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The Chair's Comments

B. Perry Morrison Jr.

My love affair with boats began when I was a small boy. One Sunday afternoon each month, our family would travel to Edenton to visit my grandmother. My sister and I were blessed with mature parents, but since each had been the youngest child in their own families, all of our grandparents save one had long since passed on. (My maternal grandfather would have been 102 years old at the time of my birth—you get the picture.) And so there was only Grandma, and one Sunday afternoon each month, we would pile into Daddy's navy blue 1965 Buick LeSabre and make the two hour and 15-minute drive to my mother's hometown, such travel to be followed by several hours of "visiting" with Methuselah's sisters and brothers, followed still by the equally long return ride home. To an active five-year-old little boy, this monthly ritual was an eastern North Carolina form of ancient Chinese water torture.

But then, there were the boats. I don't remember how I discovered them. I was forever asking Daddy to go somewhere—anywhere—just to get out of that house with all those "old people." And

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To Err Is Human, But To Forgive Is Divine

The *Viar* Controversy and What It Means for Appellate Practice

By K. Edward Greene and Sean Andrussier

Anyone who practices in our state's appellate courts should be aware of a significant controversy, one sparked by the North Carolina Supreme Court's 2005 decision in **Viar v. N.C. Dept. of Transportation.**[1] That decision has been read by many judges on the Court of Appeals to impose something close to a zero-tolerance policy for rules violations, including non-prejudicial violations that do not impede comprehension of the issues on appeal. **Viar** has generated a great deal of controversy at the Court of Appeals, which in turn has created a great deal of confusion for appellate practitioners. This article discusses the controversy and provides some direction for lawyers doing appeals.

The Landscape Before *Viar*

The North Carolina Constitution vests in the Supreme Court the exclusive power to make the rules of procedure governing the appellate courts.[2] In the mid-1970s the Supreme Court adopted the North Carolina Rules of Appellate Procedure (hereinafter "Rules"), and these Rules have been modified and amended at various times since then.

The rule invoked by an appellate court when it wishes to bypass rules violations and review the merits is Rule 2. Entitled "Suspension of Rules," this discretionary rule provides, "To prevent manifest injustice to a party, or to expedite decision in the public interest, [the appellate court] 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."

Historically appellate judges were hesitant to dismiss appeals for many types of rules violations, particularly for technical violations. As the Court of Appeals said in a 2003 decision, "This Court 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.*"[3]

Infrequently the Court of Appeals would dismiss an appeal for failure to comply with the requirements for an appellate brief. One such case was **Steingress v. Steingress,**[4] a case in which a divided Court of Appeals panel was affirmed by a divided Supreme Court (4-3) in 1999.

In **Steingress,** an equitable distribution action, the Court of Appeals majority voted to dismiss the appeal because the appellant's brief did not comply with the Rules in two respects: (1) her brief was not double-spaced and (2) the argument section failed to reference the assignments of error on which her arguments were based. Judge Walker dissented. He would have used Rule 2 to suspend the Rules and hear the appeal, while imposing a monetary sanction on counsel (taxing counsel with costs) for the violations. The decision was unpublished, which gives some indication the Court of Appeals did not deem the Rule 2 issue to be so significant.

Nonetheless, because Judge Walker dissented, the case went to the Supreme Court as an appeal of right. Justice Lake, writing for the Supreme Court majority, viewed the issue on appeal narrowly. As he saw it, Judge Walker's dissent essentially raised the issue whether the Court of Appeals majority *abused its discretion* in fail-

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Editor
Pankaj K. Shere

Editorial Address
P.O. Box 3688
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so we developed a habit where after about an hour of "visiting," I would give my dad that pleading look, now perfected so well by my own son, and he would announce that Perry and his dad were taking a walk. I would burst through the front door of the house on King Street, enjoying the sweet taste of a few moments of freedom and run headlong the half-block to the Green, turn left, then run one block to the water.

Things weren't fancy on the Edenton waterfront in those days, but there were these wonderful little old wooden rowboats tied there that people used to go fishing in the Albemarle Sound. I never knew to whom they belonged, but I loved to just go sit on the bulkhead and stare at them bobbing to and fro in the sunshine. Daddy would eventually catch up with me, and then I would start begging to get in one of the boats. Sometimes he would relent and allow me to sit in one that looked somewhat seaworthy, just for a minute or two. I would hold an oar in my hand and dream that one day I might have a wooden rowboat of my very own.

