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Rule 11(a) of the North Carolina Rules of Civil Procedure: Turner v. Duke University, the New Standards of Judicial Review

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COMMENT

Rule 11(a) of the North Carolina Rules of Civil Procedure: *Turner v. Duke University*, The New Standards of Judicial Review

I. INTRODUCTION

In 1986, Rule 11(a) of the North Carolina Rules of Civil Procedure was amended.[1] As amended, the rule is identical to Rule 11 of the Federal Rules of Civil Procedure with the exception of one sentence.[2] In pertinent part, the new North Carolina version provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record. . . . A party who is not represented by an attorney shall sign his pleading, motion, or other paper. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief, *formed after reasonable inquiry* it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.[3]

Former North Carolina Rule 11(a) provided: "If a pleading is not signed or if it is signed with intent to defeat the purpose of this rule, it may be

1. N.C. GEN. STAT. § 1A-1, R. Civ. P. 11(a) (Supp. 1989). The amended rule became effective on January 1, 1987 and is applicable to pleadings, motions, or papers filed after January 1, 1987. *In re* Williamson, 91 N.C. App. 668, 681-82, 373 S.E.2d 317, 324 (1988); Kohn v. Mug-A-Bug, 94 N.C. App. 594, 597, 380 S.E.2d 548, 550 (1989).

2. The sentence that appears in Federal Rule 11, but not in North Carolina Rule 11(a) reads: "The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished." FED. R. CIV. P. 11 (1936). This rule has not been available in North Carolina since 1868. W. Shuford, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE 88 (3d ed. 1988). In 1987, Federal Rule 11 was amended to make it gender neutral. North Carolina Rule 11(a) is not gender neutral.

3. N.C. GEN. STAT. § 1A-1, R. Civ. P. 11(a) (Supp. 1989) (emphasis added).

stricken as sham and false and the action may proceed as if the pleading had not been served."[4] Additionally, the Federal Rule permitted disciplinary action against the filer; but, the North Carolina Rule included no such provision.[5] Yet even Federal Rule 11 was not effective in deterring abuses.[6] Consequently, Rule 11 of the Federal Rules of Civil Procedure was amended in 1983.[7] Thereafter, in 1986, North Carolina adopted Rule 11 of the Federal Rules of Civil Procedure as amended.[8] It was not until late July 1989 that the North Carolina Supreme Court, in *Turner v. Duke University*,[9] addressed standard of review issues at the trial and appellate levels.

A. *Standard of Review at the Trial Court Level*

In *Turner*, the North Carolina Supreme Court held that the trial court's standard of review of a Rule 11(a) motion is one of "objective reasonableness."[10] This conclusion is not surprising because the objective reasonableness standard has been applied in all federal jurisdictions that have addressed the issue[11] and is endorsed by the advisory committee's note to Federal Rule 11.[12]

Prior to the amendment of Federal Rule 11, a showing of bad faith was necessary in order to impose sanctions. The federal courts have held that

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4. N.C. GEN. STAT. § 1A-1, R. Civ. P. 11(a) (1967).

5. FED. R. CIV. P. 11 (1936); N.C. GEN. STAT. § 1A-1, R. Civ. P. 11(a) (1967). Estrada v. Burnham, 316 N.C. 318, 325 n.5, 341 S.E.2d 538, 543 n.5 (1986).

6. FED. R. CIV. P. 11, advisory committee's note (1983); *See* 6 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1334 (1971); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 869-70 (5th Cir. 1988).

7. FED. R. CIV. P. 11 (1983); *See* 6 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1334 (1971); FED. R. CIV. P. 11 advisory committee's note (1983).

8. N.C., Gen. Stat. § 1A-1, R. Civ. P. 11(a) (Supp. 1989). Rule 11 (b), (c), and (d) of the North Carolina Rules of Civil Procedure have no counterparts in the Federal Rule. W. Shuford, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE, 88 (3d ed. 1988).

9. 91 N.C. App. 446, 372 S.E.2d 320 (1988), *rev'd*, 325 N.C. 152, 381 S.E.2d 706 (1989).

10. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713 (1989). This standard of review is applied in all federal jurisdictions and all state jurisdictions that have adopted Federal Rule 11 as amended in 1983. For a full explanation of this standard, *see infra* text and accompanying notes 56-87.

11. *See, e.g.*, Eastway Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3d Cir. 1985); Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C., 789 F.2d 1056 (4th Cir. 1986); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (1988); Century Prod., Inc., v. Sutter, 837 F.2d 247 (6th Cir. 1988); Brown v. Federation of State Medical Bds. of U.S., 830 F.2d 1429 (7th Cir. 1987); O'Connell v. Champion Int'l Corp., 812 F.2d 823 (9th Cir. 1986); Burkhart v. Kinsley Bank, 804 F.2d 588 (10th Cir. 1986); Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987); Westmoreland v. C.B.S., Inc., 770 F.2d 1168 (D.C. Cir. 1985). The First Circuit has not yet addressed the issue.

12. The relevant portion of the advisory committee's note states:

> The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. *The standard is one of reasonableness under the circumstances.* This standard is more stringent than the original good faith formula and thus it is expected that a greater range of circumstances will trigger its violation.

FED. R. CIV. P. 11 advisory committee's note (1983) (emphasis added).

under the new rule, bad faith is no longer required.[13] Adopting this interpretation, the North Carolina Supreme Court in *Turner* held that a showing of bad faith is not necessary to impose sanctions under the North Carolina Rule.[14] In reaching its conclusion, the court noted that every federal court that has considered the question is in accord.[15] Given the uniform nature of the case law on this issue, this comment will merely set out the areas of concern, give general guidelines, and direct the reader to supporting authority.

B. *Standard of Review at the Appellate Level*

Federal and state courts differ concerning the standard of review on appeal.[16] *Turner* however, did not adopt any existing standard, but created a new variation. The North Carolina standard of appellate review for a denial or granting of a Rule 11(a) motion as adopted in *Turner* is as follows:

> The trial court's decision to impose or not impose mandatory sanctions under N.C.G.S. sec. 1A-1, Rule 11 (a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. sec. 1A-1, Rule 11(a).[17]

The plain meaning of this standard is inconsistent with a *de novo* review and is inconsistent with the *Turner* court's broader analysis. Whether the plain language of the standard or the *Turner* court's apparent intent

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13. *See* FED. R. CIV. P. 11 advisory committee's note (1983); Eastway Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); Brown v. Federation of State Medical Bds. of U.S., 830 F.2d 1429 (7th Cir. 1987); Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C., 789 F.2d 1056 (4th Cir. 1986); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3d Cir. 1985); Westmoreland v. C.B.S., Inc., 770 F.2d 1168 (D.C. Cir. 1987).

14. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713.

15. *Id.*

16. For the various standards applied at the federal appellate level, *see infra* text and accompanying notes 88-91. Twenty-one state courts have adopted the 1983 Amended Federal Rule 11. Several others have adopted similar rules. Many of these courts have not yet addressed what standard of review will be applied at the appellate level. Of the courts that have addressed the issue: (a) Illinois, Minnesota, Ohio, Oregon, Utah, and Washington apply an abuse of discretion standard as to all questions presented on Rule 11; (b) Arizona, Iowa, Kentucky, and North Dakota apply a three-tiered test, whereby the findings of fact are reviewed under a clearly erroneous standard, the conclusions of law are reviewed *de novo*, and the type of sanctions imposed are reviewed under an abuse of discretion standard; and (c) Michigan has chosen to apply a clearly erroneous standard to all issues presented under Rule 11. This comment only analyzes the federal decisions concerning Rule 11.

