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Lesser Sanctions Under Rule 41(b): Prerequisites for Versatility

Few areas of the law are governed by dogma as specifically defined and as strictly adhered to as the rules of civil procedure. One does not expect to find innovative interpretation in the realm of procedural formality. Consider, for example, rule 41(b) of the North Carolina Rules of Civil Procedure. The language is succinct and apparently simple enough for a child to apply. 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 or her.[1] This rule, which serves to ensure adherence to all the rules of civil procedure and orders of the court, apparently leaves little room for judicial maneuvering. In applying rule 41, however, "[c]ourts have generally recognized the need to balance [the] judicial efficiency [protected by the rule] against [the] plaintiffs' right to meaningful access to the judicial system."[2] By tempering the facially harsh impact of rule 41(b) with the exercise of judicial discretion when applying the rule, courts attempt to realize these two goals of efficiency and access.[3] The North Carolina Court of Appeals has firmly asserted the power of the court to shape the rule 41(b) sanction to fit the offense—no longer will application of that rule be viewed as an all or nothing proposition.[4]

The recent case of *Daniels v. Montgomery Mutual Insurance Co.*[5] gave the North Carolina Court of Appeals an opportunity to articulate this view. The court supported the imposition of a lesser sanction than dismissal in response to the rule 41(b) motion in *Daniels*, but found the trial court had abused its discretion by imposing such a sanction absent findings concerning both the "effectiveness of alternative sanctions" and plaintiff's ability to comply with the sanction actually imposed.[6] The court based its decision on federal case law because no North Carolina cases were found directly on point and because section (b) of rule 41 is identical to the federal rule.[7] The federal case law discussed by the court revealed a judicial aversion to dismissing cases unless the violation was flagrant and lesser sanctions had proved futile.[8] This Note examines North Carolina's adoption of the federal approach in the *Daniels* decision. It first analyzes the United States Supreme Court's interpretation of rule 41(b), then reviews the

1. N.C. GEN. STAT. § 1A-1, Rule 41 (Supp. 1985). The severity of dismissal under this rule is obvious: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, . . . operates as an adjudication upon the merits." *Id.*

2. 5 J. MOORE, J. LUCAS, J. WICKER, MOORE'S FEDERAL PRACTICE § 41.11[2], at 41-111 (2d ed. 1986).

3. *E.g.*, Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974)

4. Daniels v. Montgomery Mut. Ins. Co., 81 N.C. App. 600, 605, 344 S.E.2d 847, 850, *disc. rev. allowed*, 318 N.C. 414, 349 S.E.2d 592 (1986).

5. *Id.*

6. *Id.* at 605, 344 S.E.2d at 850.

7. *Id.* at 603, 344 S.E.2d at 849.

8. *Id.* at 604-05, 344 S.E.2d at 849-50.

federal case law the court of appeals considered in its decision. In moving from the national view to a more localized perspective, the Note emphasizes an innovative early case from the United States Court of Appeals for the Fourth Circuit, and finally it examines the application of rule 41(b) in North Carolina cases.

On August 17, 1982, plaintiff Daniels filed an action seeking to recover on a fire insurance policy purchased from defendant.[9] Daniels' action was called for trial three times—the first two instances ended in mistrial. Prior to the first trial in November 1983, the trial judge granted defendant's motion in limine "requesting that the plaintiff be prohibited from introducing evidence or referring to any evidence that no criminal charges had been filed against the plaintiff on account of the fire."[10] The first trial ended in mistrial when plaintiff's counsel informed the court he might be a witness on behalf of his client.[11] The second trial ended in mistrial due to a deadlocked jury.[12] In September 1984, the third trial was held and again ended in mistrial, this time as a result of plaintiff's violation of the court order prohibiting reference to the fact no criminal charges had been filed against plaintiff.[13] "During opening statements to the jury, plaintiff's attorney... made the following statement: 'If Jerry Daniels had burned his house, then he ought to have been prosecuted.'"[14] In response to this clear violation of the court order, defendant moved for a dismissal of plaintiff's case pursuant to rule 41(b).[15] Instead of granting defendant's motion to dismiss, the trial court "imposed a lesser sanction by ordering that the plaintiff be taxed with the reasonable out-of-pocket expenses, including attorney's fees, incurred by the defendant in connection with the third trial."[16] When plaintiff failed to comply with this order, defendant again moved for dismissal and the trial judge granted the motion.[17]

On review, the North Carolina Court of Appeals held that the trial court order imposing the lesser sanction of expenses and attorney's fees was not supported by adequate factfinding and was therefore erroneous.[18] Relying on *Rogers v. Kroger Co.*,[19] a decision from the United States Court of Appeals for the Fifth Circuit, the appellate court adopted the practice of imposing sanctions less

9. *Id.* at 601, 344 S.E.2d at 848. "Defendant answered denying coverage and alleging that 'plaintiff intentionally caused, procured, or acquiesced in the fire for the fraudulent purpose of collecting insurance benefits.'" *Id.*

10. *Id.*

11. *Id.*

12. *Id.* Judge Robert A. Collier, Jr., presiding at the second trial, reiterated Judge Hobgood's order granting defendant's motion in limine.

