

Elevating Form over Substance: *Viar v.*
North Carolina Department of Transportation and its Progeny*

INTRODUCTION

“The North Carolina Rules of Appellate Procedure are mandatory and ‘failure to follow these rules will subject an appeal to dismissal.’”¹ This ubiquitous and oft-quoted phrase has been the stamp of disapproval employed to dismiss appeals because of appellate rule violations following the ruling in *Viar v. North Carolina Department of Transportation*.² In April 2005, the North Carolina Supreme Court admonished the court of appeals in *Viar* for what it felt was untrammelled use of Rule 2 to suspend rule violations and hear appeals.³ Prior to that time, the court of appeals routinely invoked Rule 2 to reach the merits of appeals when minor violations of the Rules of Appellate Procedure did not hinder review. However, since *Viar*, the leash has tightened around Rule 2, and the court of appeals has rarely summoned the Rule to hear an appeal. The court of appeals, in essence, has become the stomping grounds for appellants to surrender the contents of meritorious appeals because of the harsh school of thought *Viar* has created.

Interpretations differ greatly as to the meaning of the *Viar* opinion. The Supreme Court in *Viar* explicitly stated that “[i]t is not the role of the appellate courts . . . to create an appeal for an appellant. [T]he Rules of Appellate Procedure must be consistently applied; otherwise the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.”⁴ A plain reading of such language suggests the supreme court was concerned with an appellate court creating an argument or appeal to justify a result. However, because of the language in *Viar*, which states the Rules of Appellate Procedure are mandatory, the court of appeals has

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1. *Viar v. N.C. Dep’t of Transp.*, 610 S.E.2d 360, 360 (N.C. 2005) (quoting *Steingress v. Steingress*, 511 S.E.2d 298, 299 (N.C. 1999)).

2. *Viar v. N.C. Dep’t of Transp.*, 610 S.E.2d 360 (N.C. 2005).

3. *Id.*

4. *Id.* at 402.

subsequently held it is “compelled by *Viar* to dismiss [an] appeal based on . . . failure to comply” with any rule.⁵

The supreme court’s vague language and lack of guidance has led to an inconsistent application of Rule 2⁶ and a flurry of disagreement between judges on the court of appeals on when to invoke the Rule.⁷ While it appears many judges on the court of appeals still wish to exercise their discretion in suspending appellate rule violations that are not egregious, others seem to view *Viar* as a way to torch the barn and get the appellants out.

The Rules of Appellate Procedure were never intended to be used as a cane to lash out at the unwary appellant, but instead should act as a guideline to ensure a proper appeal and alert the court to the issues raised. Certainly substantive and egregious violations of the Rules should warrant dismissal. For instance, in *Perkinson v. Hawley*, the appellant failed to settle the record on appeal as required by Rule 9(a)(1)(i).⁸ Further, appellant’s brief failed to comply with the appellate rules in multiple other aspects.⁹ Finally, the appellant failed to reference any assignments of error in his brief pursuant to Rule 28(b)(6), and therefore the assignments were deemed abandoned.¹⁰ Such oversight and egregious errors on the part of the appellant surely justify dismissing an appeal. It is also well ‘settled that failure to serve a proposed record on appeal pursuant to Rule 11 is a substantial viola-

5. *Broderick v. Broderick*, 623 S.E.2d 806, 806-07 (N.C. Ct. App. 2006).

6. *Compare* *State v. Buchanan*, 613 S.E.2d 356, 356 (N.C. Ct. App. 2005) (declining to invoke Rule 2 where defendant failed to preserve the grounds for his appeal under Rule 10(b) for criminal convictions) *with* *Coley v. State*, 620 S.E.2d 25, 27 (N.C. Ct. App. 2005) (noting that although appellant violated several appellate rules, none were substantive or egregious enough to warrant dismissal of appeal, and *Viar* did not prohibit use of Rule 2) *and* *Youse v. Duke Energy Corp.*, 614 S.E.2d 396, 400 (N.C. Ct. App. 2005) (invoking Rule 2 where defendant violated numerous appellate rules but the Court could determine issues on appeal, plaintiff responded to defendant’s arguments and was therefore put on sufficient notice of the issues).

7. *See* *Walsh v. Town of Wrightsville Beach*, 632 S.E.2d 271 (N.C. Ct. App. 2006); *Youse*, 614 S.E.2d 396; *Stann v. Levine*, 636 S.E.2d 214 (N.C. Ct. App. 2006).

8. *Perkinson v. Hawley*, 2006 N.C. App. LEXIS 1810 at *2 (N.C. Ct. App. Aug. 15, 2006).

9. *Id.* at *3-4. The appellant’s brief failed in the following aspects: (1) the pages in the record were not numbered consecutively pursuant to Rule 9(b)(4); (2) the brief failed to include a subject index as required by Rule 28(b)(1); (3) the brief failed to set forth the standard of review as required by Rule 28(b)(6); (4) the brief failed to set forth grounds for appellate review as required by Rule 28(b)(4); and (5) the brief failed to include a certification of the brief pursuant to Rule 28(j)(2)(A)(2).

10. *Id.* at *3.

tion of the rules that mandates dismissal of the appeal.¹¹ However, less blatant violations, in the wake of *Viar*, have created an inconsistent approach to the suspension of Rule violations and have left judges baffled on the appropriate time to afford relief.

This Comment explores the history of Rule 2 of the North Carolina Rules of Appellate Procedure, the controversial ruling of *Viar*, and how subsequent cases have interpreted the North Carolina Supreme Court's ruling in *Viar*. What has emerged in the wake of *Viar* is an inconsistent approach to appellate rule violations and much disagreement on the amount of leeway an appellate court in North Carolina has to invoke Rule 2. Further, post-*Viar* decisions have also laid the foundation for the eradication of Rules 25 and 34.¹² These rules, which govern sanctioning for appellate rule violations, have been left by the wayside as panels of the court of appeals continue to interpret *Viar* as a mandate for dismissal. Finally, this Comment offers a solution to the current problem which plagues the appellate courts today: by invoking a balancing test to determine the nature of the rule violation or adopting rules which allow the appellant to correct mistakes in the brief, appellate courts should be able to exercise sound discretion in determining which appeals are properly before the court.

I. RULE 2

Rule 2 of the North Carolina Rules of Appellate Procedure has been in existence for over thirty years and has allowed our appellate courts to consider the merits of an appeal that is defective in some manner or otherwise not in accordance with one or more of the forty-two rules that currently govern appeals in this state.¹³ Rule 2 provides as follows:

11. *Day v. Day*, 637 S.E.2d 906, 908 (N.C. Ct. App. 2006) (citing with approval *Higgins v. Town of China Grove*, 402 S.E.2d 885, 886 (N.C. Ct. App. 1991); *Woods v. Shelton*, 379 S.E.2d 45, 47 (N.C. Ct. App. 1989); *McLeod v. Faust*, 374 S.E.2d 417, 417 (N.C. Ct. App. 1988)).

12. N.C. R. APP. P. 25; N.C. R. APP. P. 34. Rules 25 and 34 of the North Carolina Rules of Appellate Procedure govern sanctioning for Rule violations. Rule 25 states in pertinent part:

A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

13. Brady Yntema, Appellate Procedures and Technicalities, Address at the North Carolina Association of Defense Attorneys Annual Meeting (June 22-25, 2006).

