial, where plaintiff's attorney was present and ready to proceed and there was no legal requirement that a party be present.

(2) *Blackwelder Furniture Co. of Statesville, Inc. v. Harris,* 75 N.C. App. 625, 627, 331 S.E.2d 274, 275 (1985). Reversing dismissal where plaintiff's trustee in bankruptcy was present when case was called and had moved to be made a party, even where plaintiff and his attorney were not present and had repeatedly failed to appear for administrative calendars.

iv) Where There Was No Improper Intent Behind Delay in Service or Calendaring

(1) *In Re Will of Kersey*, 176 N.C. App. 748, 751, 627 S.E.2d 309, 311 (2006). Reversing the trial court's dismissal of action for caveator's failure to notify interested persons of transfer to superior court within the limitations period for filing a caveat action, as there was no such legal requirement for the notification, and the facts showed no intent to thwart the progress of the matter.

(2) *Lusk v. Crawford Paint Co.*, 106 N.C. App. 292, 416 S.E.2d 207 (1992). Reversing trial court's dismissal of plaintiff's complaint where the plaintiff's delay in service upon some of the defendants was not in technical violation of Rules 3 and 4 and did not "rise to the level of demonstrating an intent to thwart progress or to implement a delaying tactic." Also noting that "there appears to be no demonstrable intent here, but only arguable inadvertence or neglect of counsel."

(3) *Green v. Eure*, 18 N.C. App. 671, 672-3, 197 S.E.2d 599, 601 (1973). Reversing dismissal where *pro se* plaintiff took no action on his declaratory judgment action for two years after serving the complaint because he believed the court would calendar the action for hearing in due course. Holding that he was not "lacking in diligence" and that his failure arose out of a misunderstanding rather than deliberate attempt at delay.

c) Cases Affirming Dismissal For Failure to Prosecute

i) Intentional, Prejudicial Delay in Serving Complaint

(1) *Smith v. Quinn*, 324 N.C. 316, 318, 378 S.E.2d 28, 30 (1989). Affirming a dismissal based on an eight-month delay in service of the complaint where the record reflected an intentional delay "in order to gain an unfair advantage."

(2) *Sellers v. High Point Memorial Hosp., Inc.*, 97 N.C. App. 299, 303, 388 S.E.2d 197, 199 (1990). Affirming the dismissal of an action against a hospital where the plaintiff filed the complaint in May, but intentionally did not take steps to serve the hospital a summons for more than six months, and the hospital did not know of the case until it received an administrative calendar from the court.

ii) Failure to Attend a Clean-Up Calendar or Trial Calendar

(1) *Perkins v. Perkins*, 88 N.C. App. 568, 569, 364 S.E.2d 166, 167 (1988). Affirming a trial court's ex mero motu dismissal *without prejudice* of a divorce action based on the parties' failure to appear at a clean-up calendar because no pleading had been filed in almost two years, and the case had been placed on two prior clean-up calendars. Also holding that the trial court was not required to reopen the matter under Rule 60(b), even though there was a valid argument for the attorney's excusable neglect. *But see Simmons v. Tuttle*, 70 N.C. App. 101, 318 S.E.2d 847 (1984) (reversing dismissal for failure to appear at a clean-up calendar because the attorney's actions were not imputable to plaintiff).

(2) *Barbee v. Walton's Jewelers, Inc.*, 40 N.C. App. 760, 762, 253 S.E.2d 596, 598 (1979). Affirming dismissal where plaintiff and her attorney failed to appear when case was called for trial and where there was no apparent excuse for the failure.

4) Standards of Review

a) Abuse of Discretion

i) Denial of Motion to Dismiss

A decision to deny a Rule 41(b) motion is within the sound discretion of the trial court, and "will be reversed for abuse of discretion only upon a showing that its actions are 'manifestly unsupported by reason.'" *Eakes v. Eakes*, 194 N.C. App. 303, 309, 669 S.E.2d 891, 896 (2008) (affirming trial court's refusal to dismiss where the movant showed no prejudice from the claimant's delays); *see also James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 347, 634 S.E.2d 548, 556 (2006) (affirming trial court's denial of motion to dismiss); *Melton v. Stamm*, 138 N.C. App. 314, 317, 530 S.E.2d 622, 624 (2000) (making clear that the trial court is not required to grant motion); *Jones v. Stone*, 52 N.C. App. 502, 506, 279 S.E.2d 13, 15 (1981) (same)*; Deutsch v. Fisher*, 39 N.C. App. 304, 250 S.E.2d 304, 308 (1979) (holding that court's refusal to dismiss was appropriate under the facts).