17. 325 N.C. at 165, 381 S.E.2d at 714.

should control is still at issue. Unfortunately, there have been no North Carolina cases, post *Turner*, that have interpreted the new appellate standard.[18] This comment analyzes the facts giving rise to *Turner* and the standards of review set out in *Turner*. The purpose of this comment is to provide the reader with the tools necessary to interpret the North Carolina standards of review.

II. THE FACTS AND PROCEDURAL HISTORY

As the focus of this comment is Rule 11(a)[19] and conduct giving rise to sanctions, the text is limited to a discussion of the events leading to the imposition of sanctions and will not address the facts giving rise to the plaintiff's cause of action.[20] In *Turner*, the plaintiff brought a wrongful

18. *See* Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), *disc. review denied*, 326 N.C. 50, — S.E.2d — (1990). In *Shook*, the North Carolina Court of Appeals purported to apply the standard of appellate review adopted in *Turner*. However, it appears from the opinion that the *Turner* standard was not applied. *See infra* text and accompanying notes 123-127.

19. While this comment does not discuss Rule 26(g) in any detail, the reader is alerted that certification of discovery papers is governed by Rule 26(g) not Rule 11(a). FED. R. CIV. P. 11 advisory committee note (1983). However, discovery motions are governed by Rule 11(a). *Id. See* Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986).

20. In 1982, Ms. Turner was diagnosed as having lung cancer and underwent chemotherapy and radiation treatments. *Turner*, 325 N.C. at 154-55, 381 S.E.2d at 708. She later developed herpes zoster (shingles), which disappeared but left her with constant post-herpetic pain in her upper right back. *Id.* at 155, 381 S.E.2d 708. It was for this condition that she was referred to Dr. Friedman. *Id.* On the afternoon of August 25, 1983, Ms. Turner was admitted to Duke for possible treatment of her postherpetic pain. New Brief for Appellant at 2, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 526A88). Upon admission, she was examined by Dr. Woodworth, a neurology resident who was an employee of Duke. *Turner*, 325 N.C. at 155, 381 S.E.2d at 708. Dr. Woodworth noted that Ms. Turner had been experiencing constipation and had been taking medication without success in an attempt to alleviate the problem. *Id.*

Later that afternoon, Dr. Friedman discussed with the Turners tests that would be performed. *Id.* That night, Ms. Turner took medication for her constipation with no relief. *Id.* The following morning, Dr. Friedman stopped at Ms. Turner's room to review her chart but did not enter the room as it appeared she was asleep. *Id.* When Ms. Turner awoke and throughout the morning, she complained of constipation and abdominal cramping. *Id.* At about 11:00 a.m., Dr. Woodworth ordered that Ms. Turner be given a saline enema; then, if no relief, one-half a bottle of magnesium citrate; and if no relief by 2:00 p.m., the other half bottle. *Id.* at 155-56, 381 S.E.2d at 708. None of these efforts were successful and Ms. Turner continued to complain of abdominal cramping. *Id.* at 156, 381 S.E.2d at 708-09. Dr. Friedman failed to see Ms. Turner that afternoon as she had been transferred to another part of the hospital at about 2:00 p.m. *Id.* at 156, 381 S.E.2d at 709. At about 3:00 p.m., Dr. Havard, who had been called upon by Dr. Friedman to evaluate Ms. Turner's cancer, examined Ms. Turner. *Id.* His evaluation was repeatedly interrupted by Ms. Turner's trips to the bathroom. *Id.* He noted on her chart that she was complaining of extreme abdominal cramping, nausea, and vomiting. *Id.*

At 5:00 p.m., Mr. Turner, becoming increasingly concerned about his wife's abdominal pain, made repeated attempts to have his wife examined by a physician. *Id.* Despite his pleas, Ms. Turner was not evaluated until Dr. Woodworth examined her sometime between 7:00 p.m. and 8:00 p.m. *Id.* Upon discovering that Ms. Turner's bowel was distended, Dr. Woodworth immediately ordered blood work and x-rays and contacted the surgeon on duty. *Id.* When Dr. Woodworth returned to Ms. Turner, he found her unresponsive and in shock. *Id.* X-rays revealed that Ms. Turner's colon was perforated. *Id.* At 12:00 a.m., exploratory surgery was performed during which it was discovered that Ms. Turner's abdomen was full of stool. *Id.* It was determined that there was a large

death action against Duke University (Duke), Private Diagnostic Clinic (PDC), and Allan H. Friedman, M.D. (Dr. Friedman), alleging that defendants were negligent in failing to diagnose and treat his wife and that such negligence was a proximate cause of his wife's subsequent death.[21] On April 25, 1986, plaintiff served defendant Duke with his Second Set of Interrogatories in which Interrogatory Number 13 requested Duke to identify any persons who had any knowledge about the care and treatment of Ms. Turner while she was at Duke; to state the substance of that knowledge; and to identify the individual by name, address, telephone number, and job title.[22] On May 27, 1986, Duke responded to Interrogatory Number 13 by referring plaintiff to Ms. Turner's medical records.[23] On July 28, 1986 plaintiff filed a motion to compel, which in part requested the court to compel Duke to answer Interrogatory Number 13 directly, rather than by reference to the medical records.[24] The trial court, on August 6, 1986 entered an Order which provided in part:

> As to Interrogatory No. 13, it appearing that the names and addresses of the witnesses were not listed as requested, and although the objection is sustained,[25] defense counsel is requested to provide this information as to specific individuals if requested at a later date by plaintiff's counsel.[26]

By letter of May 13, 1987, plaintiff requested that Duke, pursuant to the August 6 Order, provide "a list of the names and addresses of the witnesses requested under Interrogatory No. 13."[27] Plaintiff received no response.[28] On June 4, 1987, the trial court ordered all parties to

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impaction of fecal matter in her colon and that nothing could be done to save her life. *Id.* at 156-57, 381 S.E.2d at 709. At 4:10 a.m., Ms. Turner was pronounced dead. *Id.* at 157, 381 S.E.2d at 709. Autopsy revealed the cause of death to be perforation of the colon which led to bacterial peritonitis and sepsis. *Id.* (Bacterial peritonitis is defined as inflammation of the abdomen caused by bacteria, stemming from, for example, a perforated digestive tract. *See* I. Dox, MELLONI'S ILLUSTRATED MEDICAL DICTIONARY, 367 (2d ed. 1985). Sepsis is defined as pus forming microorganisms, or their toxins, in the blood. *Id.*, at 432).

21. *Turner*, 325 N.C. at 154-55, 381 S.E.2d at 709.

22. *Id.* at 166, 381 S.E.2d at 714.

23. *Id.*

24. *Id.*

25. There is no objection set out in defendant's answer to interrogatory No. 13. New Brief of Appellant at 28 n.2, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No.526A88).

26. *Turner*, 325 N.C. at 166, 381 S.E.2d at 714.

27. New Brief for Appellee at 8, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No.526A88) (quoting letter from plaintiff's counsel to Duke's counsel); *Turner*, 325 N.C. at 166, 381 S.E.2d at 714.