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.¹⁴

Rule 2 has not been amended since its adoption on June 13, 1975. The “Supreme Court [of North Carolina] has stated that ‘Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances.’”¹⁵ Prior to *Viar*, the court of appeals routinely invoked Rule 2 to suspend the rules of appellate procedure and allow defective appeals to be decided on their merits.¹⁶ Such cases often involved multiple rule violations that were waived in order for the appeal to go forward.¹⁷

Traditionally, Rule 2 would not be extended to forgive substantive or egregious defects in an appeal that would place the burden on the appellee to respond or burden the appellate court in determining the issues on appeal.¹⁸

II. VIAR V. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

On June 12, 1997, Megan and Macey Viar were killed in a motor vehicle accident on Interstate Highway 85 in Rowan County.¹⁹ Melissa Viar, the decedents’ sister, was driving in a rainstorm when she lost control of the car, crossed the median, and collided with a tractor-trailer truck.²⁰ Both Megan and Macey died instantly, and Melissa sustained serious injuries.²¹

14. N.C. R. APP. P. 2.

15. *Hill v. West*, 627 S.E.2d 662, 663 (N.C. Ct. App. 2006) (quoting *Steingress v. Steingress*, 511 S.E.2d 298, 299-300 (N.C. 1999)).

16. *Yntema*, *supra* note 14.

17. *See Cannon v. Day*, 598 S.E.2d 207, 209-10 (N.C. Ct. App. 2004) (invoking Rule 2 although there were multiple rule violations, including: no statement of the grounds for appellate review, no page references to the record or transcript in the Statement of Facts, no specification of the pertinent assignments of error following the questions presented, and the brief’s incorrect font and excessive number of lines per page).

18. *Shook v. County of Buncombe*, 480 S.E.2d 706 (N.C. Ct. App. 1997).

19. *Viar v. N.C. Dep’t of Transp.*, 590 S.E.2d 909, 911 (N.C. Ct. App. 2004).

20. *Id.*

21. *Id.*

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On March 6, 1998, Claude Viar filed an affidavit with the N.C. Industrial Commission under the North Carolina Tort Claims Act, asserting a claim for negligence against the North Carolina Department of Transportation (NCDOT).²² He alleged that Megan and Macey's deaths were proximately caused by the absence of a guard rail between the north and southbound lanes of the interstate.²³ Mr. Viar later amended the complaint and alleged negligence on the part of several other NCDOT employees, who he asserted were responsible for not placing median barriers on that stretch of interstate.²⁴

The deputy commissioner issued an opinion denying Viar's claim on November 20, 2000, and Mr. Viar appealed to the Full Commission, which affirmed the decision of the deputy commissioner.²⁵ The Commission concluded that Mr. Viar had failed to show that NCDOT was negligent in not installing a median barrier on that section of the highway.²⁶

The North Carolina Court of Appeals reversed on the grounds that the Industrial Commission erred by failing to make adequate findings to support its conclusion that NCDOT's actions were reasonable, relying on an improperly conducted assessment of the financial cost of installing median barriers and failing to make necessary findings of fact.²⁷ Judge Levinson authored the opinion, Judge Wynn concurred, and Judge Tyson dissented.

In his dissent, Judge Tyson pointed out multiple Rule violations by the appellant, and relied on *Shook v. County of Buncombe* in support of his contention that the appeal should be dismissed.²⁸ Specifically, Judge Tyson was concerned with two defects in the plaintiff's appeal.

First, Judge Tyson noted that our supreme court has ruled that "where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."²⁹ Tyson further noted that since the "plaintiff failed to assert error to any of the Commission[er]'s findings of fact, the . . . findings [were] binding and [the Court of Appeals] must conclude they are supported by competent evidence."³⁰

22. *Id.* at 911-12.

23. *Id.* at 912.

24. *Viar*, 590 S.E.2d at 912.

25. *Id.*

26. *Id.*

27. *Id.* at 919-20.

28. *Viar*, 590 S.E.2d at 921 (Tyson, J., dissenting).

29. *Id.*

30. *Id.*

Second, Judge Tyson maintained the appeal should be dismissed because the appellant's brief violated Rule 28(b)(6), which requires that, immediately following each question argued, the appellant identify "the pages at which [the assignment of error] appear in the printed record on appeal."³¹ Tyson argued that the appellant's question presented and arguments on that issue did not correspond to the first assignment of error.³² Accordingly, Tyson stated that the appeal was not properly before the court and should be dismissed.³³

Relying on Judge Tyson's dissent, the NCDOT appealed, and on April 7, 2005, the North Carolina Supreme Court issued a per curiam opinion dismissing the appeal for appellate rules violations.³⁴ In the brief and somewhat curt opinion, the Court pointed out that appellant failed to comply with Rule 10 and Rule 28(b).³⁵

The supreme court found appellant's two assignments of error were not numbered and did not make specific record references.³⁶ Further, the court stated that the second assignment of error did not "state plainly, concisely and without argumentation the legal basis on which error [was] assigned."³⁷ The court also found that appellant

31. *Id.*

32. *Id.*

33. *Id.* at 922.

34. *Viar v. North Carolina Dep't of Transp.*, 610 S.E.2d 360 (N.C. 2005).

35. *Id.* at 360. N.C. R. APP. P. 10; N.C. R. APP. P. 28(b). Rule 10 states, in pertinent part:

(1) *Form; Record References.* A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal in short form without argument, and shall be separately numbered. Each assignment of error shall so far as practicable, be confined to a single issue of law; and shall state plainly, concisely, and without argumentation the legal basis on which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

With respect to the appellant brief, Rule 28(b) requires, in pertinent part:

(6) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

36. *Id.* at 361.

37. *Id.* (alteration in original).

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made no argument as to the first stated assignment of error in his brief, and thus, the error was abandoned pursuant to Rule 28(b)(6).³⁸

The supreme court then admonished the court of appeals for the invocation of Rule 2 to hear the merits of the appeal, stating: “[i]t is not the role of the appellate courts . . . to create an appeal for an appellant. As this case illustrates, the Rules . . . must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.”³⁹ This one statement has resulted in a number of appeals being dismissed for Rule violations.

III. PRE-VIAR USE OF RULE 2

Before Rule 2 was curtailed by the opinion, or the misconstrued language of the opinion, in *Viar*, the court of appeals routinely invoked Rule 2 to hear cases on the merits. For instance, in *Anthony v. City of Shelby*,⁴⁰ the appellant’s brief contained identical violations to those in the case of *Viar*, specifically violations of Rule 10(c)(1) and 28(b)(6).⁴¹ However, without much explanation, except for stating the appellant had violated the rules, the court of appeals declared that “[n]evertheless, we have considered their arguments and affirm the trial court’s order.”⁴²

A year before *Viar*, Judge Geer authored an opinion in which the court of appeals invoked Rule 2 and suspended multiple rules violations.⁴³ The court noted that the appellant’s brief violated the rules of appellate procedure in the following manner:

- (1) the brief’s Table of Cases and Authorities contains no references to the pages on which the citations appear, in violation of N.C. R. App. P. 26(g)(2) and 28(b)(1);
- (2) the brief contains no statement of the grounds for appellate review, in violation of N.C. R. App. P. 28(b)(4);
- (3) the brief’s Statement of Facts contains almost no page references to the transcript, the record, or exhibits, in violation of N.C. R. App. P. 28(b)(5); and
- (4) in the brief’s argument section, the questions presented are not followed by specification of the pertinent assignments of error, in violation of N.C. R. App. P. 28(b)(6). In addition to those rule violations pointed out by plaintiffs, we also note that defendant’s brief is printed in 11-point non-proportionally-spaced type, with

38. *Id.*

39. *Id.* (citing with approval *Bradshaw v. Stansberry*, 79 S.E. 302 (1913)).