ii) Findings of Fact to Support Dismissal

Where the trial court makes the required findings of fact regarding lesser sanctions, the appellate courts will not disturb those findings where there is evidence in the record to support them. *Lee v. Roses*, 162 N.C. App. 129, 132, 590 S.E.2d 404, 407 (2004); *Foy v. Hunter*, 106 N.C. App. 614, 620, 418 S.E.2d 299, 303 (1992).

b) De Novo

Where the appeal of a Rule 41(b) dismissal alleges an error of law, the Court of Appeals reviews the matter *de novo*. Appeals in this context have proceeded on grounds that (1) the trial court did not make the required findings of fact to support the dismissal; or (2) that there was, as a matter of law, no "failure to prosecute". See Sections (3) and (4) above.

Punitive Damages and Default Judgment

i. Defaulting party must be permitted a jury trial as to punitive damages as matter of due process. This includes a right to present its own evidence as to punitive damages. *Hunter v. Spaulding*, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

ii. Defendant must be permitted to present evidence as to the factors a jury considers under G.S. 1D-35. *Decker v. Homes, Inc.*, 187 N.C. App. 658, 654 S.E.2d 495 (2007).

iii. The factors in G.S. 1D-35 are:

a. The reprehensibility of the defendant's motives and conduct.

b. The likelihood, at the relevant time, of serious harm.

c. The degree of the defendant's awareness of the probable consequences of its conduct.

d. The duration of the defendant's conduct.

e. The actual damages suffered by the claimant.

f. Any concealment by the defendant of the facts or consequences of its conduct.

g. The existence and frequency of any similar past conduct by the defendant.

h. Whether the defendant profited from the conduct.

i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

CIVIL ORDERS: WHEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE REQUIRED

Ann M. Anderson, School of Government

A. Rule of Civil Procedure 52

1. Judgments in non-jury trials

a) In bench trials (trials without jury), the judge not only makes the legal conclusions but also is the finder of fact.

b) Written findings of fact and conclusions of law are required in all actions tried without a jury, whether or not requested by a party. Rule 52(a)(1).

c) Findings of fact must be set forth separately from the conclusions of law.

(1) Failure to set forth the findings and conclusions separately is likely to be reversible error. *Pineda-Lopez v. North Carolina Growers Assoc., Inc.*, 151 N.C. App. 587, 566 S.E.2d 162 (2002).

d) Normally the findings and conclusions will appear in the judgment. In the less common event a judge prepares a detailed written opinion or memorandum of decision, it is sufficient if the judge includes the findings of fact and conclusions of law in that document. Rule 52(a)(3).

e) Amendments:

(1) Judge may amend judgment in non-jury trial upon motion made within 10 days or upon Rule 59 motion. Rule 52(b).

(2) Judge should be careful to include all necessary findings of fact and conclusions of law in amended judgment.

2. Rule 41(b) dismissals (dismissals in non-jury trials)

a) In bench trials, upon motion of the defendant, a judge may render a decision (involuntary dismissal) against the plaintiff at the close of plaintiff's evidence. Rule 41(b).

b) Upon doing so, judge must make written findings of fact and conclusions of law (just as if he or she had heard both parties' evidence). *Id.*; Rule 52(a)(2).

(1) Failure to make findings and conclusions as required by Rule 41(b) is reversible error and requires remand. *Greensboro Masonic Temple v. McMillan*, 142 N.C. App. 379, 382, 542 S.E.2d 676, 678 (2001) (citing *Hill v. Lassiter*, 135 N.C. App. 515, 520 S.E.2d 797 (1999)).

3. Orders on motions

a) Default Rule: Findings and conclusions are not required on decisions on motions (or the court's own orders without a motion). Rule 52(a)(2).

b) Exception: When requested by a party, findings and conclusions are required.

(1) Request should be made prior to entry of the trial court's written order (if any). *J.M. Dev. Group v. Glover*, 151 N.C. App. 584, 566 S.E.2d 128 (2002).

c) **BUT NOTE**: Certain types of orders should not contain findings of fact, even if the party requests them:

(1) Summary judgment motions (Rule 56)

(a) The court's task is to determine only whether genuine issues of material fact exist, and not to decide those facts one way or the other.