28. *Turner*, 325 N.C. at 166, 381 S.E.2d at 714. Defendant Duke argued in its Brief that the August 6, 1986 Order was not violated by Duke, but rather by plaintiff in that plaintiff never requested the information *as to specific individuals*. New Brief for Appellee at 25-26, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 526A88). The North Carolina Court of Appeals recognized that this Order was ambiguous and interpreted it to mean that Duke was required to provide the requested information if the plaintiff asked about specific individuals. Turner v. Duke Univ., 91 N.C. App. 446, 450, 372 S.E.2d 320, 323 (1988). The North Carolina Supreme Court reversed the court of appeals holding and stated: "[Duke's] argument is disingenuous. A more

supplement all outstanding interrogatories on or before July 1, 1987.[29] On June 25, 1987, defendant Friedman provided his supplemental response to interrogatories, in which he identified Dr. Havard, Visalia, California, address unknown, as an expected witness.[30] On July 1, 1987, Duke provided by letter a list of witnesses who were expected to be called at trial; included in the list was a Dr. Havard.[31] For each of the witnesses listed, no address or any information concerning the substance of his or her testimony was provided.[32] On July 6, 1987, Duke hand delivered a Notice to Take the Deposition of Dr. Havard in California on July 21, 1987, six days prior to trial, and a Notice to Take the Deposition of Dr. Scheerer in Florida on July 23, 1987, four days prior to trial.[33] Dr. Havard was an Oncology[34] Fellow who saw Ms. Turner during her stay at Duke.[35] Dr. Scheerer was an Oncologist[36] who had treated Ms. Turner's cancer in Florida.[37]

On July 17, 1987, plaintiff filed a Motion for Sanctions against Duke

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logical interpretation of the order's somewhat ambiguous language is that Duke was directed to provide information as to specific individuals *who Duke intended to present as witnesses* if requested to do so at a later date by plaintiff's counsel." *Turner*, 325 N.C. at 169, 381 S.E.2d at 716 (emphasis added). The supreme court noted that it would "defy logic" to expect the plaintiff to decipher an illegible signature in order to request the information contemplated by Interrogatory No. 13. *Id.* The supreme court then concluded that plaintiff had requested Duke to comply with the August 6, 1986 Order and that Duke failed to do so. *Id.*

29. *Id.* at 166, 381 S.E.2d at 714. The July 1, 1987 deadline was set at a hearing on a motion in this case to which Duke was not a party (plaintiff's Motion to Compel against defendant Friedman). New Brief for Appellee at 8, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 526A88). No one from the firm representing Duke was present at the hearing when the deadline was set. *Id.* In its Brief, Duke referred to the Affidavit of William Daniell (attorney for Dr. Friedman/PDC), which was purported to state that the June 4 Order was entered with the understanding that Duke would be notified before a proposed order was submitted to the court. *Id.* Duke received no such notification. *Id.* Neither the North Carolina Court of Appeals nor the North Carolina Supreme Court addressed Duke's arguments. *Turner*, 91 N.C. App. 446, 372 S.E.2d 320 (1988), *rev'd*, 325 N.C. 152, 381 S.E.2d 706 (1989). Nevertheless, Duke received a copy of the signed order on June 8, 1987 (New Brief for Appellee at 8, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No.526A88)). It can be reasonably inferred that the court did not find Duke's absence from the hearing to be prejudicial.

30. *Turner*, 325 N.C. at 166, 381 S.E.2d at 715.

31. *Id.* More specifically, Duke responded that it expected to call any witnesses called by the plaintiff and defendant Friedman and any health care providers whose names were listed in Ms. Turner's Duke medical chart. New Brief for Appellee at 10, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 526A88). Duke then gave its list of witnesses prefaced by the phrase "individuals include, but are not limited to." *Id.*

32. *Turner*, 325 N.C. at 166, 381 S.E.2d at 714-15.

33. *Id.* at 166-67, 381 S.E.2d at 715.

34. This is defined as a cancer specialist.

35. *Turner*, 325 N.C. at 167, 381 S.E.2d at 715. Dr. Havard was not identified as a possible witness for Duke until July 1, 1987. New Brief for Appellant at 26, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 526A88). The only identification of Dr. Havard in the medical records is on the bottom of one page and it is illegible. *Turner*, 325 N.C. at 169, 381 S.E.2d at 716.

36. *See supra* note 34.

37. *Turner*, 325 N.C. at 167, 381 S.E.2d at 716.

under Rules 11(a), 26(g)[38] and 37(b)(2) of the North Carolina Rules of Civil Procedure alleging: (1) that Duke failed to comply with an order instructing it to answer Interrogatory Number 13 when so requested by plaintiff; (2) that Duke failed to comply with an order instructing it to identify all expert witnesses it expected to call by June 17, 1987; (3) that Duke failed to comply with an order instructing all parties to supplement outstanding interrogatories by July 1, 1987; and (4) that Duke noticed depositions of two expert witnesses post June 17, 1987 for an improper purpose and to harass plaintiff's counsel in contravention of Rule 11(a).[39] Plaintiff sought an order that: (1) struck the notices of deposition of Dr. Havard and Dr. Scheerer as sham and disallowed the deposition testimony into evidence; (2) struck the defensive pleadings of Duke and entered Default Judgment against it; (3) taxed Duke with attorney's fees and expenses in preparing and arguing the motion for sanctions; and (4) granted any other relief the court deemed just and proper.[40] A hearing on the motion was held on July 20, 1987 following which plaintiff's motion was denied.[41]

On July 27, 1987, *Turner* was tried in the Superior Court of Durham County, North Carolina.[42] At the end of plaintiff's evidence, a directed verdict was entered in favor of defendants Friedman and Private Diagnostic Clinic.[43] Thereafter, the jury returned a verdict in favor of Duke.[44]

Plaintiff appealed to the North Carolina Court of Appeals assigning as error: (1) the trial court's order granting a directed verdict as to defendants Friedman and Private Diagnostic Clinic and (2) the denial of plain-

38. Plaintiff did not cite Rule 26 (g) as a basis for his July 17, 1987 motion for sanctions. New Brief for Appellee at 12 n.12, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 526A88). However, Duke concedes in its brief that Rule 26(g) is the mirror image of Rule 11(a) and that the standards of review should be the same. *Id.*

There is a typographical error in the *Turner* North Carolina Supreme Court opinion. *Turner*, 325 N.C. at 167, 381 S.E.2d 715. Rule 26(a) should read Rule 26(g). *See*, *Turner*, 325 N.C. at 157, 381 S.E.2d at 709. *See also supra* note 19.

39. *Turner*, 325 N.C. at 157, 167, 381 S.E.2d at 709, 715; N.C. Gen. Stat. § 1A-1, R. Civ. P. 11 (Supp. 1989).

On April 27, 1987, an order was entered directing plaintiff to identify his expert witnesses on or before May 18, 1987 and defendants to identify their expert witnesses on or before June 17, 1987. New Brief of Appellee at 7, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 526A88); New Brief of Appellant at 3, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 526A88). The order is not discussed in *Turner*, other than when setting out plaintiff's allegations in his motion to compel. *See Turner*, 325 N.C. at 157, 381 S.E.2d at 709. This may be because it was determined that neither Dr. Havard nor Dr. Scheerer were "expert" witnesses and therefore, the April 27 Order was not germane to the court's analysis. *Id.* at 168, 381 S.E.2d at 715-16.

40. *Turner*, 325 N.C. at 167, 381 S.E.2d at 715.

41. *Id.* at 167, 381 S.E.2d at 715.

42. *Turner*, 91 N.C. App. 446, 447, 372 S.E.2d 320, 321 (1988).

43. *Turner*, 325 N.C. at 157, 381 S.E.2d at 709.