40. *Anthony v. City of Shelby*, 567 S.E.2d 222 (N.C. Ct. App. 2002).

41. *Id.*

42. *Id.* at 225 (citation omitted).

43. *Cannon v. Day*, 598 S.E.2d 207 (N.C. Ct. App. 2004).

more than 27 lines per page, in violation of N.C. R. App. P. 26(g)(1) and 28(j).⁴⁴

The court of appeals, although stating it was very concerned about the extent of the violations, elected to suspend the rules pursuant to Rule 2 in order to review the defendant's assignments of error.⁴⁵

However, the violations did not go unnoticed. Chief Judge John Martin, in a poignant concurrence, expressed his disapproval of the violations of the rules and reiterated that the rules of appellate procedure were mandatory, not directory.⁴⁶ Citing former Chief Justice Story of the North Carolina Supreme Court, Chief Judge Martin wrote:

The work of the Court is constantly increasing, and, if it is to keep up with its docket, which it is earnestly striving to do, an orderly procedure, marked by a due observance of the rules, must be maintained. When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties.⁴⁷

According to Chief Judge Martin's opinion, Rule 2 should only be invoked where the error would deny a fair trial, or the error is a technicality that does not affect the court in ruling on the appeal.⁴⁸

Prior to *Viar*, the North Carolina Court of Appeals also routinely summoned Rule 2 to save appeals.⁴⁹ The widespread usage of the rule creates a number of questions in the post-*Viar* world. When, now, can Rule 2 be invoked? What has happened to Appellate Rules 25 and 34, the rules governing sanctioning for appellate rule violations? As stated earlier, in *Viar*, the supreme court reprimanded the court of appeals for what it felt was unrestrained use of Rule 2.⁵⁰ However, the supreme court's opinion did nothing more than create further inconsistency and confusion for determining the appropriate time to suspend the rules and hear the merits of an appeal.

44. *Id.* at 209-10.

45. *Id.* at 210.

46. *Id.* at 213 (Martin, C.J., concurring).

47. *Id.* (quoting *Pruitt v. Wood*, 156 S.E. 126, 127 (N.C. 1930)).

48. *Cannon*, 598 S.E.2d at 213.

49. See *Stockton v. Estate of Thompson*, 600 S.E.2d 13, 15 (N.C. Ct. App. 2004) (withstanding violation of Rule 28(b)(4)); see also *N.C. Farm Bureau Mut. Ins. Co. v. Allen*, 553 S.E.2d 420, 422 (N.C. Ct. App. 2001) (withstanding violation of Rule 28(b)(5)); *Cannon*, 598 S.E.2d at 209-210 (withstanding violations of Rules 26(g)(2), 28(b)(1), 28(b)(4), 28(b)(5), 28(b)(6), and 26(g)(1)).

50. *Viar v. North Carolina Dep't of Transp.*, 610 S.E.2d 360, 361 (N.C. 2005).

IV. THE POST-VIAR WORLD: IRRECONCILABLE DIFFERENCES

From April 2005 to December 2006, the Court of Appeals cited *Viar* over one hundred times, frequently dismissing an appeal for violations of rules of appellate procedure. *Viar* has created an inconsistent approach to the application of Rule 2, creating an outbreak of disagreement among the judges on the court of appeals. While many judges have pursued a strict application of *Viar*, others have noted their disapproval of such a harsh standard.⁵¹ In many cases that have invoked *Viar*, panels have concluded that dismissal is mandatory even if the rule violations do not frustrate the issues on appeal.⁵² Many of these dismissals have involved deficiencies in assignments of error that the court has dismissed on its own initiative, without a second thought as to whether the appellee was actually prejudiced.⁵³

The greatest problem has been the inconsistent approach of the court to apply Rule 2 to save an appeal. A stark example of such conflicting applications can be found in two recent cases. In *Stann v. Levine*, an appeal was dismissed for multiple violations of the appellate rules.⁵⁴ The appellant violated Rule 26(g), which requires that “the body of the text shall be presented in double spacing between each line of text.”⁵⁵ The brief contained pages with thirty-five lines of text, as opposed to the required twenty-seven lines.⁵⁶ Additionally, the brief failed to include a statement of the grounds for appellate review as mandated by Rule 28(b)(4).⁵⁷ Moreover, the argument failed to “contain a concise statement of the applicable standard(s) of review for each question presented” as well as any citation of authorities in violation of Rule 28(b)(6).⁵⁸ The court also found the appellant’s statement of facts was in violation of Rule 28(b)(5), which states that “[a]n appellant’s brief in any appeal shall contain . . . [a] full and complete statement of the facts . . . supported by references to pages in the transcript

51. See *Stann v. Levine*, 636 S.E.2d 214, 222 (N.C. Ct. App. 2006) (Geer, J., dissenting); see also *Consolidated Elec. Distrib., Inc. v. Dorsey*, 613 S.E.2d 518, 521 (N.C. Ct. App. 2005) (Wynn, J., concurring).

52. See *Walsh v. Town of Wrightsville Beach Bd. Of Aldermen*, 632 S.E.2d 271, 273 (N.C. Ct. App. 2006); see also *State v. Buchanan*, 613 S.E.2d 356, 356 (N.C. Ct. App. 2005).

53. See *Broderick v. Broderick*, 623 S.E.2d 806 (N.C. Ct. App. 2006); see also *Jet Air, LLC v. Triad Aviation, Inc.*, 628 S.E.2d 806 (N.C. Ct. App. 2006).

54. *Stann*, 636 S.E.2d at 214.

55. *Id.* at 216 (citing N.C. R. App. P. 26(g)).

56. *Stann v. Levine*, 636 S.E.2d 214, 216 (N.C. Ct. App. 2006) (Geer, J., dissenting).

57. *Id.*

58. *Id.*

of the proceedings, the record on appeal, or exhibits, as the case may be.”⁵⁹ Finally, in the court’s opinion, the most significant error was a violation of Rule 10(c)(1).⁶⁰ The majority opinion noted that appellant’s assignment of error was not stated at the conclusion of the record and the assignment of error, attempting to dismiss on jurisdictional grounds, was overbroad, vague, and unspecific.⁶¹

The majority opinion, written by Judge Jackson with Judge Tyson concurring, noted the court of appeals has “held that when a litigant exercises ‘substantial’ compliance with the appellate rules, the appeal may not be dismissed for a technical violation of the rules.”⁶² However, Judge Jackson stated that a “substantial compliance exception to the rules had not been expressly endorsed by our Supreme Court.”⁶³ Judge Jackson, as well as many other judges, overlooks Rule 25 of the North Carolina Rules of Appellate Procedure post-*Viar*. The supreme court has the authority to determine the rules of appellate procedure pursuant to N.C. Const. art. IV, § 13(2), and Rule 25 states explicitly that “a court of the appellate division may . . . impose a sanction against a party or attorney or both when the court determines that such party or attorney or both *substantially failed to comply with these appellate rules*.”⁶⁴ Rule 34 states that an appellate court may impose a sanction when the court determines that a brief “grossly violated appellate court rules.”⁶⁵

It would appear from the context of Rule 25 of the Rules of Appellate Procedure that the supreme court has spoken on the topic of substantial compliance. Cases subsequent to *Viar* have failed to employ Rules 25 or 34, both of which deal with sanctioning in the cases of rule violations. Strict constructionists have read *Viar* to rule that all appellate rule violations will subject an appeal to dismissal. However, a more sensible reading of *Viar* illustrates the supreme court was concerned about the author of an opinion creating an argument that the appellant never made to justify a result the court wanted to be achieved.