I never did acquire that rowboat, but I did marry into a boating family, where most have bought and sold several boats before they're first licensed to drive a car. After 13 years of borrowing boats, I finally bought my own. It was the most foolish financial decision I have ever made, but I have loved every minute of owning that boat. In fact, I have gotten more joy out of owning my little boat than anything I've ever purchased. To me it represents freedom, the ability to go almost anywhere you want to go. On the water there are no traffic signals, no rush hours, no traffic snarls. You can spend time alone fishing the marshes, trawl for blues or Spanish mackerel, take the family water skiing or just throw out an anchor and enjoy the sun. My boat is a 17-footer, nimble and quick. Its draft is minimal, and her range is limitless, from the ocean to the shallow marshes. My Boston Whaler 170 is unsinkable, easy to operate, easy to turn, easy to dock and easy to trailer.

Owning that Whaler is sort of like being at the helm of a solo law practice. Yes, it's a lot of hard work, but it's easy to make decisions and change direction. If something's not working, then you can change it without calling a committee meeting or consulting with partners. As the sole owner, you make all your own decisions, and you alone enjoy the fruits (or the consequences) of your actions. Hopefully, you're successful and you feel the need to grow your business to handle an expanding client base, but then your crew gets larger, and being at the helm is not quite so easy. More people depend on you to steer the boat safely through the

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ing to use Rule 2, a discretionary rule. Justice Lake's majority opinion held that the Court of Appeals majority did not abuse its discretion in declining to apply Rule 2.

Before delivering that holding, Justice Lake's majority opinion stated that the Rules are "mandatory" and failure to follow them "will subject an appeal to dismissal." He added this caveat about Rule 2: "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."[5]

Justices Frye, Orr, and Parker dissented.

Because **Steingress** was decided on the basis that the Court of Appeals did not abuse its discretion in declining to invoke Rule 2, the case did not seem too significant. And, indeed, in the six years after **Steingress** was decided (March 1999 through March 2005), the Court of Appeals cited **Steingress** only about 30 times; and in many (if not most) of those cases, the Court of Appeals noted rules violations but then proceeded to invoke Rule 2 and reach the merits.

One such case was **Viar v. N.C. Dept. of Transportation,**[6] decided by the Court of Appeals in 2004, five years after **Steingress.**

Viar

Megan and Macey Viar, sisters, were killed in a car accident on I-85 when the car in which they were riding crossed the grass median separating the northbound and southbound lanes. The administrator of their estate, their father, filed a negligence claim against the Department of Transportation under the Tort Claims Act based on the Department's failure to install a guard rail or median barrier between those lanes. The claim was denied by the Industrial Commission, and the plaintiff appealed. Despite rules violations, a majority of the Court of Appeals reached the merits and voted to reverse and remand the case to the Industrial Commission.

Judge Tyson dissented, contending the appeal should have been dismissed for the rules violations. In response to Judge Tyson's dissent, the majority explained that it deemed the violations technical and not substantive and opined dismissal of an appeal for technical rules violations would amount to a manifest injustice:

> While the failure to comply with the appellate rules subjects an appeal to dismissal, [citing **Steingress**], this Court may suspend or vary the requirements of the rules to "prevent manifest injustice," N.C.R.App. P. 2, or "as a matter of appellate grace." **Enterprises, Inc. v. Equipment Co.,** 300 N.C. 286, 288, 266 S.E.2d 812, 814 (1980). * * * In this case, the dissenting opinion does not assert that the rules violations by plaintiff impede comprehension of the issues on appeal by the appellee or this Court, or that the appellate process has been otherwise frustrated. Nor does the record support such a conclusion. * * * The violations are technical rather than substantive, and are not so egregious as to warrant dismissal. * * * Plaintiff has presented a compelling appeal warranting reversal, the merits of which were orally argued before this Court. Dismissal of such appeal for technical appellate rules violations would amount to a manifest injustice.[7]

The violations to which the majority alluded related to the plaintiff's two assignments of error: neither of the assignments referenced the record, and one assignment did not state the legal basis for the error (as required by Rule 10(c)).