44. *Id.*

tiff's motion for sanctions against Duke.[45] On October 4, 1988, the North Carolina Court of Appeals upheld the directed verdict as to defendants Friedman and Private Diagnostic Clinic, with one judge dissenting, and upheld the denial of plaintiff's motion for sanctions.[46] In reviewing the trial court's denial of plaintiff's motion for sanctions, the court of appeals noted that the North Carolina courts had not yet addressed the issue of which standard of review should be applied in reviewing Rule 11(a) decisions of the trial court.[47] Looking to the federal courts for guidance, and citing *Westmoreland v. C.B.S., Inc.*,[48] the court of appeals held that a "clearly erroneous"[49] standard should apply.[50] Applying this standard, the court failed to find that the trial court's order was "clearly erroneous."[51] Plaintiff appealed as a matter of right[52] the affirmance of the order granting a directed verdict to defendants Friedman and Private Diagnostic Clinic[53] and filed a Petition for Discretionary Review as to the denial of his motion for sanctions against Duke.[54] The North Carolina Supreme Court granted plaintiff's Petition for Discretionary Review on December 8, 1988.[55]

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45. *Id.*

46. *Id.* at 154, 381 S.E.2d at 708.

47. *Turner*, 91 N.C. App. at 449, 372 S.E.2d at 322 (1988).

48. 770 F.2d 1168 (D.C. Cir. 1985).

> Under Rule 11, sanctions may be imposed if a reasonable inquiry discloses the pleading, motion, or paper is (1) not well-grounded in fact, (2) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (3) interposed for any improper purpose such as harassment or delay. . . . *[T]he district court is accorded wide discretion. For the court has tasted the flavor of the litigation and is in the best position to make these kinds of determinations.*

Id. at 1174-75 (emphasis added).

49. Black's Law Dictionary defines "clearly erroneous" as: "Findings when based upon substantial error in proceedings or misapplication of law, Kauk v. Anderson, 137 F.2d 331, 333 (8th Cir. 1943); or when unsupported by substantial evidence, or contrary to clear weight of evidence or induced by erroneous view of law. Gasifier Mfg. Co. v. General Motors Corp., 138 F.2d 197, 199 (8th Cir. 1943); Smith v. Porter, 143 F.2d 292, 294 (8th Cir. 1943)." BLACK'S LAW DICTIONARY 228 (5th ed. 1979).

50. "A reviewing court must consider whether the trial court based its decision on the relevant factors before it and whether the judgment was clearly erroneous." *Turner*, 91 N.C. App. at 449, 372 S.E.2d at 323 (1988).

51. *Id.* at 446, 453, 372 S.E.2d at 325 (1988).

52. N.C. GEN. STAT. § 7A-30 (1967) provides in part: "[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . (2) In which there is a dissent."

53. *Turner*, 325 N.C. at 157, 381 S.E.2d at 710. On appeal, the supreme court reversed the court of appeals and held "that the plaintiff presented sufficient evidence to take his case to the jury." *Id.* at 162, 381 S.E.2d at 712. Accordingly, the case was remanded to the superior court for further proceedings. *Id.* at 171, 381 S.E.2d at 717-18. This comment will not analyze the portion of the decision that discusses review of the order granting the directed verdict.

54. *Turner*, 325 N.C. 157, 381 S.E.2d at 710.

55. New Brief of Appellant at 6, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No. 526A88).

III. STANDARD OF REVIEW AT THE TRIAL COURT LEVEL

As stated earlier, given the uniformity of the federal decisions on this issue, this comment will merely set out the areas of concern, provide general guidelines, and direct the reader to supporting authority.

A. *Holding and Analysis of Turner v. Duke University*

The *Turner* court held: "[A] showing of substantive bad faith is unnecessary under N.C.G.S. sec. 1A-1, Rule 11(a). Rather the standard under our Rule 11(a) is one of *objective reasonableness under the circumstances.*"[56] In reaching its conclusion, the court relied on the advisory committee's note and several federal court decisions.[57] The relevant portion of the advisory committee's note states:

> The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. *The standard is one of reasonableness under the circumstances.* This standard is more stringent than the original good faith formula and thus it is expected that a greater range of circumstances will trigger its violation.[58]

Turner provided no further analysis of this issue. To merely state that the standard of review is one of "objective reasonableness" is an over simplification that provides little guidance to the trial court, the appellate court, or the practicing attorney.

B. *The Federal Courts*

In order to fully understand the *Turner* court's standard of review at the trial court level, it is necessary to look to the federal courts for guidance.

1. The "Frivolous" Clause

Under Rule 11, there are two grounds for imposing sanctions.[59] The first is found in the "frivolous" clause.[60] The frivolous clause of Rule 11 is composed of two subparts: (a) whether *reasonable inquiry* was made into the facts; and (b) whether *reasonable inquiry* was made into the law.[61] If either subpart is not satisfied, Rule 11 is violated.[62] The test is whether a reasonable attorney in like circumstances could not believe that the signer's actions are factually and legally justified.[63] The addition

56. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713 (emphasis added).
57. *Id.*
58. FED. R. CIV. P. 11 advisory committee's note (1983) (emphasis added).
59. FED. R. CIV. P. 11 (1983); N.C. GEN. STAT. § 1A-1, R. Civ. P. 11(a) (Supp. 1989); Brown v. Federation of State Medical Bds. of U.S., 830 F.2d 1429, 1435 (7th Cir. 1987).
60. *Brown*, 830 F.2d at 1435.
61. *Id.*
62. *Id.*
63. Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987). *See also* Lyles v. K-Mart Corp., 703 F.

of the phrase "formed after reasonable inquiry," in the new rule, imposes on each attorney an affirmative duty to conduct a reasonable inquiry into the viability of a pleading before it is signed.[64] It is not enough that an attorney acted in good faith or was unaware of the groundless nature of an argument or claim.[65]

Several factors which the trial court should consider in determining whether an attorney has made a reasonable inquiry into the facts of a case include:

(1) the complexity of the facts;[66]

(2) the extent to which a pre-filing investigation would be beneficial;[67]

(3) the amount of time available for investigation;[68]

(4) the extent to which it is necessary to rely on information provided by the client;[69]

(5) the extent to which the attorney relied on the client for factual information;[70]

(6) whether the case was accepted from another attorney;[71] and

(7) the extent to which the development of the facts requires discovery.[72]

Factors that should be considered in determining whether a reasonable inquiry into the law was made include:

(1) the underlying policy that Rule 11 should not chill an attorney's enthusiasm or creativity;[73]

Supp. 435, 440 (W.D.N.C. 1989)("Whether a reasonable attorney in like circumstances *would* believe his actions to be factually and legally justified." (emphasis added)).

64. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985).

65. *Id.*

66. *Brown*, 830 F.2d at 1435; Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 875-76 (5th Cir. 1988) (*en banc*); Harris v. Marsh, 679 F. Supp. 1204, 1385-86 (E.D.N.C. 1987).

67. *Brown*, 830 F.2d at 1435; *Thomas*, 836 F.2d at 875-76; Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1012 (2d Cir. 1986) (all documents were in the control of the opposing party).

68. FED. R. CIV. P. 11 advisory committee's note (1983); *Brown*, 830 F.2d at 1435; Century Prod., Inc. v. Sutter, 837 F.2d 247, 250 (6th Cir. 1988); *Harris*, 679 F. Supp. at 1385-86.

69. FED. R. CIV. P. 11 advisory committee's note (1983); *Brown*, 830 F.2d at 1435; *Century*, 837 F.2d at 250-51; *Harris*, 679 F. Supp. at 1385-86. For more guidance as to when a reasonable inquiry requires more than mere reliance on the representations of the client, *see Harris*, 679 F. Supp. at 1385-86; Fleming Sales Co. v. Bailey, 611 F. Supp. 507, 519 (N.D. Ill. 1985); Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc., 114 F.R.D. 684, 689 (S.D.N.Y. 1987); Whittington v. Ohio River Co., 115 F.R.D. 201, 206 (E.D. Ky. 1987); Continental Air Lines, Inc. v. Group Sys. Int'l Far East, Ltd., 109 F.R.D. 594, 597 (C.D. Cal. 1986).

70. *Thomas*, 836 F.2d at 875-76 and *see infra* note 71.