13. *Id.* at 602, 344 S.E.2d at 848. "Prior to the trial Judge James Davis reiterated the prior court order prohibiting the introduction of evidence or reference to any matter before the jury that no criminal charges had been filed against the plaintiff as a result of the fire." *Id.* at 601-02, 344 S.E.2d at 848.

14. *Id.* at 602, 344 S.E.2d at 848.

15. *Id.* Defendant suggested that, in the alternative, an appropriate lesser sanction would be to tax plaintiff with defendant's costs in defending the action. *Id.*

16. *Id.*

17. *Id.* at 602, 344 S.E.2d at 849.

18. *Id.* at 605, 344 S.E.2d at 850.

19. 669 F.2d 317 (5th Cir. 1982). Some of the alternative lesser sanctions suggested in *Rogers* were: "[a]ssessment of fines, costs or damages against the plaintiff or his counsel, attorney discipli-

drastic than dismissal when such sanctions would promote a more just result.[20] The court went on to say, however, that bare imposition of lesser sanctions was not enough.[21] The use of lesser sanctions required the concomitant evaluation of those sanctions for both effectiveness and feasibility.[22]

The court of appeals also adopted the reasoning of *Hornbuckle v. Arco Oil & Gas Co.*,[23] in which the United States Court of Appeals for the Fifth Circuit affirmed imposition of a sanction less than dismissal when "plaintiff's lawyer refused to start the trial because of a conflict in his case schedule."[24] The *Hornbuckle* court demanded that before a lesser sanction is imposed the court must make "express findings concerning whether plaintiff Hornbuckle had the ability to pay the sum assessed as an alternative to dismissal, and, if not, whether any sanction less severe than dismissal, including those that might be assessed against counsel, would be appropriate and sufficient."[25] In ordering plaintiff in *Daniels* to pay defendant's costs and attorney's fees for the third trial, the trial court failed to assess the effectiveness of alternative sanctions and plaintiff's ability to pay the costs and fees.[26] The North Carolina Court of Appeals, by vacating both the dismissal and the order taxing costs and attorney's fees against plaintiff, not only upheld the use of a lesser sanction, but improved the image of such sanctions by requiring they be found effective and appropriate *prior* to implementation.[27]

To analyze the effect *Daniels* will have on the use of rule 41(b) in North Carolina, the origin and purpose of the rule must first be considered. At common law there were no provisions for dismissing an action and the rare invocation of dismissal was construed as a nonsuit.[28] The premise of this construction was that under either dismissal or nonsuit cases were not decided on their merits.[29] The court's power to dismiss has been described as "inherent" and the promulgation of Federal Rule of Civil Procedure 41 in 1938 served as federal

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nary measures, conditional dismissal, dismissal without prejudice, and explicit warnings . . . ." *Id.* at 321.

20. *Daniels*, 81 N.C. App. at 604, 344 S.E.2d at 849-50.

21. *Id.* at 605, 344 S.E.2d at 850.

22. *Id.* The court did not specifically state that the district court had "abused its discretion" in dismissing plaintiff's case, but the failure to make the necessary findings of fact was unequivocally labeled as error. *Id.*

23. 732 F.2d 1233 (5th Cir. 1984), *cert. denied*, 106 S. Ct. 1198 (1986). *Hornbuckle* revolved around plaintiff's counsel scheduling himself to be in both Fort Worth and Dallas. The Dallas judge telephoned the Fort Worth judge who agreed to continue counsel's case. Plaintiff's counsel, having planned on being in Fort Worth, refused to start trial in Dallas because he was unable to "shift gears" from his involvement in the Fort Worth case. *Id.* at 1235.

24. *Daniels*, 81 N.C. App. at 605, 344 S.E.2d at 850.

25. *Hornbuckle*, 732 F.2d at 1237.

26. *Daniels*, 81 N.C. App. at 605, 344 S.E.2d at 850.

27. *Id.*

28. 2 T. WILSON & J. WILSON, NORTH CAROLINA PRACTICE AND PROCEDURE § 1641, at 121 (2d ed. 1956).