Judge Geer argued in her dissent in *Stann* that the focus of the court’s opinion in *Viar* was the court of appeals’ reliance on Rule 2 to

59. *Id.* (quoting N.C. R. App. P. 28(b)(5)).

60. *Id.* at 217.

61. *Id.*

62. *Stann*, 636 S.E.2d at 219 (Geer, J., dissenting) (quoting *Spencer v. Spencer*, 575 S.E.2d 780, 785 (N.C. Ct. App. 2003)).

63. *Id.*

64. N.C. R. App. P. 25(b) (emphasis added).

65. N.C. R. App. P. 34(a)(3).

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address an issue not raised or argued by an appellant and reiterated the language of *Viar*, indicating that it is not the role of the appellate courts to create an appeal for an appellant.⁶⁶ Judge Geer, who stressed the court of appeals was increasingly elevating form over substance, argued that such a stringent construction of *Viar* would lead to wholesale dismissals.⁶⁷

First, Judge Geer stated “the proper line is to dismiss only those appeals that substantively affect the ability of the appellee to respond and this Court to address the appeal.”⁶⁸ She then cited a number of cases where other panels of the court of appeals had construed *Viar* similarly and concluded the court of appeals retains discretion under Rule 2 to hear an appeal despite minor rule violations.⁶⁹ Judge Geer voiced her concern over the implications such an austere construction of *Viar* would mandate. Specifically, an “appellant has little ability to ensure that his or her counsel complies with the appellate rules . . . , [and] a legal malpractice claim may be difficult to pursue. . . , and collegiality and principles of professionalism will have to be set aside in order to ensure proper representation of the appellate client.”⁷⁰

Judge Geer also noted her disagreement with the majority’s contention that appellant violated Rules 28(b)(5) and 10(c)(1). In regards to Rule 10(c)(1), Judge Geer argued the triviality of the rule violation where the appellant placed the assignments of error on page 111 of a 117 page record.⁷¹ In addition, appellant’s assignment of error stated that the trial court committed reversible error by dismissing the action of the plaintiff for lack of jurisdiction.⁷² Judge Geer stated it was unclear what the majority would have preferred appellant to have stated, and the phrasing of the assignment of error did not substantively impact the appeal in this case.⁷³ The dissent’s final concern focused on the appellees’ violations of the appellate rules. According to Judge Geer, the culture created by *Viar* only imposes sanctions on

66. *Stann*, 636 S.E.2d at 223 (Geer, J., dissenting).

67. *Id.*

68. *Id.*

69. *Stann*, 636 S.E.2d at 223 (Geer, J., dissenting) (citing *State v. Hill*, 632 S.E.2d 777, 790 (N.C. Ct. App. 2006); *Welch Contracting, Inc. v. N.C. Dep’t of Transp.*, 622 S.E.2d 691, 694 (N.C. Ct. App. 2005); *Davis v. Columbus County Schs.*, 622 S.E.2d 671, 674 (N.C. Ct. App. 2005); *Coley v. State*, 620 S.E.2d 25, 27 (N.C. Ct. App. 2005)).

70. *Id.*

71. *Id.* at 224-25.

72. *Id.* at 217.

73. *Id.* at 225.

the appellant while “allow[ing] appellees to violate the rules with impunity.”⁷⁴

Interestingly, Judge Tyson, who concurred in the majority opinion of *Stann* also joined in the majority opinion of *Seay v. Wal-Mart Stores, Inc.*⁷⁵ The case of *Seay* arose out of a worker’s compensation claim that was denied by the Industrial Commission.⁷⁶ At the outset of the opinion, the panel noted that appellant failed to comply with both Rule 10(c)(1) and Rule 28(b)(6).⁷⁷ With respect to the first violation, the appellant failed to reference the record or transcript in his assignment of error.⁷⁸ The second violation arose from the appellant’s failure to make any reference to his sole assignment of error or include the numbers and pages by which it appeared in the record.⁷⁹ The panel concluded that reaching the merits of the case “does not create an appeal for an appellant or cause this Court to examine issues not raised by the appellant . . . , [and] [d]efendants were given sufficient notice of the issue on appeal as evidenced by the filing of their brief thoroughly responding to plaintiff’s argument.”⁸⁰ Such inconsistency leads to a misapplication of the rules of appellate procedure, and if *Viar* is to be strictly followed according to a conservative reading, this appeal should have been dismissed.

Several months prior to *Seay*, the court of appeals was faced with a similar case involving identical rule violations. In *Walsh v. Town of Wrightsville Beach*,⁸¹ Judge Calabria, writing for the majority, dismissed an appeal again involving violations of Rules 10(c)(1) and 28(b)(6).⁸² The majority expressed that “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”⁸³ If the court of appeals is bound by such precedent, it would appear that *Seay* should have been dismissed because of the decision in *Walsh* or other prior decisions that dismissed violations of Rule 10(c)(1) and 28(b)(6). However, the

74. *Stann*, 636 S.E.2d at 226 (Geer, J., dissenting).

75. *Seay v. Wal-Mart Stores, Inc.*, 637 S.E.2d 299 (N.C. Ct. App. 2006).

76. *Id.*

77. *Id.* at 300.

78. *Id.*

79. *Id.*

80. *Id.* at 301.

81. *Walsh v. Town of Wrightsville Beach Bd. of Aldermen*, 632 S.E.2d 271 (N.C. Ct. App. 2006).

82. *Id.*

83. *Id.* at 273 (quoting *In re Appeal from Civil Penalty*, 379 S.E.2d 30, 37 (N.C. 1989)).

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court is routinely inconsistent in its application of the rules post-*Viar*, which creates a culture that *Viar* did not intend.

Judge Hunter dissented in *Walsh*:

“Since the decision of the Supreme Court in *Viar*, this Court has not treated violations of the Rules as grounds for automatic dismissal. Instead, the Court has weighed (1) the impact of the violations on the appellee, (2) the importance of upholding the integrity of the Rules, and (3) the public policy reasons for reaching the merits in a particular case.”⁸⁴

If this is accurate, it would appear the court of appeals would invoke a balancing test to determine if the nature of the rule violation prejudiced the appellee or prevented the court from effectively determining the issues on appeal without creating an argument or appeal for the appellant. However, the inconsistency of application has fallen short of reaching the test Judge Hunter espouses.

Two schools of thought have emerged in the post-*Viar* world: (1) those panels that feel that minor rule violations that do not prejudice the appellee and enable the court to decipher the arguments on appeal should allow the invocation of Rule 2; and (2) other panels that read *Viar* strictly and mandate that most, if not all, rule violations are subject to dismissal without any regard for sanctioning set forth in Rules 25 and 34. The latter panels have become consumed with dismissals and appear to view the rule violations as a cancer that should be excised as early as possible.

The judges on the court of appeals are elected and appointed to exercise their wisdom and discretion to hear appeals and decide the merits of certain cases. While it is true that such discretion may not be arbitrary or capricious, we certainly cannot curtail their authority by a strict reading of *Viar*. The present situation can be analogized quite simply to a speeding violation. Law enforcement officers routinely exhibit such discretion in determining a violation of such speeding laws. If every motorist were ticketed for traveling 58 m.p.h. in a 55 m.p.h. zone, we would be a nation of walkers and bicyclists. However, such harsh application cannot survive. We allow these officers of the law discretion on whom to ticket, and it usually falls upon those motorists committing the most egregious violations of speeding laws.