(b) Findings of fact are inappropriate. *Hodges v. Moore*, 697 S.E.2d 406, COA10-69 (July 20, 2010); *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 33-34, 588 S.E.2d 20, 30 (2003).

(c) The Judge may *recite* the undisputed facts. *Wiley v. United Parcel Service Inc.,* 164 N.C. App. 183, 594 S.E.2d 809 (2004); *Capps v. City of Raleigh,* 35 N.C. App. 290, 241 S.E.2d 527 (1978). If the court chooses to do so, however, it is best to make the intention clear:

> "By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings. We understand that a number of trial judges feel compelled to make findings of fact reciting those "uncontested facts" and not as a resolution of contested facts. In the instant case, there was no statement that any of the findings were of "uncontested facts." *War Eagle, Inc. v. Belair*, 694 S.E.2d 497, 500 (N.C. App. 2010).

(2) Motions under Rule 12(b)(6)

(a) The court's only task is to determine whether complaint contains sufficient allegations. Allegations must be accepted as true.

(b) Findings of fact are inappropriate.

(3) Motions for judgment on the pleadings. (Rule 12(c))

(a) The court's task is to determine whether the allegations in the complaint and admissions in the answer establish that movant is entitled to judgment as a matter of law.

(b) Findings of fact are inappropriate.

4. Preliminary Injunctions and TROs

a) Findings of fact and conclusions of law not required unless requested by a party. Rule 52 (a)(2).

b) Court must, however, include the following:

(1) In a TRO entered without notice, the order must state the date and hour of issuance; must define the injury; state why it is irreparable; and state why it was issued without notice. Rule 65(b).

(2) In every injunction and restraining order, the order must set forth the reasons for issuance; must be specific in its terms; and must describe in reasonable detail the act or acts enjoined or restrained. Rule 65(d).

B. Other Types of Civil Orders (Outside Rule 52)

1. Rule 11 Sanctions

Findings of fact and conclusions of law should be included in an order granting or denying sanctions in order to allow appellate review. *Sholar Bus. Assocs., Inc. v. Davis*, 138 N.C. App. 298, 303, 531 S.E.2d 236, 240 (2000); *Lowry v. Lowry*, 99 N.C. App. 246, 393 S.E.2d 141 (1990).

2. Attorney Fees.

Findings and conclusions are required both the entitlement to attorney fees per the relevant factors in *Washington v. Horton*, 132 N.C. App. 347 (1999); and as to the dollar amount of attorney fees awarded, taking into consideration (1) time and labor expended, (2) skill required, (3) customary fee for like work, and (4) experience and ability of the attorney. *Gilchrist v. French*, 169 N.C. App. 255 (2005).

3. Consent Judgments

a) Findings and conclusions not required. *In re Estate of Peebles*, 118 N.C. App. 296, 454 S.E.2d 854 (1995).

b) There are no facts to be determined. Court is merely reciting parties' agreement and allowing formal entry of the agreement into the record. *Crane v. Green*, 114 N.C. App. 105, 107, 441 S.E.2d 144, 145 (1994).

Summary Judgment <u>Against Movant</u>

- There is no prohibition on granting summary Judgment *against* moving party if the non-moving party is entitled to it as a matter of law ("no genuine issue").
    - *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 447 (1979).

      "Summary judgment may, when appropriate, be rendered against the party moving for such judgment. Summary judgment in favor of the non-movant is appropriate when the evidence presented demonstrates that no material issues of fact are in dispute, and the non-movant is entitled to entry of judgment as a matter of law." (internal citations omitted).
    - *Stegenga v. Burney*, 174 N.C. App. 196, 198, 620 S.E.2d 302, 303 (2005).

      Summary judgment for a non-moving party is proper "when the evidence presented demonstrates that no material issues of fact are in dispute, and the non-movant is entitled to entry of judgment as a matter of law."
- Prior notice to the moving party not required. Judge may grant it on his or her own motion.
    - "Although a party does not have to move for summary judgment to be entitled to it, the nonmovant must be entitled to the judgment as a matter of law." *Carriker v. Carriker*, 350 N.C. 71, 74, 511 S.E.2d 2, 5 (1999) (addressing propriety of grant of summary judgment against moving party on judge's own motion).
- Trial court should be sure the moving party has had opportunity to present evidence as to the specific issue that is the basis for summary judgment. *A-S-P,* 298 N.C. at 212, 258 S.E.2d at 447. When in doubt, consider invoking Rule 56(e) to allow movant more time to present evidence.