29. *Id.* "[D]ismissing an action . . . was a regular proceeding in equity by which the plaintiff could end his suit at any time before decree upon the payment of costs, or the suit was dismissed upon the merits." *Id.*

statutory recognition of this power.[30] The rule was primarily aimed at minimizing instances in which plaintiffs sought to punish defendants by dragging them into court and keeping them there, thus undermining the judicial system and abusing individual courts.[31] North Carolina adopted the federal rule in 1967,[32] although the power of the court to dismiss for failure to prosecute already was well established and state statutes had long provided for court control over its own affairs.[33]

Because rule 41(b) is a federal rule, it is subject to United States Supreme Court interpretation. *Link v. Wabash Railroad Co.*[34] is the seminal Supreme Court case interpreting rule 41(b). In *Link* the Court upheld the dismissal of a six-year-old civil case marred with delays that culminated in plaintiff's attorney's unexplained failure to appear at a pretrial conference.[35] The *Link* decision emphasized the purposes of rule 41(b) by asserting three points. First, federal courts have authority "to dismiss *sua sponte* for lack of prosecution" based not on a rule or statute, but on their inherent power "to manage their own affairs."[36] Despite the purported "inherentness" of this power, the Court gave considerable weight to the deliberateness of the attorney's failures before exercising the power "within the bounds of permissible discretion."[37] Second, courts need not give notice to plaintiff that the case has been dismissed.[38] Third, the Court refused to excuse plaintiff for errors attributable primarily to his or her attorney.[39] The Court noted:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney

30. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2361, at 149 (1971).

31. McCann v. Bentley Stores Corp., 34 F. Supp. 234 (W.D. Mo. 1940); *see* N.C. GEN. STAT. § 1A-1, Rule 41 comment.

32. An Act to Amend the Laws Relating to Civil Procedure, ch. 954, § 1, 1967 N.C. Sess. Laws 1274, 1316 (codified at N.C. GEN. STAT. § 1A-1, Rule 41 (Supp. 1985)).

33. Motion for nonsuit was earlier governed by N.C. GEN. STAT. § 1-183 (1943), *repealed by* Act of June 27, 1967, ch. 954, 1967 N.C. Sess. Laws 1274: "When on trial of an issue of fact in a civil action or special proceeding, the plaintiff has introduced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit." In nonjury trials the motion for nonsuit has been replaced by the motion for a dismissal. *See* Phillips v. Woxman, 43 N.C. App. 739, 741, 260 S.E.2d 97, 99 (1979), *cert. denied*, 299 N.C. 545, 265 S.E.2d 404, *cert. denied*, 449 U.S. 835 (1980).

The motion to dismiss for failure to prosecute, prior to adoption of rule 41(b), was governed by N.C. GEN. STAT. § 1-222 (1943), *repealed by* Act of June 27, 1967, ch. 954, 1967 N.C. Sess. Laws 1274. Subsection (4) of this section stated: "The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served." *Id.*

34. 370 U.S. 626 (1962).

35. *Id.* at 633-34. *Link* was a personal injury case that the Court dismissed sua sponte. *Id.* at 627-29.

36. *Id.* at 629-30.

37. *Id.* at 633-34. The Court stated that "it could reasonably be inferred from his absence, as well as from the drawn-out history of the litigation [that plaintiff's counsel was] deliberately proceeding in dilatory fashion." *Id.*

38. *Id.* at 632.

39. *Id.* at 633-34.

as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.[40]

In dissent, Justice Black vehemently criticized the majority opinion as "a good illustration of the deplorable kind of injustice that can come from the acceptance of any such mechanical rule."[41] He argued for the plaintiff's right to rely minimally on an attorney, and against application of the rule as a boon to judicial efficiency.[42] Because dismissal based on attorney failure is directed at otherwise meritorious lawsuits, "such dismissals will be more than offset by the increased burden on appellate courts."[43]

The lower courts' reviews of rule 41(b) dismissals routinely rely on evidence of a deliberate record of delay in assessing trial court action according to the abuse of discretion standard propounded in *Link*.[44] However, in applying that standard federal courts have limited permissible discretion in ways more attuned to Justice Black's dissent than to the majority opinion.[45] The language of the United States Court of Appeals for the Third Circuit in *Poulis v. State Farm Fire & Casualty Co.*[46] is illustrative:

> Although sanctions are a necessary part of any court system, we are concerned that the recent preoccupation with sanctions and the use of dismissal as a necessary "weapon" in the trial court's "arsenal" may be contributing to or effecting an atmosphere in which the meritorious claims or defenses of innocent parties are no longer the central issue.[47]

Circuit courts have recognized the severity of a dismissal with prejudice under rule 41(b) and consequently have been wary of imposing such a sanction absent a showing of "a clear record of delay or contumacious conduct by the

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40. *Id.*

41. *Id.* at 645 (Black, J., dissenting). Justice Black felt plaintiff's delays were not extraordinary and found defendant's lawyers and the trial judge more blameworthy than plaintiff for the delays. Justice Black blamed the trial judge for a three-year delay caused by his erroneous initial dismissal of the case. Plaintiff's delay in answering interrogatories was dwarfed by defendant's six-year delay in conceiving and preparing them. *Id.* at 637-41 (Black, J., dissenting).