While it is true that speed limits are mandatory, and not directory, the same can be said of the rules of appellate procedure. When a panel of the court of appeals determines a rule violation does not frustrate

84. *Id.* at 274 (Hunter, J., dissenting) (quoting *Hammonds v. Lumbee River Elec. Membership Corp.*, 631 S.E.2d 1 (N.C. Ct. App. 2006)).

the issues on appeal or prejudice the appellee, the court, in its discretion, should be allowed to suspend the rules in order to hear the merits on appeal or impose sanctions on appellant's counsel. While it is certainly true that *Viar* reprimanded the court of appeals for routinely invoking Rule 2 to save an appeal, the supreme court, by the plain language in the opinion, was primarily concerned with the court of appeals creating an appeal by addressing issues not raised by the appellant in his brief.

However, while such a concept seems quite simple, the supreme court recently affirmed that the court of appeals "may not review an appeal that violates the Rules of Appellate Procedure *even though such violations neither impede our comprehension of the issues nor frustrate the appellate process.*"⁸⁵ This statement, while adopted by the supreme court, further eviscerates Rule 2 and leaves Rules 25 and 34 by the wayside. A strict construction of such language effectively allows *per se* dismissal without a second thought of the suspension of appellate rules or sanctions.

Judge Hunter attempted to reintroduce sanctions in the winter of 2005 involving a case where the appellant violated Rules 10 and Rule 28.⁸⁶ In his dissent, he stated:

[T]he assignments of error provide sufficient information to permit the Court to accept that the legal basis for defendant's appeal included a challenge to the acceptance of an expert witness, that insufficient evidence was presented to support certain of the trial court's findings, and that the trial court erred in its legal classification of the property. Therefore, review of these assignments of error does not create an appeal for defendant as prohibited by *Viar v. N.C. Dep't of Transp*
.....⁸⁷

He further stated the appellee "was neither disadvantaged nor was the court unduly burdened by the imprecise wording of defendant's assignments of error and failure to include the standard of review."⁸⁸ Because the plaintiff did not contend that the defendant's assignments of error were insufficient, and the court was not creating an appeal, he suggested reviewing the merits while imposing sanctions pursuant to Rule 25(b).⁸⁹ Judge Geer went so far to say that "any violation of Rule

85. *Munn v. N.C. State Univ.*, 626 S.E.2d 270 (N.C. 2006) (reversing *per curiam* for the reasons stated in Judge Jackson's dissenting opinion, in *Munn v. N.C. State Univ.*, 617 S.E.2d 335 (N.C. Ct. App. 2005)) (emphasis added).

86. *Bennett v. Bennett*, 638 S.E.2d. 243, 245-46 (N.C. Ct. App. 2006) (Hunter, J., dissenting).

87. *Id.* at 245.

88. *Id.* at 245.

89. *Id.* at 245-46.

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10 is purely technical and cannot justify the sanction of dismissal under Rules 25 and 34 of the Rules of Appellate Procedure.”⁹⁰

V. CONSISTENT INCONSISTENCY

Relying on the appellate rules, at least one panel of the court of appeals attempted to overturn prior law that the North Carolina Supreme Court had not reversed. In *Ellis v. Williams*,⁹¹ the North Carolina Supreme Court reversed the court of appeals when it dismissed an appeal after the appellant had failed to list assignments of error to a summary judgment order. The supreme court held that the “purpose of summary judgment is to eliminate formal trial when the only questions involved are questions of law.”⁹² The court further stated that summary judgment is always based on: (1) whether there is a genuine issue of material fact; and (2) whether the moving party is entitled to summary judgment, and that “notice of appeal adequately apprises the opposing party and the appellate court of the limited issues to be reviewed. Exceptions and assignments of error add nothing.”⁹³ The supreme court noted that assignments of error normally aid the court in sifting through the record and determining the scope of review, but in cases of summary judgment, an appellate court must carefully examine the entire record, and requiring an appellant to list assignments of error would be a superfluous formality.⁹⁴

As the court of appeals consistently states, “[i]t is elementary that this Court is bound by holdings of the Supreme Court.”⁹⁵ However, such a statement does not prove true in application. Subsequent to *Ellis*, the North Carolina Court of Appeals in *Shook v. County of Buncombe*, held “[i]n our view, *Ellis* is no longer the law.”⁹⁶ The court of appeals reasoned that in light of the supreme court’s substantive amendment to Rule 10, *Ellis* no longer applied.⁹⁷ In a 2006 unpublished opinion, *Snow v. County of Dare*, the court of appeals dismissed an appeal from an entry of summary judgment when the two assignments of error read as follows: “(1) the trial court erred in granting

90. *Jones v. Harrelson and Smith Contractors, LLC*, 638 S.E.2d 222, 230 (N.C. Ct. App. 2006) (Geer, J., dissenting).

91. *Ellis v. Williams*, 355 S.E.2d 479 (N.C. 1987).

92. *Id.* at 481.

93. *Id.*

94. *Id.*

95. *Jones*, 638 S.E.2d at 228 (quoting *Rogerson v. Fitzpatrick*, 468 S.E.2d 447, 450 (N.C. Ct. App. 1996)).

96. *Shook v. County of Buncombe*, 480 S.E.2d 706, 707 (N.C. Ct. App. 1997).

97. *Id.*

summary judgment in favor of plaintiff, [and] (2) the trial court erred in failing to grant summary judgment in favor of defendant.”⁹⁸ The court of appeals ruled that in light of the *Viar* precedent, it was compelled to dismiss the appeal.⁹⁹

However, in a recent opinion by Chief Judge Martin, the court of appeals in *Nelson v. Hartford Underwriters Insurance Company* reaffirmed the viability of *Ellis* in light of *Viar*.¹⁰⁰ Chief Judge Martin first noted that a recent opinion of the court of appeals appeared to state a new rule regarding sufficiency of assignment of error, citing *Hubert Jet Air, LLC v. Triad Aviation, Inc.*¹⁰¹ In *Hubert*, the panel dismissed the plaintiff’s appeal from a partial summary judgment order because the assignment of error was deemed to be insufficient.¹⁰² Chief Judge Martin then confirmed that a contrary rule, not overruled by the supreme court, established that no assignment of error is necessary when the sole question is whether the trial court erred in granting summary judgment.¹⁰³ Chief Judge Martin then stated:

[T]his Court is required to follow the decisions of our Supreme Court, as well as our prior precedents. Although the Supreme Court’s recent decision in *Viar* . . . directed this Court not to create an appeal for the appellant, and to ensure an appellee has notice of the basis upon which an appellate court might rule, *we think the reasoning of Viar and Ellis are compatible. In any case, Viar does not address the issue of assignments of error and summary judgment, and does not overrule Ellis.* Accordingly, we follow *Ellis* and the precedents of this Court, and determine that plaintiffs’ assignment of error with respect to the order granting summary judgment is sufficient.¹⁰⁴

Nelson and *Snow* illustrate the dichotomy of the two schools of thought prevalent within the court of appeals in the post-*Viar* world. While many panels, such as the majority in *Nelson*, can read *Viar* in light of its true meaning and apply prior precedent to distinguish the supreme court’s intent, other panels, such as the one in *Snow*, apply a *per se* dismissal to all appellate rule violations, regardless of precedent.