JNOV AND PUNITIVE DAMAGES

I. General Standard for JNOV: On a motion for judgment notwithstanding the verdict (JNOV), trial judge views the evidence in the light most favorable to the non-movant, and determines whether there was "more than a scintilla" of evidence to support the jury's verdict. *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987). Until 2009, the same standard seemed to apply to a review of a punitive damages verdict. *Williams v. Boylan-Pierce*, 69 N.C. App. 315, 319–21, 317 S.E.2d 17, 20 (1984); *Shugar v. Guill*, 304 N.C. 332, 283 S.E.2d 507 (1981); *Cockerham-Ellerbee v. Jonesville*, 190 N.C. App. 150, 660 S.E.2d 178 (2008) ("the weight and credibility of evidence of willful or wanton conduct…[are] questions are for a jury, not for this Court")

II. Standard for JNOV on Punitive Damages:

a. In *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 693 S.E.2d 640 (2009), the Supreme Court altered this rule in motions for JNOV as to punitive damages: The majority opinion held that the standard for reviewing a jury award of punitive damages is "whether the nonmovant has produced clear and convincing evidence from which a jury could reasonably find one or more of the aggravating factors" in G.S. 1D-15(b) (fraud, malice, or willful or wanton conduct).

b. It appears that, with this standard, the trial judge is in the position of assessing the weight and *persuasiveness* of the evidence (whether it is "clear and convincing"), a role normally within the exclusive province of the jury.

c. The trial court must apply this standard in the opinion required under G.S. 1D-50 when "upholding or disturbing" punitive damages. G.S. 1D-50 requires the judge to "address with specificity the evidence, or lack thereof, as it bears on the liability for or amount of punitive damages in light of the requirements of this Chapter."

i. The appellate court, however, does not give deference to that opinion, as the appellate court reviews the matter *de novo*, engaging in the same analysis as the trial court – whether the evidence was "clear and convincing." The judge's opinion simply "provide[s] valuable assistance to the appellate court" in making this determination. *Id.* at 723, 693 S.E.2d at 644.

ii. Although the 1D-50 opinion only operates as "assistance" to the appellate courts, if the trial court does not create the opinion (applying a "clear and convincing" analysis), the matter will be remanded. In the first case applying the "clear and convincing" JNOV standard, the Court of Appeals held that,

> "Pursuant to the Supreme Court's express holding…we are constrained to reverse the trial court's denial…of JNOV with respect to punitive damages, and we remand the matter...for a written opinion as to those damages in view of *Scarborough*." *Hudgins v. Wagoner*, 694 S.E.2d 436, 447–48 (N.C. App. June 15, 2010).

III. Hypothetical Example

- Trial on breach of contract, breach of fiduciary duty, and fraud (seeking punitive damages). Verdict for plaintiff on all claims. Defendant moves for JNOV.

Before *Scarborough*:

Claim	Trial Court's JNOV Review Standard	Appellate JNOV Review Standard
Breach of Contract Breach of Fiduciary Duty Fraud	Was there "more than a scintilla of evidence to support the verdict"? (Inferences in non-movant's favor.)	Was there "more than a scintilla of evidence to support the verdict"? (Inferences in non-movant's favor.)
Punitive Damages	Was there "more than a scintilla of evidence" to support the verdict? (Inferences in non-movant's favor.) *(PLUS – written opinion pursuant to 1D-50.)*	Was there "more than a scintilla of evidence" to support the verdict? (Inferences in non-movant's favor.)

After *Scarborough*:

Claim	Trial Court's JNOV Review Standard	Appellate JNOV Review Standard
Breach of Contract Breach of Fiduciary Duty Fraud	Was there "more than a scintilla of evidence to support the verdict"? (Inferences in non-movant's favor.)	Was there "more than a scintilla of evidence to support the verdict"? (Inferences in non-movant's favor.)
Punitive Damages	Whether the non-movant produced "clear and convincing evidence" of one or more aggravating factors. *(Reflected in written opinion pursuant to 1D-50).*	Whether the non-movant produced "clear and convincing evidence" of one or more aggravating factors. (*Written opinion pursuant to 1D-50 = "valuable assistance" to appellate court*)