42. *Id.* at 647-49 (Black, J., dissenting). Justice Black noted:

> [I]t seems to me to be contrary to the most fundamental ideas of fairness and justice to impose the punishment for the lawyer's failure to prosecute upon the plaintiff who, so far as this record shows, was simply trusting his lawyer to take care of his case as clients generally do.

Id. at 643 (Black, J., dissenting).

43. *Id.* at 649 (Black, J., dissenting).

44. *See, e.g.*, Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863 (3d Cir. 1984) (litigation characterized by consistent delay of plaintiff's counsel); Donnelly v. Johns-Manville Sales Corp., 677 F.2d 339, 342 (3d Cir. 1982) ("[D]ismissal is a drastic sanction and should be reserved for those cases where there is a clear record of delay . . . ."); Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974) ("facts do not depict 'a drawn out history' of 'deliberately proceeding in a dilatory fashion' as in Link v. Wabash R.R., 370 U.S. 626, 633 . . . ."); Von Poppenheim v. Portland Boxing & Wrestling Comm'n, 442 F.2d 1047, 1054 (9th Cir. 1971) ("Somewhere along the line, the rights of the defendants to be free from costly and harassing litigation must be considered. So too must the time and energies of our courts . . . ."), *cert. denied*, 404 U.S. 1039 (1972); Durham v. Florida East Coast Ry. Co., 385 F.2d 366 (5th Cir. 1967) (relying on *Link*, court notes dismissal only in cases of "a clear record of delay or contumacious conduct by the plaintiff").

45. *See supra* notes 41-43 and accompanying text.

46. 747 F.2d 863 (3d Cir. 1984).

47. *Id.* at 867.

plaintiff."[48]

In evaluating the propriety of trial court decisions to dismiss, circuit courts consistently have looked for a clear record of delay, and have evaluated contumaciousness in terms of the applicability of lesser sanctions.[49] In *Industrial Building Materials, Inc. v. Interchemical Corp.*[50] the United States Court of Appeals for the Ninth Circuit found the district court had improperly dismissed the case for noncompliance with a court order without considering other alternatives.[51] The court stated that the district court's exercise was reviewable, but "would certainly not be so vulnerable to challenge were it not for the question of whether suitable alternatives to dismissal were available."[52] Another important consideration in assessing plaintiff contumaciousness was whether the delay or disobedience was intentional.[53] The United States Court of Appeals for the Eighth Circuit, in *First Iowa Hydro Electric Cooperative v. Iowa-Illinois Gas & Electric Co.*,[54] upheld the trial court's dismissal based on the "wilful and deliberate" refusal of plaintiffs to comply with court orders to testify and to make a deposit for master's fees.[55]

Basing an abuse of discretion standard on a showing of plaintiff procrastination and contumaciousness may have provided a minimal guide, but reviewing courts began to create their own formulas to make the standard more workable. In *Rogers*, the United States Court of Appeals for the Fifth Circuit succinctly enunciated a formula for reviewing trial court use of rule 41(b) dismissal.[56] This formula breaks down the criteria for dismissing an action into two requisite and three aggravating factors.[57] The requisite factors are: (1) a clear record of delay and (2) a finding that imposition of lesser sanctions would be futile.[58] Requisite factors are the most pervasively articulated and can, by themselves, justify dis-

48. Donnelly v. Johns-Manville Sales Corp., 677 F.2d 339, 342 (3d Cir. 1982), *quoted in* Poulis v. State Farm Fire & Casualty Co. 747 F.2d 863, 866 (3d Cir. 1984); *see also Poulis*, 747 F.2d at 868-69 ("this litigation has been characterized by a consistent delay by plaintiff's counsel"; in determining whether the attorney's conduct was willfull or not, however, the court found "no basis for terming counsel's conduct in this case 'contumacious' "); Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974) (court noted that dismissal was appropriate only in extreme circumstances and cited the language of Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 368 (5th Cir. 1967), in which the United States Court of Appeals for the Fifth Circuit stated that dismissal was only permitted "in the face of a clear record of delay or contumacious conduct by the plaintiff."

49. *See, e.g.*, Rogers v. Kroger Co., 669 F.2d 317 (5th Cir. 1982); Von Poppenheim v. Portland Boxing & Wrestling Comm'n, 442 F.2d 1047 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). In *Von Poppenheim*, two lesser sanctions proved futile—plaintiff refused to file a specific pretrial statement promptly, and when the statement was filed it did not conform to the court order for specificity. *Id.* at 1050-51.

50. 437 F.2d 1336 (9th Cir. 1970).

51. *Id.* at 1338-39.

52. *Id.* at 1339.

53. Courts were invoking the ground of "deliberateness" stressed in the Supreme Court's opinion in *Link*. *See supra* note 37 and accompanying text.