71. Fed. R. Civ. P. 11 advisory committee's note (1983); Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 557-58 (9th Cir. 1986), *cert. denied*, 484 U.S. 822(1989); *Brown*, 830 F.2d at 1435; *Century*, 837 F.2d at 250-51; *Thomas*, 836 F.2d at 875-76; *Harris*, 679 F. Supp. at 1385-86.

72. *Thomas*, 836 F.2d at 875-76; *Harris*, 679 F. Supp. at 1385-86.

73. FED. R. CIV. P. 11 advisory committee's note (1983). *In re* TCI, Ltd., 769 F.2d 441, 448 (5th Cir. 1985) ("A court must take care not to penalize arguments for legal evolution."); Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987). In *In re TCI*, the attorney argued for expansion of law to allow an exception to the employment at will doctrine for "whistle-blowers." The court held

(2) the time available to the attorney to prepare the document;[74]
(3) the time available to the attorney to research the law;[75]
(4) the plausibility of the legal view;[76]
(5) the identity of the signer (an attorney or a litigant *pro se*);[77]
(6) the complexity of the factual and legal issues;[78]
(7) whether the attorney depended on referring counsel or another member of the bar;[79] and,
(8) whether the document was a good faith effort to extend or modify the law.[80]

2. The "Improper Purpose" Clause

The second ground for the imposition of sanctions under Rule 11 is found in the "improper purpose" clause.[81] The improper purpose clause prohibits the filing of any document for the purpose of harassment, delay, or needless increase in the cost of litigation.[82] As with the frivolous clause, the test is one of objective reasonableness.[83] The signer is not excused because he did not intend to bring about harassment, delay or expense.[84] If *reasonable* steps could have been taken to avoid the harassment, delay, or needless increase in litigation costs, sanctions are appropriate.[85] The acts are therefore *objectively* tested[86] without consideration of the signer's subjective intent.[87]

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that it will not inhibit imaginative legal or factual approaches to the law, especially where the attorney has informed the court that he is seeking a modification or change in the law.

74. FED. R. CIV. P. 11 advisory committee's note (1983); *Brown*, 830 F.2d at 1435; *Thomas*, 836 F.2d at 875-76; *Harris*, 679 F. Supp. at 1385-86.

75. *Harris*, 679 F. Supp. at 1385-86.

76. FED. R. CIV. P. 11 advisory committee's note (1983); *Brown*, 830 F.2d at 1435; *Thomas*, 836 F.2d at 875-76; *Harris*, 679 F. Supp. at 1385-86.

77. *Brown*, 830 F.2d at 1435; *Thomas*, 836 F.2d at 875-76.

78. *Brown*, 830 F.2d at 1435; *Thomas*, 836 F.2d at 875-76; *Harris*, 679 F. Supp. at 1385-86.

79. FED. R. CIV. P. 11 advisory committee's note (1983).

80. *Brown*, 830 F.2d at 1435; *Harris*, 679 F. Supp. at 1385-86. There is a large body of case law on this issue. *See, e.g.*, Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) (a pleader need not be correct in his view of the law, but he must have a good faith belief in the merits of his argument); *In re* TCI, Ltd., 769 F.2d at 445 (5th Cir. 1985) ("if a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable.").

81. *Brown*, 830 F.2d at 1436. *See* FED. R. CIV. P. 11 (1983); N.C. GEN. STAT. § 1A-1, R. Civ. P. 11(a) (Supp 1989).

82. FED. R. CIV. P. 11 (1983); N.C. GEN. STAT. § 1A-1, R. Civ. P. 11(a) (Supp. 1989).

83. Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C., 789 F.2d 1056, 1060 (4th Cir. 1986); *Zaldivar*, 780 F.2d at 831 n. 9.

84. Lieb v. Topstone Indust., Inc., 788 F.2d 151, 157 (3rd Cir. 1986).

85. *Id.*

86. For example: Does Act X + Act Y + Act Z = harassment, delay, or increase in litigation costs?

87. For example: Did the plaintiff intend to harass the defendant when he filed his lawsuit? *See* Zaldivar v. City of Los Angeles, 780 F.2d at 832 (9th Cir. 1986).

3. Overview

Turner provides limited guidance into the standard of review at the trial court level. Fortunately, the case law in the federal courts on this issue is well developed. The rules and factors which have been applied by the federal courts will, no doubt, influence the North Carolina courts. Thus, every trial lawyer should be aware of these guidelines and practice accordingly.

IV. STANDARD OF REVIEW AT THE APPELLATE LEVEL

A. *Holding and Analysis of Turner v. Duke University*

1. The Court's Review of Existing Standards

In *Turner*, the court acknowledged that federal courts have taken three different approaches in determining the applicable standard of appellate review.[88] The standards set out in the first approach are as follows: (1) a legal conclusion that the conduct violated Rule 11 is a legal issue reviewable *de novo*; (2) disputed factual determinations are reviewed under a "clearly erroneous" standard; and (3) the appropriateness of an imposed sanction is reviewed under an "abuse of discretion" standard.[89] The second approach discussed in *Turner* reviews *de novo* the legal sufficiency of a pleading or motion and the determination to impose sanctions. The second approach also reviews the factual reasons and the amount and type of sanctions imposed under an "abuse of discretion" standard.[90] The third approach taken by the federal courts applies an "abuse of discretion" standard across the board.[91]

88. *Id.* at 164-65, 381 S.E.2d at 713-14. Not mentioned in the opinion is the standard applied by the Seventh Circuit in Ordower v. Feldman, 826 F.2d 1569 (7th Cir. 1987), and *In re* Ronco, Inc., 838 F.2d 212 (7th Cir. 1988). In those cases, the court applied an abuse of discretion standard to the legal conclusions drawn, a "clearly erroneous" standard to the factual conclusions rendered, and an abuse of discretion standard to the "appropriateness" of the sanctions imposed. It should be noted that the seventh circuit is split on the issue of which appellate standard is applied. Brown v. Federation of State Medical Bds. of U.S., 830 F.2d 1429 (7th Cir. 1987); Harp Ins. Corp. v. McQuade, 825 F.2d 1101 (7th Cir. 1987); *Ordower*, 826 F.2d 1569 (7th Cir. 1987); *In re* Ronco, 838 F.2d 212 (7th Cir. 1988).

89. *Turner*, 325 N.C. at 164-65, 381 S.E.2d at 713 (citing *Brown*, 830 F.2d 1429 (7th Cir. 1987)); *Zaldivar*, 780 F.2d 823 (9th Cir. 1986).

90. *Turner*, 325 N.C. at 165, 381 S.E.2d at 713-14 (citing Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) (*en banc*); Westmoreland v. C.B.S., Inc., 770 F.2d 1168 (D.C. Cir. 1987); Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985)).

91. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714 (citing Thomas v. Capital Sec. Services, Inc., 836 F.2d 866 (5th Cir. 1988); O'Connell v. Champion Intern. Corp., 812 F.2d 393 (8th Cir. 1987); EBI, Inc. v. Gator Indus., Inc., 807 F.2d 1 (1st Cir. 1986); Cotner v. Hopkins, 795 F.2d 900 (10th Cir. 1986); Stevens v. Lawyer's Mut. Liab. Ins. Co. of N.C., 789 F.2d 1056 (4th Cir. 1986)).