98. *Snow v. County of Dare*, 2006 N.C. App LEXIS 1040, *2 (N.C. Ct. App. May 16, 2006).

99. *Id.*

100. *Nelson v. Hartford Underwriters Ins. Co.*, 630 S.E.2d 221 (N.C. Ct. App. 2006).

101. *Id.* at 226.

102. *Hubert Jet Air, LLC v. Triad Aviation, Inc.*, 628 S.E.2d 806 (N.C. Ct. App. 2006).

103. *Nelson*, 630 S.E.2d at 226-27 (citing *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 326 S.E.2d 316, 319 (N.C. Ct. App. 1985)).

104. *Id.* (emphasis added).

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The latter panels invoke mandatory language, such as the elementary nature of following supreme court precedent, but they are the ones, in contradiction with *Viar*, that seek to create the argument that justifies the result they feel is necessary.

Conflicting opinions as to assignments of error have also arisen in appeals involving judgments notwithstanding the verdict. In *Jones v. Harrelson & Smith Contractors, LLC*, the majority dismissed the appeal when the appellant's assignment of errors involved vague language that did not specify the legal basis on which error is assigned.¹⁰⁵ The plaintiff's assignments of error read, in pertinent part: "(1) did the trial court, . . . err in . . . granting, . . . the defendant's prior Motion for Directed Verdict on the plaintiff's unfair and deceptive trade practice claim . . . ?, and (2) did the trial court err by . . . granting defendant's Motion for Judgment Notwithstanding the Verdict as to the fraud claim and award of compensatory damages?"¹⁰⁶

The dissent argued the majority would require the plaintiff to restate the obvious, since as with summary judgment decisions, a directed verdict or entry of judgment notwithstanding the verdict involves only a single question of law: whether the evidence was sufficient to support the claim.¹⁰⁷ Pointing out that restating the obvious would be a superfluous formality, the dissent argued that *Ellis* and the present case could not be reconciled, and therefore the assignments of error should not be abandoned.¹⁰⁸ Such ambiguities present difficult scenarios to resolve without the guidance of the supreme court. However, the majority, constrained by the ruling in *Viar*, continued to pursue a narrow interpretation of the rules of appellate procedure and dismissed the appeal without analysis of the comparative nature of summary judgment and judgment notwithstanding the verdict.¹⁰⁹

VI. THE CRIMINAL DEFENDANT

Inconsistency of the application of the rules of appellate procedure has also plagued criminal appeals. Two cases provide a stark example of identical violations with differing results. In *State v. Buchanan*,¹¹⁰ the defendant failed to comply with Rule 10(b) by not

105. *Jones v. Harrelson and Smith Contrs., LLC*, 638 S.E.2d 222, 227-28 (N.C. Ct. App. 2006).

106. *Id.* at 227.

107. *Id.* at 230 (Geer, J., dissenting) (citing *Alberti v. Manufactured Homes, Inc.*, 381 S.E.2d 478, 480 (N.C. Ct. App. 1989)).

108. *Id.*

109. *Id.*

110. *State v. Buchanan*, 613 S.E.2d 356 (N.C. Ct. App. 2005).

renewing his motion to dismiss at the close of all evidence.¹¹¹ Because the panel of the court of appeals was constrained by *Viar*, the appeal was dismissed, the reasoning being that in *Viar*, the “Supreme Court stated that this Court may not review an appeal that violates the Rules of Appellate Procedure even though such violations neither impede our comprehension of the issues nor frustrate the appellate process.”¹¹² Just over a year later, a different panel of the court of appeals invoked Rule 2 to prevent manifest injustice in an appeal involving an identical violation.¹¹³ Judge Steelman dissented, identifying the failure to renew the motion to dismiss was identical to the case of *State v. Buchanan*. He stated that “for the law to have any meaning or integrity, it must be applied in a consistent manner. If it is not, then it is being applied in an arbitrary and capricious manner, which can only bring disrepute upon the courts.”¹¹⁴

How can these cases be resolved? The simple answer is they cannot. It has been stated “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”¹¹⁵ However, differing panels continue to apply the rules in an arbitrary manner where one panel determines that manifest injustice enables Rule 2 to apply but another follows the stringent dictates of *Viar*.

VII. ABOLITION OF ASSIGNMENTS OF ERROR

It is well settled and has been evidenced by the above arguments that most dismissals post-*Viar* have been the result of violations of Rule 10, as well as Rule 28, which govern the proper format of assigning error on appeal. In *Broderick*, Judge Wynn urged the supreme court to abolish assignments of error pursuant to its exclusive authority to create the rules of appellate procedure.¹¹⁶ Judge Wynn noted the abolishment of such rules would be “consistent with the Federal Rules of Appellate Procedure, the Local Rules of Appellate Procedure for the United States Court of Appeals for the Fourth Circuit, and

111. *Id.* at 356.

112. *Id.* at 357.

113. *State v. Denny*, 635 S.E.2d 438, 440 (N.C. Ct. App. 2006).

114. *Id.* at 442 (Stelman, J., dissenting).

115. *Walsh v. Town of Wrightsville Beach Bd. of Aldermen*, 632 S.E.2d 271, 273 (N.C. Ct. App. 2006) (quoting *In re Appeal from Civil Penalty*, 379 S.E.2d 30, 37 (1989)).

116. *Broderick v. Broderick*, 623 S.E.2d 806, 807 (N.C. Ct. App. 2006) (Wynn, J., concurring).

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the appellate rules of other state courts, which do not require parties to file assignments of error on appeal.”¹¹⁷ He then cited multiple examples of states that have abolished such rules.¹¹⁸

Judge Wynn holds the position, as noted earlier, that the “cost of effectively denying our citizens *access to justice* in our appellate courts outweighs the benefits of strictly enforcing the technical requirements for assignments of error.”¹¹⁹ Abolishing assignments of error would make North Carolina consistent with other jurisdictions and would allow appellants with meritorious appeals a greater opportunity for access to the judicial system.

VIII. IMPLICATIONS OF VIAR AND RELIEF FOR APPELLANTS

The implications of *Viar* stretch beyond the mere dismissal of an appeal for appellate rule violations, whether the violations are technical in nature or constitute an egregious disobedience of a substantial rule. A *per se* dismissal of an appeal for rules violations, regardless of the significance of the violations, is unjust to the parties.¹²⁰ The appellant possesses no particular guarantees of trustworthiness that his or her lawyer will adequately conform to the rules of appellate procedure to survive what in effect has become a strict scrutiny standard. Further, because of carelessness of the counsel, a “party with an otherwise meritorious appeal may be left with no remedy or relief.”¹²¹ In order to prevail on a legal malpractice claim, an appellant must prove that he or she would have prevailed both on appeal and on remand.¹²² This exceedingly difficult hurdle of proving malpractice on the part of appellate counsel affords many appellants no relief. For a criminal defendant to prevail on an ineffective assistance of counsel claim, “a

117. *Id.* at 808.

118. *Id.* See ALA. R. APP. P. 20 (providing that assignments of error in Alabama appellate courts are no longer required); FLA. R. APP. P. 9.040 (stating “[a]ssignments of error are neither required nor permitted” in Florida appellate courts); *Camputaro v. Stuart Hardwood Corp.*, 429 A.2d 796, 801 (Conn. 1980) (“Although this issue was not initially assigned as error, it is properly before us under [Connecticut] Practice Book, 1978, § 3060W, which abolishes the necessity of filing assignments of error.”); *Murcherson v. State*, 145 S.E.2d 58 (Ga. App. 1965) (noting that the Appellate Practice Act of 1965 abolishes assignments of error in Georgia); *Trust Co. of Chicago v. Iroquois Auto Insur. Underwriters, Inc.*, 2 N.E.2d 338 (Ill. Ct. App. 1936) (“The former practice of formal assignment of error attached to the record accomplished nothing in the aid of the court, and this was the reason for its abolition . . .”).