54. 245 F.2d 613 (8th Cir.), *cert. denied*, 355 U.S. 871 (1957).

55. *Id.* at 628-29.

56. *Rogers*, 669 F.2d at 320.

57. *Id.*

58. *Id.*

missal.[59] Aggravating factors, on the other hand, refine the overall analysis of court discretion by identifying and incorporating case-specific considerations that help either to justify or undermine trial court implementation of rule 41(b) dismissal.[60] They are reminiscent of the considerations Justice Black feared would lay dormant if the *Link* majority decision was mechanically applied.[61] The three aggravating factors are: "the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, the degree of actual prejudice to the defendant, and whether the delay was the result of intentional conduct."[62] The Fifth Circuit, replete with decisions recognizing various factors, clarified the factor-by-factor analysis into a workable formula for reviewing dismissals.[63]

When the court applied its formula to the facts in *Rogers*, an employment discrimination action, it found no clear record of delay, no indication that the trial court had considered lesser sanctions, and none of the aggravating elements "present in most of the prior dismissals [the court had] affirmed."[64] In assessing the aggravating factors the court emphasized that plaintiff's attorney, not the plaintiff, was blameworthy, that the defendant offered no evidence of actual prejudice, and that delays were a product of "ineptitude" rather than intentional disobedience.[65]

Given the clarity of the *Rogers* analysis it is not surprising that other circuits adopted its factor-by-factor approach in reviewing their own dismissals. The *Poulis* case, which involved a more complicated application of the factors enunciated in *Rogers*, is an example of such a case. Plaintiffs in *Poulis* sought to recover on a fire insurance policy and defendant denied liability.[66] The trial court found that plaintiffs took no action seeking discovery, failed to answer State Farm's interrogatories, and "did not file their pre-trial statement . . . as required."[67] After being advised that his statement was overdue, plaintiff's counsel promised to submit the statement the next day but failed to do so.[68] The district court dismissed the case sua sponte and the United States Court of Appeals for the Third Circuit reviewed this exercise of discretion using the *Rogers* criteria as well as a sixth factor—the meritoriousness of the plaintiff's original claim.[69]

59. *Id.* at 320 n.5.

60. *Id.* at 320.

61. *Link,* 370 U.S. at 648-49 (Black, J., dissenting)

62. *Rogers*, 669 F.2d at 320.

63. *Id.* at 320-23.

64. *Id.* at 322.

65. *Id.* at 322-23. Determining whether the defendant is prejudiced is often a difficult task because any delay could be interpreted as somewhat prejudicial unless the defendant was directly responsible for it. "[S]ome courts have held that prejudice resulting from a delay may be presumed." 5 J. MOORE, J. LUCAS, J. WICKER, *supra* note 2, § 41.11[2], at 41-131.

66. *Poulis*, 747 F.2d at 865.

67. *Id.*

68. *Id.*

69. *Id.* at 868-70. The *Poulis* court did not attribute its analysis to the *Rogers* formula and did not distinguish between requisite and aggravating factors, but did state that it was "guided by the manner in which the trial court balanced" factors identical to those enunciated in *Rogers*. *Id.* at 868.

Review of the facts in *Poulis* revealed a "pattern of dilatoriness," but it also exposed an erroneous district court conclusion that no other sanctions were appropriate.[70] The circuit court suggested that the trial court "could have imposed on plaintiff's counsel the costs, including attorney's fees," directly caused by counsel's dilatoriness.[71] The court also found no culpability on the part of plaintiff for the late pre-trial statement and "no basis for terming counsel's conduct in this case 'contumacious.' "[72] The circuit court did find, however, that defendant had been prejudiced by the delays and failures to answer interrogatories.[73] In terms of the *Rogers* formula, the *Poulis* case contained the requisite factor of a history of delay, which alone could justify dismissal, and one aggravating factor, prejudice to the defendant.[74] The *Poulis* court, in assessing its sixth factor, meritoriousness of the claim, found weaknesses in plaintiff's assertions.[75] The court concluded that, although it might have decided the question differently, it found no abuse of discretion in the trial court's dismissal order.[76] The *Poulis* decision reveals how the *Rogers* factor-by-factor analysis makes exercise and review of discretionary dismissal less of a mystery by identifying the pivotal criteria that come into play when courts exercise such discretion.

Although *Rogers* provided an evolutionary framework for reviewing dismissal, its factors were gleaned from prior cases in which courts had implemented the factors in their own way.[77] The United States Court of Appeals for the Fourth Circuit, in *Reizakis v. Loy*,[78] also borrowed individual criteria from circuit court precedents throughout the federal system in an effort to make its analysis of rule 41(b) more thorough.[79] The *Reizakis* court did not distinguish between requisite and aggravating factors nor did it provide as thorough a framework as *Rogers*, but it did develop a review approach consisting of factors identical to those used in *Rogers* eight years later.[80] Furthermore, the *Reizakis* opinion emphasized that rule 41(b) is discretionary by stating that "courts interpreting the rule uniformly hold that it cannot be automatically or mechanically applied."[81] The court reiterated the concern expressed in Justice Black's dissent

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70. *Id.* at 868-69.