2. The Standard Adopted in *Turner*

The supreme court, "after careful analysis of the rule and the federal decisions,"[92] created its own appellate standard of review:

> The trial court's decision to impose or not impose mandatory sanctions under N.C.G.S. sec. 1A-1, Rule 11 (a) is reviewable *de novo* as a *legal* issue. In the *de novo* review, the appellate court *will determine* (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. sec. 1A-1, Rule 11(a).[93]

3. The *Turner* Court's Analysis

Attempting to apply the newly adopted standard to the facts in *Turner*, the supreme court held that the denial of plaintiff's motion for sanctions under Rule 11(a) was not warranted.[94] In reaching its conclusion, the court focused on whether the trial court's conclusion of law that Duke's conduct did not trigger Rule 11(a) was supported by the facts.[95] The plaintiff alleged:

(1) that Dr. Scheerer was an expert witness and that Duke failed to disclose his identity in a timely manner,

(2) that Duke failed to identify Dr. Havard in response to other discovery requests;

(3) that the doctor's depositions threatened to cause a needless increase in the cost of litigation and an unnecessary delay; and

(4) that the depositions were noticed for an improper purpose, that is, to disrupt his counsel's trial preparation.[96] The court found that allegation numbers 2, 3 and 4 had merit, and in combination, were sufficient to trigger Rule 11(a) sanctions.[97]

Plaintiff's second allegation was based on Duke's failure to identify Dr. Havard in response to plaintiff's Interrogatory Number 13 when requested to do so by plaintiff.[98] The Court Order entered August 6, 1986 compelled Duke to provide the information requested in Interrogatory

92. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714.

93. *Id.* (emphasis added).

94. *Id.* at 166, 381 S.E.2d at 714-15.

95. *Id.* at 166-67, 381 S.E.2d at 715.

96. *Id.* at 167, 381 S.E. at 715.

97. *Id.* The first allegation was rejected because it was determined that Dr. Scheerer was not an expert witness. *Id.* at 167-68, 381 S.E.2d at 715-16. "[N]ot every role of a doctor as a witness . . . is in the capacity of an 'expert' witness." *Id.* at 168, 381 S.E.2d at 715. As this is an ancillary issue, it will not be discussed in this comment.

98. *Turner*, 325 N.C. at 168-69, 381 S.E.2d at 716.

Number 13 "as to specific individuals if requested at a later date by plaintiff's counsel."[99] As discussed earlier,[100] Duke contended the Order of August 6 was ambiguous and that it was under no duty to respond until plaintiff provided the names of specific individuals about which information was requested by Interrogatory Number 13.[101] The supreme court rejected this argument and held that Duke had failed to comply with the August 6 Order when it failed to respond to a written request from plaintiff requesting an answer to Interrogatory Number 13.[102]

Plaintiff's third allegation was that the noticing of the depositions of Dr. Havard and Dr. Scheerer "threatened to cause a needless increase in the costs of litigation and an unnecessary delay."[103] The court noted that Duke had argued at the Rule 11(a) hearing that Dr. Scheerer's deposition testimony was needed because plaintiff planned to introduce testimony at trial on the issue of whether Ms. Turner's cancer[104] was resectable.[105] Duke further asserted at that hearing that Duke's expert witness, Dr. Ozer, would only be giving testimony regarding Ms. Turner's life expectancy.[106] The court then refers to both the deposition and trial testimony[107] of Dr. Ozer, wherein he testifies concerning the resectability of Ms. Turner's cancer.[108] Based on these findings, the court held that Dr. Scheerer's deposition testimony was duplicative.[109]

Continuing with its analysis of plaintiff's third allegation, the court considered two arguments asserted by Duke.[110] First, Duke argued that plaintiff could have reduced costs by accepting its suggestion to take the depositions by phone.[111] The court rejected this argument and found that it had no bearing on the threshold issue of whether Rule 11(a) had been violated.[112] Secondly, the court considered Duke's argument that plaintiff objected to any continuance of the trial.[113] The court deemed

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99. *Id.*

100. *See supra* note 28.

101. *Turner*, 325 N.C. at 169, 381 S.E.2d at 716.

102. *Id.*

103. *Id.* at 167, 381 S.E.2d at 715.

104. For facts of the case, see *supra* note 20.

105. *Turner*, 325 N.C. at 169, 381 S.E.2d at 716. Resectable means removable by surgery. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1983).

106. *Turner*, 325 N.C. at 170, 381 S.E.2d at 716.

107. It is important to note that the trial testimony was not evidence before the judge at the Rule 11(a) hearing.

108. *Turner*, 325 N.C. at 170, 381 S.E.2d at 716-17.

109. *Id.* at 170, 381 S.E.2d at 717.

110. *Id.*

111. *Id.*

112. *Id.* The court, in dicta, did note this argument may have been more properly directed to the mandatory sanctions clause of Rule 11(a). *Id.* All cases of which this writer is aware have indicated that once a violation of Rule 11 occurs, some type of sanction is mandatory. However, the court's intent may have been to simply point out that Duke's argument was relevant to the determination as to the *type* of sanction imposed.

113. *Id.* While it is not apparent from the opinion, this argument was advanced by Duke to

Duke's argument to be supportive of plaintiff's claim that the noticing was filed to cause unnecessary delay.[114] Based on these findings, the court held that plaintiff's third allegation had merit.[115]

Plaintiff's fourth allegation was that the depositions of Dr. Scheerer and Dr. Havard were noticed for an "improper purpose" such as to disrupt plaintiff's counsel's trial preparation.[116] The supreme court agreed with plaintiff's counsel that two depositions, one in Florida four days before trial, and one in California six days before trial, would have rendered him unable to conscientiously prepare his client's case for trial.[117] Based on this finding, the court stated, "[t]he inference that the noticing and taking of the depositions of Dr. Havard and Dr. Scheerer represents an attempt to harass plaintiff's counsel in violation of Rule 11(a) is not difficult to make."[118] The court then concluded: (1) that it was convinced that several violations of Rule 11(a) had occurred; (2) that Rule 11(a) sanctions are mandatory; and (3) that the court of appeals erred in affirming the trial court's denial of plaintiff's motion under Rule 11(a) for sanctions.[119] The court then ordered that the case be remanded for further proceedings consistent with its opinion.[120]

On remand, the Durham County Superior Court entered an Order on October 24, 1989, which: (1) made findings of fact and conclusions of law consistent with the supreme court opinion; (2) made an additional conclusion of law that Duke's counsel's personal, physical, and emotional strain in June 1987 did not mitigate the sanctions necessary in this case;[121] (3) awarded attorney fees in the amount of $6,445; (4) struck the notices of deposition of Dr. Havard and Dr. Scheerer and held that the depositions could not be introduced at any subsequent trial; (5) granted plaintiff a new trial against Duke; (6) awarded costs in the amount of $1,962; and (7) stated that a public reprimand was not necessary.[122]

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show that plaintiff suffered no undue prejudice from the noticing of the depositions and thus, the granting of a new trial against Duke would be inappropriate. New Brief of Appellee at 37, 41, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989)(No. 526A88).

114. *Turner*, 325 N.C. at 170-71, 381 S.E.2d at 717.

115. *Id.*

116. *Id.* at 167, 381 S.E.2d at 715.

117. *Id.* at 171, 381 S.E.2d at 717.

118. *Id.* Although not included in the opinion, evidence before the court which was not available at the Rule 11(a) hearing disputed representations made by Duke at that hearing. *See* New Brief of Appellant at 18, Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989) (No.526A88). Duke represented that it learned just before trial that Dr. Havard would not be available for trial. *Id.* Dr. Friedman's testimony at trial indicated that he was aware of efforts to schedule Dr. Havard's deposition several months before trial.

119. *Turner*, 325 N.C. at 171, 381 S.E.2d at 717.

120. *Id.*, 391 S.E.2d at 717-18.

121. Duke's counsel was five months pregnant, suffered from a ruptured disc and was confined to bed for the last two weeks of June 1987. The court held this did not excuse her failure to provide answers to outstanding discovery as ordered by July 1, 1987.