119. *Broderick*, 623 S.E.2d at 808 (Wynn, J., concurring).

120. *Stann v. Levine*, 636 S.E.2d 214, 224 (N.C. Ct. App. 2006) (Geer, J., dissenting).

121. *Id.*

122. *Id.*

defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense."¹²³ "[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."¹²⁴ Further, the criminal defendant must make the motion of appropriate relief to the trial court, which must be filed either *pro se* or with new counsel.¹²⁵

Strict adherence to rules of appellate procedure often undermines concepts of professional ethics and responsibility. The North Carolina Rules of Professional Conduct encourage lawyers to extend professional courtesy by alerting opposing counsel of his or her mistakes. For example, a lawyer may contact an opposing lawyer who failed to file a timely answer in order to remind the other lawyer of the error and to give the other lawyer a last opportunity to file the pleading.¹²⁶ However, it can be argued that if "appellee's counsel fails to file a motion to dismiss for rules violations, then counsel is not aggressively representing his or her client . . . [and] [c]ollegiality and principles of professionalism will have to be set aside in order to ensure proper representation of the appellate client."¹²⁷

NORTH CAROLINA SUPREME COURT SPEAKS: *STATE V. HART*

In May 2007, the North Carolina Supreme Court issued an opinion addressing the problems *Viar* had created.¹²⁸ The court first noted that "every violation of the rules does not require dismissal of the appeal or the issue, although some other sanction may be appropriate, pursuant to Rule 25(b) or Rule 34 of the Rules of Appellate Procedure."¹²⁹ The court continued by discussing the issue of the phrase first stated in *Viar*, but reaffirmed in *State v. Buchanan*, namely that "[the] Supreme Court stated that this Court may not review an appeal that violates the Rules of Appellate Procedure even though such violations neither impede our comprehension of the issues nor frustrate the

123. *State v. Allen*, 626 S.E.2d 271, 286 (N.C. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

124. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (quoting *Strickland*, 466 U.S. at 694).

125. N.C. GEN. STAT. §§ 15A-1411 to 1420 (2005).

126. Council of the N.C. State Bar, RPC 212 (1995).

127. *Stann*, 636 S.E.2d at 224 (Geer, J., dissenting).

128. *Hart*, *supra* note 135.

129. *Id.* at 202.

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appellate process.”¹³⁰ The supreme court then stated, “[I]n *Viar*, we neither admonished the Court of Appeals to avoid applying Rule 2, nor did we state that the court may not review an appeal that violates the Rules, even when rules violations ‘d[o] not impede comprehension of the issues on appeal or frustrate the appellate process.’”¹³¹ The court merely noted that the court of appeals majority had “justified its application of Rule 2 in *Viar* by using that phrase.”¹³² The supreme court reversed the decision of *Munn v. N. C. State Univ.* for those reasons stated in Judge Jackson’s dissenting opinion, but, according to *Hart*, did not “intend to adopt the *Buchanan* analysis cited therein.”¹³³

The supreme court then “expressly disavowed any interpretation”¹³⁴ that all rules violations mandate dismissal. After a brief discussion of the case, the court analyzed the usage of Rule 2, noting that it “must be used cautiously,”¹³⁵ and reaffirming “that Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances.”¹³⁶

The court’s opinion in *Hart*, while a brief victory for those who did not interpret *Viar* so strictly, left many questions unanswered. Although noting that Rule 2 was still in existence and should be used cautiously, the supreme court did nothing to clarify on which occasions usage would be proper. Further, the court did not address or attempt to define “manifest injustice.” In fact, subsequent to the *Hart* decision, the court of appeals has continued to grapple over the appropriate usage of Rule 2.

On June 5, 2007, the first two post-*Hart* decisions were filed. The opinions illustrated a stark contrast of opinion, yet a clear example of the problems *Viar* and its progeny created and *Hart* failed to solve. In *McKinley Bldg. Corp. v. Alvis*, the court of appeals, in an opinion written by Judge Jackson, invoked sanctions against defendants’ counsel pursuant to Rule 34(b) rather than dismissing the appeal.¹³⁷ Defendants’ brief violated Rules 28(b)(4), 28(b)(6), and 10(c), but the court

130. *State v. Buchanan*, 613 S.E.2d 356, 357 (N.C. Ct. App. 2005).

131. *Hart*, 644 S.E.2d at 203 (quoting *Viar v. N.C. Dep’t of Transp.*, 610 S.E.2d 360, 361 (N.C. 2005)).

132. *Id.* at 203.

133. *Id.*

134. *Id.*

135. *Id.* at 205.

136. *Id.* at 205 (quoting *Steingress v. Steingress*, 511 S.E.2d 298, 299-300 (N.C. 1999)).

137. *McKinley Bldg. Corp. v. Alvis*, 645 S.E.2d 219, 221 (N.C. Ct. App. 2007).

concluded the violations were not “sufficiently egregious to warrant dismissal.”¹³⁸

Judge Tyson dissented, stating that “[b]ased upon the numerous and egregious violations of the North Carolina Rules of Appellate Procedure, defendants’ appeal should be dismissed.”¹³⁹ He stated the majority “mischaracterizes this Court’s duty when confronted with violations of the appellate rules in light of *Hart*.”¹⁴⁰ He further argued that “[n]othing in the record or briefs demonstrates the need to disregard defendants’ rule violations ‘to prevent manifest injustice’ or ‘to expedite decision in the public interest,’”¹⁴¹ thereby permitting the use of Rule 2.

In a similar case filed the same day, Judge Tyson wrote the majority opinion dismissing an appeal in *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.* for identical rule violations as those found in *McKinley*. Defendant failed to reference the record in violation of Rule 10(c),¹⁴² failed to reference any assignments of error pursuant to Rule 28(b)(6),¹⁴³ and failed to state the grounds for appellate review and standard of review in accordance with Rule 28(b)(4).¹⁴⁴ The majority declined to exercise Rule 2, because nothing “in the record of briefs demonstrates the need to disregard the rule violations ‘to prevent manifest injustice’ or ‘to expedite decision in the public interest.’”¹⁴⁵

Judge Hunter dissented in *Dogwood*, arguing for sanctions against the party or attorney pursuant to Rule 25(b).¹⁴⁶ In his opinion, dismissal is the most severe punishment the court of appeals can impose, and should “be reserved for cases where no other sanctions are appropriate.”¹⁴⁷ He noted that trial courts must consider lesser sanction before imposing dismissal, and stated that “dismissals for basic rules violations without consideration of their type or degree is a too simplistic method of enforcing the appellate rules and ignores the discretion those rules give this Court.”¹⁴⁸

138. *Id.*

139. *Id.* at 225 (Tyson, J., dissenting).

140. *Id.* at 228.

141. *Id.* at 227 (quoting N.C.R. App. P. 2 (2007)).

142. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 645 S.E.2d 212, 214 (N.C. Ct. App. 2007).

143. *Id.* at 215.

144. *Id.* at 215-16.

145. *Id.* at 216 (quoting N.C.R. App. P. 2 (2007)).

146. *Id.* at 217-18 (Hunter, J., dissenting).

147. *Id.* at 218.