71. *Id.* at 869.

72. *Id.* at 868-69.

73. *Id.* at 868. The court found prejudice in that defendant was "obliged to file its pretrial statement without the opportunity to review plaintiffs' pretrial statement which was due to be filed first." *Id.*

74. *Id.* at 868-70; *see supra* text accompanying notes 57-63.

75. *Id.* at 869-70. Plaintiff's claim was in fact untimely because it was not brought within one year of the loss, as was required by the policy, but the trial court denied defendant's motion to dismiss on this ground because the motion was filed more than two weeks after the close of discovery in violation of court "policy." *Id.* at 870.

76. *Id.*

77. *Rogers*, 669 F.2d at 320-21. The court provided a citation list of prior cases and the factors they used to review dismissal. *Id.* at 320.

78. 490 F.2d 1132 (4th Cir. 1974).

79. *Id.* at 1135.

80. *Id.* The court of appeals found no deliberate delay, no personal responsibility on the part of plaintiff, no actual prejudice to defendant, and no effort by the trial court to consider alternative measures. *Id.* at 1135-36.

81. *Id.* at 1135.

in *Link* by noting judicial reluctance to punish a client for the behavior of his or her lawyer: "[w]here a party is not responsible for the fault of his attorney, dismissal may be invoked only in extreme circumstances."[82]

The factors considered in *Reizakis* and restructured in *Rogers* provide a surprisingly firm footing for appellate court review according to a standard as elusive as "abuse of discretion." The analysis these cases supply, combined with a pervasive recognition that dismissal with prejudice is an extreme sanction, illuminate the federal courts' aversion to dismissal absent the flagrant violation of court rules or orders, and the futility of lesser sanctions.

Some of the factors that federal circuit court cases have recognized have been adopted by North Carolina courts. Most of the North Carolina cases focus on the first part of rule 41(b), which allows dismissal for violation of another rule of civil procedure. Although these cases are not directly on point with *Daniels*, which involved a violation of a specific court order instead of a rule, they do illustrate North Carolina treatment of dismissal decisions. In *Harris v. Maready*[83] the North Carolina Supreme Court upheld the trial court's denial of a motion to dismiss and reversed the North Carolina Court of Appeals' contrary holding.[84] Plaintiff in *Harris* violated rule 8(a)(2) of the North Carolina Rules of Civil Procedure, which states in part: "wherein the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars ($10,000). . . ."[85] Plaintiff violated the rule by demanding an amount in excess of five million dollars in her complaint in a malpractice suit against a law firm.[86] In its discretion the trial court denied defendant's motion to dismiss.[87]

In upholding the trial court decision, the supreme court in *Harris*, relying on cases in New York and Washington, stated:

> We agree with the view expressed in other jurisdictions that dismissal for a violation of Rule 8(a)(2) is not always the best sanction available to the trial court and is certainly not the only sanction available. Although an action may be dismissed under Rule 41(b) for a plaintiff's failure to comply with Rule 8(a)(2), this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice.[88]

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82. *Id.*

83. 311 N.C. 536, 319 S.E.2d 912 (1984).

84. *Id.* at 552, 319 S.E.2d at 922.

85. N.C. GEN. STAT. § 1A-1, Rule 8(a)(2)(1983).

86. *Harris*, 311 N.C. at 549-50, 319 S.E.2d at 920-21.

87. *Id.* at 550, 319 S.E.2d at 921.

88. *Id.* at 551, 319 S.E.2d at 921-22. The New York case was Pizzingrilli v. Von Kessel, 100 Misc. 2d 1062, 1065-66, 420 N.Y.S.2d 540, 542-43 (1979), in which the court expressed the view that dismissal was too drastic a sanction for violation of the prohibition against stating an amount of money demanded. The Washington case was McNeal v. Allen, 95 Wash. 2d 265, 621 P.2d 1285 (1980), in which a doctor unsuccessfully attempted to sue for defamation a plaintiff who violated a state prohibition on stating amount of damages in a malpractice suit. The court upheld the trial court's determination that the statute was procedural, not substantive. *Id.* at 267, 621 P.2d at 1286.

In addition to this emphasis on lesser sanctions, North Carolina courts have also recognized the deliberateness of a violation as a factor in assessing the propriety of dismissal.