122. While a public reprimand was not ordered, it is interesting to note than an article in a

4. Critique of the Court's Analysis

The standard of appellate review adopted in *Turner* is confusing and subject to different interpretations. To date, the court has not interpreted the *Turner* standard in another case. One case, *Shook v. Shook*,[123] quoted the test, recognized that it was controlling, and purported to apply it.[124] However, the case provides little insight into the interpretation of the new standard as it simply concludes each requirement was clearly met.[125] Nevertheless, it appears that the court failed to determine whether the conclusion of law was supported by the findings of fact (the second prong of the *Turner* test).[126] More importantly, the court provides no analysis as to how it reached its determination that the *Turner* test was met.[127] Therefore, the *Shook* opinion is of no assistance in interpeting the *Turner* standard.

The new standard is different from any standard applied in the federal or state courts.[128] Consequently, analysis of other jurisdictions provides little assistance in interpreting the new North Carolina standard. There is no discussion in *Turner* as to why this standard was created. Nor is there any indication of which federal decisions influenced the drafting of the new standard. The court has provided few clues about the standard's origin, but the court's reasoning does provide some guidance as to the meaning and intent of the new standard.

a. Background

i. De novo *Hearing*

> A hearing *de novo* literally means a new hearing. . .*It is in no sense a review of the hearing previously held,* but is a complete trial of the controversy, the same as if no previous hearing had ever been held. It differs, therefore, from an ordinary appeal. . .wherein the proceedings of the hearing in the inferior court are reviewed and their validity determined by the reviewing court.[129]

In a *de novo* review, the court has the full power to determine the issues

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weekly professional newspaper discussed the sanctions against the Raleigh attorney at length. *Lawyers Weekly*, 2 NCLW 0941 (Nov. 6, 1989). Thus, the sanction was publicized although not by court order. Turner v. Duke Univ., 85 CVS 1927 (Durham County Super. Ct. Oct. 24, 1989) (Order for Sanctions entered).

123. 95 N.C. App. 578, 383 S.E.2d 405 (1989), *disc. review denied*, 326 N.C. 50, — S.E.2d — (1990) (plaintiff's petition for discretionary review contained a conclusory statement that the *Turner* standard was not properly applied. The petition did not provide the court with any explanation as to why).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See supra*, note 16.

129. Collier & Wallis, Ltd. v. Astor, 9 Cal. 2d 202, 205, 70 P.2d 171, 173 (1937) (emphasis added).

and rights of all parties involved as if the suit had been filed originally in that court.[130] The court hears the merits with no presumption in favor of the lower court's findings.[131] The court is not confined to the evidence presented in the court below, but may hear any additional evidence offered by the parties.[132]

ii. *The Scope of Appellate Review in North Carolina*

As a general rule, conclusions of law drawn by the trial judge from the findings of fact are reviewable *de novo* on appeal.[133] Likewise, findings that are based on a mixed question of fact and law are not binding on the court; but, are also reviewable *de novo*.[134] Conversely, findings of fact are binding on the appellate court where there is some evidence to support the findings.[135] Nevertheless, an issue as to whether the findings of fact are supported by sufficient evidence can be raised on appeal.[136]

b. The New Standard of Appellate Review[137]

i. *The standard* as written *is inconsistent with a* de novo *review.*

As discussed above, a *de novo* hearing is in no sense a review of the

130. *In re* Hayes, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964); Appalachian Poster Advertising Co., Inc. v. Harrington, 89 N.C. App. 476, 478-79, 366 S.E.2d 705, 706-07 (1988).

131. *Id.*; Norris v. Grosvenor Marketing, Ltd., 803 F.2d 1281, 288 n.6 (2d Cir. 1986); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n.7 (2d Cir. 1985)("We need not defer to the lower court's opinion.").

132. Bagley v. Wood, 34 N.C. 90, 91 (1851).

133. Huyck Corp. v. Town of Wake Forest, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987) (citing Humphries v. City of Jacksonville, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980); Food Town Stores v. City of Salisbury, 300 N.C. 21, 26, 265 S.E.2d 123 127, *aff'd*, 321 N.C. 589, 364 S.E.2d 139 (1988)).

134. Olivetti Corp. v. Ames Business Sys., Inc., 319 N.C. 534, 548, 356 S.E.2d 586-87, *reh'g. denied*, 320 N.C. 639, 360 S.E.2d 92 (1987); Taylor v. Cone Mills, 306 N.C. 314, 293 S.E.2d 189 (1982).

135. *In re* Montgomery, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984); Henderson County v. Osteen, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979) (findings of fact are conclusive on appeal if there is evidence to support them); Davidson v. Duke Univ., 282 N.C. 676, 712, 194 S.E.2d 761, 783 (1973) ("findings of fact are conclusive on appeal when supported by any. . . evidence."); N.C.R. App. P. 16(a) (1989) ("Review by the Supreme Court..is to determine whether there is *error of law* in the decision of the Court of Appeals" - not errors of fact).

136. *In re* Montgomery, 311 N.C. at 110, 316 S.E.2d at 252 (citing, N.C. GEN. STAT. § 1A-1, R. Civ. P. 52 (1953)).

137. The new standard is as follows:

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. sec. 1A-1, Rule 11 (a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or to deny the imposition of mandatory sanctions under N.C.G.S. sec. 1A-1, Rule 11 (a).

Turner, 325 N.C. at 165, 381 S.E.2d at 714. (emphasis added).

hearing previously held.[138] It differs from an ordinary appeal wherein the lower court ruling is reviewed to determine if it is valid.[139] Nevertheless, the appellate standard adopted in *Turner requires* the appellate court to review the lower court's judgment, conclusions of law, and findings of fact.[140] Furthermore, it states that it *must* uphold the lower court's ruling if each is supported.[141] This language restricts the court's review to the three determinations set out. It does not allow the appellate court to draw its own findings of fact or conclusions of law.[142] Nor does it take into consideration that new evidence may be presented to the appellate court that was not available to the lower court.[143] Instead, the standard requires that the appellate court only review the trial court's decision to determine if it is in error.[144]

The standard's requirements, as written, are inconsistent with a *de novo* review. In addition, as discussed below, the standard is inconsistent with the review that the *Turner* court conducted.

ii. *The* Turner *court intended to adopt a full* de novo *review, including a* de novo *factual review.*

The *Turner* court considered evidence that was not available at the July 20, 1987 Rule 11(a) hearing.[145] Specifically, the court considered trial testimony which directly disputed representations made by Duke's counsel at the Rule 11(a) hearing.[146] It then drew its own findings of fact

138. Collier & Wallis v. Astor, 9 Cal. 2d 202, 205, 70 P.2d 171, 173 (1937).

139. *Id.*

140. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714. Some courts require that the trial court's order include findings of fact when an award of substantial compensatory sanctions is made. While recognizing that this requirement heightens the responsibilities of the trial court, the *Brown* court stressed its need for findings in order to evaluate the trial court's decision. *Brown*, 830 F.2d at 1440. It also emphasized that the requirement may actually reduce the burden on the trial court as it *remands* cases for findings when necessary. *Id.* (emphasis added). While *Turner* did not address whether it was requiring the trial court to make findings of fact and conclusions of law in its orders, it is apparent from the adopted appellate standard that *findings will need to be included in the trial court's order.* All trial lawyers should be aware of this when preparing orders for the court.

141. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714.

142. *See Id.*

143. *See Id.*; Bagley v. Wood, 34 N.C. 90, 91 (1851).

144. *See Turner*, 325 N.C. at 165, 381 S.E.2d at 714.