148. *Id.*

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In the wake of *Hart*, it is clear that many questions are left unanswered. On the same day in June 2007, two opinions were filed regarding the same issues, yet were decided in a completely opposite manner. Such inconsistency is a manifest injustice. In *Hart*, the court stated that “[f]undamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority.”¹⁴⁹ But such consistency will never be found until further clarification of the appropriate usage of Rule 2 is given. As it stands now, judges with a proclivity toward dismissal continue to have the discretion to determine what exactly is or is not an injustice or a matter in the public interest. Until fundamental changes are made, such arbitrariness and untrammled discretion will continue. If so, by exalting form over substance, these panels will continue to deny effective access to the appellate tribunals, possibly denying the North Carolina Bar important jurisprudential decisions.

WHAT IS THE SOLUTION?

The supreme court’s holding in *Viar* has been viewed as “stripping the appellate courts of all discretion to make allowances for human errors that make no difference in the review of an appeal.”¹⁵⁰ Several opinions state that because the court of appeals must follow the strict mandate of *Viar*, failure to comply with rules of appellate procedure warrants dismissal.¹⁵¹

This Comment notes numerous examples of inconsistent applications of the North Carolina Rules of Appellate Procedure with regard to civil appeals, criminal appeals, summary judgment appeals, and cases with identical rule violations that were ruled oppositely by differing panels. Further, there must be efforts to resuscitate Rules 25 and 34 which govern sanctions in terms of violations of the appellate rules. The recurring problems cannot be solved without further guidance by the North Carolina Supreme Court.

Such an answer may be found by establishing a balancing test, which Judge Hunter first mentioned in his dissenting opinion in *Walsh v. Town of Wrightsville Beach Board of Aldermen*.¹⁵² The balancing test

149. *Hart*, 644 S.E.2d at 206.

150. *Id.*

151. *Broderick v. Broderick*, 623 S.E.2d 806, 811 (N.C. Ct. App. 2006) (Wynn, J., concurring); *Consolidated Elec. Distrib., Inc. v. Dorsey*, 613 S.E.2d 518, 521 (N.C. Ct. App. 2005) (Wynn, J., concurring).

152. *Walsh v. Town of Wrightsville Beach Bd. of Aldermen*, 632 S.E.2d 271, 274 (N.C. Ct. App. 2006) (Hunter, J., dissenting).

should read as follows: First, does the violation of rules of appellate procedure violate a substantial rule which unduly prejudices the appellee in responding to the appeal? Such violations would include failure to serve the record on appeal and failure to include assignments of error in the brief, notwithstanding cases of summary judgment. Second, does the violation of the Rules of Appellate Procedure impede the comprehension of the issues to the extent the court of appeals would be creating an appeal for the appellant? If the answer to either of these questions is yes, then the appeal should be dismissed unless the dismissal would result in manifest injustice to the party, or a public policy issue trumps the appellate rule violations. If, however, the appellee is able to, and in fact does respond to the arguments on appeal, and the appellate court is not frustrated by overly-broad assignments of error, the appeal should be heard.

If the Rule violations are technical in nature regarding requirements such as spacing, font, number of lines per page, placement of assignments of error at the end of the record, citing to the record or transcript, and other minor technicalities, the appellate court, in its discretion, should have the option of imposing sanctions pursuant to Rules 25 and 34 of the North Carolina Rules of Appellate Procedure while hearing the merits of the case. Such sanctions would not impede the administration of justice or access of meritorious appeals to the appellate process and would curb the casual attitude of many members of the North Carolina Bar. "In addition to not punishing parties for the mistakes of their attorneys, this approach would also ensure that counsel for both appellants and appellees are subjected to the same scrutiny."¹⁵³

A second, and simpler approach, would be to alter the existing rules of appellate procedure to allow errors in appellant's brief or record to be corrected upon notification by the clerk of court. This is the approach taken by the United States Court of Appeals for the Fourth Circuit.¹⁵⁴ When an appellant fails to comply with the Federal

153. *Jones v. Harrelson and Smith Contractors, LLC*, 638 S.E.2d 222, 232 (N.C. Ct. App. 2006) (Geer, J., dissenting).

154. 4TH CIR. R. 45. The Fourth Circuit's Local Rule 45 of Appellate Procedure reads:

When an appellant in either a docketed or non-docketed appeal fails to comply with the Federal Rules of Appellate Procedure or the rules or directives of this Court, the clerk shall notify the appellant or, if appellant is represented by counsel, appellant's counsel that upon the expiration of 15 days from the date thereof the appeal will be dismissed for want of prosecution, unless prior to that date appellant remedies the default. Should the appellant fail to comply within said 15-day period, the clerk shall then

Rules of Appellate Procedure, the clerk of court notifies the appellant or appellant's counsel of the default, after which the appellant then has a fifteen day window to rectify the error.¹⁵⁵ Such an approach would allow equal access to the judicial system for all appellants, and would virtually ensure due process for every meritorious appeal. This is also the approach followed by Alabama, Mississippi, and Texas.¹⁵⁶

Although the Supreme Court recently spoke on the issue of appellate rule violations,¹⁵⁷ the court of appeals will continue to engage in an elaborate waltz of disagreement in determining which appeals should be considered. If the rigid construction of *Viar* continues, no longer will appellants be able to smuggle imperfect briefs into an appellate court where certain panels masquerade as a gatekeeper to justice. First-time and tenured appellants, enthusiastic as they are moments away from justice, will continue to be riddled with the bullets of dismissal from the culture that *Viar* has created. Appellate counsel, unless conforming to the rigid demands of *Viar* and its progeny, will quickly learn that no longer will he or she receive a slap on the hand in disapproval, but instead will be confronted with the threat of complete dismissal.

Since April 2005, the focus of the appellate courts has shifted. Before *Viar*, the philosophy of the appellate courts in North Carolina rested on a lenient interpretation of the rules of appellate procedure and equal access to justice by only punishing the most egregious violations. Since *Viar*, the espoused philosophy has been that in order to salvage the integrity of the appellate process, meritorious appeals will have to be sacrificed for the greater good. However, *per se* dismissal is not the solution. Our appellate courts must exercise their wisdom and discretion to determine those appeals which are appropriate and punish those which are not. It is their duty.

It is the court of appeals' responsibility to correct errors in the trial courts, and the court does not "serve well the parties, the Bar, the citizens of North Carolina, or justice by dismissing appeals for mistakes by lawyers that hinder neither . . . [the court's] ability to perform

enter an order dismissing said appeal for want of prosecution, and shall issue a certified copy thereof to the clerk of the district court as and for the mandate. In no case shall the appellant be entitled to reinstate the case and remedy the default after the same shall have been dismissed under this rule, unless by order of this Court for good cause shown. The dismissal of an appeal shall not limit the authority of this Court, in an appropriate case, to take disciplinary action against defaulting counsel.

155. *Id.*

156. ALA. R. APP. P. 2(a)(2); MISS. R. APP. P. 2(a)(2); TEX. R. APP. P. 37.

157. *State v. Hart*, 644 S.E.2d 201 (N.C. 2007).

. . . [its] responsibilities nor the ability of an opposing party to respond.”¹⁵⁸ It is the job of the court of appeals to correct errors in the trial court, and it is not doing that job when it dismisses appeals for non-substantive rule violations.¹⁵⁹

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158. *Stann v. Levine*, 636 S.E.2d 214, 225 (N.C. Ct. App. 2006) (Geer, J., dissenting).

159. *Id.*