The court of appeals in *Stokes v. Wilson and Redding Law Firm*[89] explained the significance of deliberateness by distinguishing the violations in *Stokes* and in *Harris* from the violation in the earlier case of *Schell v. Coleman*.[90] In *Schell* plaintiff failed to amend his complaint when given the opportunity, and aggravated his violation by serving the defendant-attorney in open court.[91] In *Harris* plaintiff failed to amend, but did not aggravate the situation so egregiously. In *Stokes* the violation was even less blatant because plaintiff was never given an opportunity to cure his violation.[92] The North Carolina Court of Appeals in *Stokes*, based on the rationale of *Harris*, found the trial court had erred in dismissing plaintiff's complaints with prejudice.[93] Indeed, North Carolina courts give considerable weight to the aggravating factor of contumaciousness recognized in the federal system.

Butler Service Co. v. Butler Service Group[94] addressed the aggravating factor of plaintiff counsel's personal culpability.[95] *Butler* focused on a violation of rule 3 of the General Rules of Practice for the Superior and District Courts that states "when an attorney has conflicting engagements in different courts, priority shall be as follows: appellate courts, superior court, district court, magistrate's court."[96] Plaintiff's counsel was in district court when his case was called in superior court.[97] The court of appeals pointed out that "[p]laintiff . . . was standing outside of superior courtroom #304, ready and willing to prosecute its case at the time the case was dismissed."[98] In distinguishing between violations attributable to plaintiff personally and violations attributable to counsel, the court suggested that imposition of sanctions against attorneys "are clearly more palatable than the Rule 41(b) dismissal in this case."[99]

These earlier North Carolina cases indicate that the factors worthy of consideration in federal court review are deemed equally worthy in North Carolina appellate review. The *Daniels* decision emphasized this point by approving trial court imposition of lesser sanctions pursuant to rule 41(b) when a plaintiff has

89. 72 N.C. App. 107, 323 S.E.2d 470 (1984).

90. 65 N.C. App. 91, 308 S.E.2d 662 (1983); *see Stokes*, 72 N.C. App. at 116-18, 323 S.E.2d at 476-78.

91. *Schell*, 65 N.C. App. at 94, 308 S.E.2d at 664. The aggravation did not stop at service. Plaintiff informed the North Carolina Department of Insurance that "a lawsuit existed against [defendant] attorneys in the amount of two million dollars ($2,000,000) for misappropriations, and [caused] adverse radio and newspaper publicity." *Id.*

92. *Stokes*, 72 N.C. App. at 116-17, 323 S.E.2d at 477.

93. *Id.* at 118, 323 S.E.2d at 478.

94. 66 N.C. App. 132, 310 S.E.2d 406 (1984).

95. *Id.* at 133, 310 S.E.2d at 406.

96. *Id.* at 134, 310 S.E.2d at 407. The General Rules of Practice for the Superior and District Courts were adopted pursuant to N.C. GEN. STAT. § 7A-34 (Supp. 1985).

97. *Butler*, 66 N.C. App. at 134, 310 S.E.2d at 407. The court noted, "Rule [3] does not definitely address the 'Catch-22' plaintiff's counsel found himself in . . . ." *Id.*

98. *Id.* at 135, 310 S.E.2d at 408.

99. *Id.*

violated a specific court order.[100] The *Daniels* court noted that the trial court had the equitable power to impose attorney's fees "when the interests of justice so require" and cited a recent statutory provision allowing "the assessment of attorney's fees against a party in cases where the court finds 'that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading . . . .' "[101] In addition to the court's inherent power to manage and control its proceedings, the *Daniels* court noted "North Carolina courts have the inherent power to impose fines and sanctions against an attorney for disobeying a court order."[102] The emphasis is on preserving the plaintiff's claim if less stringent measures will cure the plaintiff's offense.

Although the *Daniels* court did not use all of the factors enumerated in *Rogers*, an evaluation of the *Daniels* facts in terms of those factors illustrates how North Carolina has adopted some of the federal tactics for reviewing dismissals. First, the events in *Daniels* reveal no clear record of delay.[103] Second, the trial court imposed a lesser sanction with which plaintiff failed to comply.[104] Third, the facts indicated and plaintiff's counsel strenuously argued that "plaintiff was blameless and that the violation of the motion in limine was due solely to the actions of his counsel at trial."[105] Fourth, the degree of actual prejudice to defendant, as indicated by the sanction imposed by the trial court, was limited to the expenses incurred by defendant in connection with the third trial.[106] Fifth, the court made no finding of intentional misconduct, despite defendant's assertion that the record left no doubt that plaintiff's failure was intentional.[107] According to this five part formula, the facts of *Daniels* yield one requisite factor—the futility of a lesser sanction—and possibly one aggravating factor—intentional misconduct. Under this analysis, the trial court was arguably within its permissible discretion in dismissing the case.

The primary significance of *Daniels* is that the North Carolina Court of Appeals found the trial court had *abused* its discretion in dismissing on these facts.[108] The "abuse" did not result from total ignorance of one of the impor-

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100. *Daniels*, 81 N.C. App. at 605, 344 S.E.2d at 850.