145. *See supra* text and accompanying notes 104-08.

146. The Rule 11(a) hearing took place on July 20, 1987. The trial commenced on July 27, 1987. *Id.* The opinion in *Turner* refers to trial testimony of Dr. Ozer which discredited representations made by Duke at the Rule 11(a) hearing. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714. Duke had asserted at the Rule 11(a) hearing that Dr. Ozer would not be testifying at trial as to the resectability of Ms. Turner's cancer and, therefore, Dr. Scheerer's testimony was needed (thus, the reason for the noticing of his deposition). *Id.* At trial, Dr. Ozer testified concerning the resectability of Ms. Turner's cancer. *Id.*

In addition, Duke had represented to the court at the Rule 11(a) hearing that it did not learn of the unavailability of Dr. Havard until just before trial (thus the reason for noticing the deposition so close to the trial date). However, defendant Friedman testified at trial that he was aware that the scheduling of the deposition of Dr. Havard was being planned several months before trial. *Id.* This

which were, in part, supported by evidence that was not before the trial court.[147] The court's consideration of, and reliance on, this evidence (in its determination as to whether the trial court's findings of fact were supported by a sufficiency of the evidence) amounts to a factual *de novo* review. While this is consistent with a *de novo* review, it is inconsistent with the language of the newly adopted standard.[148]

The standard states that the decision whether to impose mandatory sanctions under Rule 11(a) is a legal issue that is reviewable *de novo*.[149] The standard then states that in the *de novo* review, the appellate court will make several determinations, all of which involve questions of law.[150] Regardless of the language in the standard, the *Turner* court conducted a full *de novo* review and did not limit itself to a *de novo* review of the legal issues.

c. *Interpretation of the New Standard*

Under a strict reading of the new standard, it appears that the use of the term *de novo* in the standard has little or no meaning. However, the *Turner* court conducted a *de novo* review. It considered new evidence and drew its own findings and conclusions. It did not follow its articulated new standard. If it had so confined itself, it would not have been free to consider new evidence or to draw its own findings of fact. This is strong evidence that the *Turner* court did not intend the standard to be as strict and confining as it appears. At some point in the analysis the appellate court must be free to consider the evidence *de novo* and draw its own findings of fact and conclusions of law if it so wishes. To reason otherwise, negates the use of the term *de novo*. It is this writer's opinion that the court intended to provide the framework for the appellate court's review, but, to retain the freedom (through the application of a full *de novo* review) to draw contrary findings and/or conclusions if the evidence warrants.

V. STANDARD OF REVIEW OF THE TYPE OF SANCTION IMPOSED

A. The *Turner* Court's Analysis

The *Turner* court, relying on *Westmoreland v. C.B.S., Inc.*[151], adopted

evidence is not mentioned in the *Turner* opinion. *Id.* However, it is difficult to imagine that this evidence did not influence the court in its decision. Especially in light of the court's comment that "the inference that the noticing and taking of the depositions of Dr. Havard and Dr. Scheerer represents an attempt to harass plaintiff in violation of Rule 11(a) is not difficult to make." *Turner*, 325 N.C. at 171, 381 S.E.2d at 717.

147. *Id.* at 169, 381 S.E.2d at 716-17.

148. *See id.* at 165, 381 S.E.2d at 714.

149. *Id.* at 165, 381 S.E.2d at 714.

150. *Id.*

151. 770 F.2d 1168 (D.C. Cir. 1985).

an "abuse of discretion" standard for review of the type of sanctions imposed under Rule 11(a).[152] In *Westmoreland*, the court held that the portion of Rule 11 that states: "*shall* impose sanctions" if a violation occurs, concentrates the court's *discretion* on an appropriate sanction rather than whether or not to impose sanctions.[153] An abuse of discretion standard is applied to review the type of sanctions imposed under Rule 11 in all jurisdictions that have addressed the issue.[154] As the *Turner* court did not expand any further on this issue, a brief look at the federal case law is warranted.

B. *The Federal Courts*

If Rule 11 is violated, the imposition of sanctions is mandatory.[155] However, the trial court has broad discretion in determining what sanction is appropriate.[156] Rule 11 provides that "an appropriate sanction. . . may include an order to pay. . . reasonable expenses. . . including a reasonable attorney's fee."[157] This does not preclude the imposition of other sanctions.[158] Nor does it require that attorney's fees be awarded.[159]

New Rule 11 was enacted because old Rule 11 was not effective in deterring abuses of the legal system.[160] The new Rule is intended to reduce the reluctance of the courts to impose sanctions.[161] The new Rule emphasizes the responsibility of the attorney and reinforces those obligations by the imposition of sanctions.[162] The purpose of sanctions under Rule 11 is to deter the violating attorney as well as other attorneys from violating the Rule.[163] As such, the imposition of sanctions should be educational, rehabilitative, and tailored to the particular wrong.[164] The trial court should choose the sanction that fosters the purpose of Rule 11, taking into account the nature of the case, the parties, and the violation.[165] The court should impose the least severe sanction which ade-

152. *Turner*, 325 N.C. at 165, 381 S.E.2d 714.

153. *Westmoreland*, 770 F.2d at 1174.

154. *See supra* note 16 and text accompanying notes 88-91.

155. FED. R. CIV. P. 11 (1983); N.C. GEN. STAT. § 1A-1, R. Civ. P. 11(a) (Supp. 1989); Brown v. Federation of State Medical Bds. of U.S., 830 F.2d 1429, 1433 (7th Cir. 1987); Cabell v. Petty, 810 F.2d 463 (4th Cir. 1987). Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 876-78 (5th Cir. 1988) (en banc) ("There are no longer any free passes for attorneys who violate Rule 11.").

156. *Cabell*, 810 F.2d at 466; *Thomas*, 836 F.2d at 878.

157. FED. R. CIV. P. 11 (1983) (emphasis added); N.C. GEN. STAT. § 1A-1, R. Civ. P. 11(a) (Supp. 1989) (emphasis added)).

158. Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157-58 (3d Cir. 1986).

159. Doyle v. United States, 817 F.2d 1235, 1237 (5th Cir. 1987).

160. FED. R. CIV. P. 11 advisory committee's note (1983).

161. *Id.*

162. *Id.*

163. Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); *See also Brown*, 830 F.2d at 1439-40.

164. *Thomas*, 836 F.2d at 877.

165. *Id.*

quately furthers the purpose of Rule 11.[166] Nevertheless, drastic remedies such as dismissal and default judgment are also available.[167] The ultimate goal is to strike a balance between policing the exploitation of the legal system and protecting the adversarial system.[168]

VI. CONCLUSION

The amendment of Rule 11(a) was a recognition by the North Carolina General Assembly that litigation abuses need to be policed more closely. The North Carolina courts have now joined the federal courts in applying an objective reasonableness standard of review at the trial court level. This standard gives the trial court the needed flexibility to consider all factors which might have effected the pleader's conduct. In apparently embracing a full *de novo* review at the appellate level, the court has opened the door for a closer review of Rule 11(a) rulings. The full *de novo* review allows the court to scrutinize not only the trial court's ruling, but the pleader's conduct as well. Most importantly, the new appellate standard now allows Rule 11(a) to reach abuses that have, until now, been unreachable. Specifically, representations that are later proven to be false can now be refuted. Evidence discovered after a hearing can be presented to the appellate court. In effect, evidence outside the record is considered. This greatly expands the reach of Rule 11(a).

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166. *Id.* at 877-78; *Brown,* 830 F.2d at 1437.

167. *Donaldson*, 819 F.2d at 1557, n. 6.

168. Century Products, Inc. v. Sutter, 837 F.2d 247, 251 (6th Cir. 1986).

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