101. *Id.* at 603, 344 S.E.2d at 848-49. The court was referring to N.C. GEN. STAT. § 6-21.5 (Supp. 1985).

102. *Daniels*, 81 N.C. App. at 604, 344 S.E.2d at 850.

103. *Daniels*, 81 N.C. App. at 601-02, 344 S.E.2d at 849-50. The *Daniels* court did not make specific findings with regard to each factor, but each factor can be approximately evaluated using the facts on record. Certainly the delay resulting from the first two trials cannot be blamed on plaintiff dilatoriness. *See supra* text accompanying notes 11-12.

104. *Daniels*, 81 N.C. App. at 602, 344 S.E.2d at 848.

105. *Id.* at 604, 344 S.E.2d at 849. The fact the violation in *Daniels* occurred as a result of a statement by plaintiff's attorney in court weakens the contention that plaintiff was personally blameworthy.

106. *Id.* at 602, 344 S.E.2d at 848.

107. Brief for Appellee at 8, *Daniels* (No. 8522SC1011). "[T]he record leaves no doubt that the plaintiff's failure to comply with Judge Davis' Order was intentional." *Id.* The reason the court of appeals did not evaluate plaintiff's intent in failing to comply with the order taxing costs (Judge Davis' Order) was its conclusion that the order was erroneously issued. *Daniels*, 81 N.C. App. at 605, 344 S.E.2d at 850. The critical intent of the *Rogers* analysis in *Daniels* is the intent connected with plaintiff's counsel's misconduct in court.

108. *Daniels*, 81 N.C. App. at 605, 344 S.E.2d at 850.

tant factors, but from too cursory an application of a lesser sanction.[109] The *Daniels* decision hinged on the trial court's conclusion that plaintiff was not personally blameworthy and that a lesser sanction was appropriate.[110] The abuse occurred in concluding that imposition of costs and attorney's fees on plaintiff was the appropriate lesser sanction without adequate factfinding, then dismissing the case based on plaintiff's failure to comply with this "appropriate" lesser sanction.[111]

Many federal court decisions have merely urged the imposition of lesser sanctions, but have not expressly required the district courts to determine whether the lesser sanction would be feasible and effective.[112] This loose requirement probably results because those courts were dealing with cases in which the notion of alternative sanctions was not even broached. In *Von Poppenheim v. Portland Boxing & Wrestling Commission*[113] the United States Court of Appeals for the Ninth Circuit affirmed a district court dismissal in which two attempted alternative sanctions had proved futile.[114] The court noted that "[t]he district judge . . . need not exhaust [all sanctions] before finally dismissing a case. The exercise of his discretion to dismiss requires only that possible and meaningful alternatives be reasonably explored, bearing in mind the drastic foreclosure of rights that dismissal effects."[115]

The "reasonable exploration" suggested in *Von Poppenheim* was refined by the United States Court of Appeals for the Fifth Circuit in *Hornbuckle* to include a court determination of plaintiff's ability to comply with the sanction imposed.[116] The practicality for requiring such a determination is unquestionable, but few circuits actually have imposed such a requirement on district courts. *Daniels* is chiefly significant in that it adopts the *Hornbuckle* approach and incorporates that decision's prerequisites for imposition of sanctions into the formula for reviewing dismissals.[117] The *Daniels* decision makes clear that in North Carolina, when a court chooses to impose a sanction less harsh than dismissal under rule 41(b), it must first determine the effectiveness and feasibility of the sanction in order to withstand appellate review.[118] The logic behind such a requirement is so clear that perhaps other appellate courts have assumed that trial courts would undertake the necessary factfinding without a specific requirement to do so. In light of *Daniels*, the North Carolina Court of Appeals now

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109. *Id.*

110. *Id.* at 602, 344 S.E.2d at 848.

111. *Id.* at 605, 344 S.E.2d at 850.

112. *See* cases cited *supra* note 44. The main objective of the circuit courts was to expose the district courts to the *availability* of other sanctions. *See supra* text accompanying note 51-52.

113. 442 F.2d 1047 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972).

114. *Id.* at 1053-54. The court had attempted unsuccessfully to have plaintiff arrange for substitute counsel and to continue the proceedings in order to allow plaintiff to come into compliance with a pretrial order. *Id.* at 1053.

115. *Id.* at 1053-54. "There is no requirement, however, that every single alternative be examined." 5 J. MOORE, J. LUCAS, J. WICKER, *supra* note 3, § 41.11[2], at 41-129 to -130.

116. *Hornbuckle*, 732 F.2d at 1237.

117. *Daniels*, 81 N.C. App. at 605, 344 S.E.2d at 850.

118. *Id.*

requires not only that courts shape the rule 41(b) sanction to fit the offense, but also that the sanction fit the plaintiff's pocketbook.[119]

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119. *Id.*