But that was only part of the problem: The majority decided the appeal on the basis of an issue to which the appellant did not even assign error, and indeed the majority based its decision on a rationale that was not specifically argued in the appellant's brief.

Based on Judge Tyson's dissent, the Attorney General appealed to the Supreme Court as a matter of right. In a per curiam opinion—a unanimous opinion—the Supreme Court vacated the decision of the Court of Appeals and dismissed the appeal.[8] That the Supreme Court unanimously spoke with one voice in vacating the decision was perceived by many as an attempt by the Supreme Court to send a significant message to the Court of Appeals.

The Supreme Court in **Viar** began by reiterating what it had said in **Steingress:** the Rules are mandatory and the failure to follow them "will subject an appeal to dismissal." Then, after explaining that the appellant failed to comply with the Rules, the Court said this:

> The majority opinion in the Court of Appeals, recognizing the flawed content of plaintiff's appeal, applied Rule 2 of the Rules of Appellate Procedure to suspend the Rules. The majority opinion then addressed the issue, not raised or argued by plaintiff, which was the basis of the Industrial Commission's decision, namely, the reasonableness of defendant's decision to delay installation of the median barriers. The Court of Appeals majority asserted that plaintiff's Rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process. It is not the role of the appellate courts, however, to create an appeal for an appellant. As this case illustrates, the 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.[9]

As we shall see, that passage has generated great confusion: Was the Supreme Court warning the Court of Appeals not to suspend the Rules absent extraordinary circumstances, even when the violations "did not impede comprehension of the issues on appeal or frustrate the appellate process"? Or was the Supreme Court warning the Court of Appeals not to "create an appeal for the appellant" in the sense of reaching issues "not raised or argued by" the appellant?

The Fallout After *Viar*

The Supreme Court issued **Viar** on April 7, 2005. In the 21 months that have followed, the decision has been cited in well over 100 decisions of the Court of Appeals.

In most of those cases a majority has invoked **Viar** for essentially this proposition: Dismissal of all or part of an appeal is *required* when an appellant fails to comply with Rules, absent the most extraordinary of circumstances, even if the error does not impede comprehension of the issues on appeal or prejudice opposing parties. *See* **State v. Hill,** 632 S.E.2d 777 (N.C.App. 2006) ("Since Viar, this Court has been more reluctant to use the authority allowed by Rule 2 to suspend or vary the requirements of any of the rules '[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]' N.C. R. App. P. 2. As a consequence, cases in which appeals have been dismissed, or arguments deemed abandoned, abound.").

It bears noting that these dismissal decisions do not include the run-of-the-mill dismissals that have historically generated little controversy—e.g., dismissals from untimely appeals, untimely records on appeal, improper interlocutory

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shallows and reach your destination at the end of every month. Sometimes you might need to buy a bigger boat so that your operation will run more efficiently, to allow for more crew and passengers than before. Whereas earlier you could get by with only a first mate, now you may consider hiring a professional captain to share duties at the helm while you deal with the passengers and crew.

Then, suddenly one day you find yourself at the helm of a cruise ship, one with a small but dedicated crew and close to 2,300 passengers. This cruise ship, and for the sake of discussion, let's call it the Litigation Section, has been sailing along nicely for nearly 25 years, but lately it's begun to take on a little water. It's still running its standard routes and getting the job done, but it's tired. Some of its passengers are "jumping ship" and booking cruises on the new, more glamorous smaller "boutique" lines. But you're the captain, and you've only got 12 months to get things "ship shape" and make the cruise ship attractive again not only to new passengers, but also to entice former ones to come back for another cruise. Dry dock is not an option, as this ship must stay afloat. The first thing you realize is that you can't do it alone, so you call a meeting of your first officers.

Our section's first officers met last summer to do long-range planning for our Litigation Section. This was the first time in our collective memories that we'd ever talked about anything other than the present. We all easily agreed on several issues. First, our section council needs to be more responsive to its members. Second, that while the section leadership has for years been doing very important work with the North Carolina Bar Association, the General Assembly and the N.C. State Bar involving litigation issues, we were not doing a good enough job in communicating our activities to the section membership. Third, we needed to do a little bit less business at our annual meetings and have a little bit more fellowship. Lastly, we all realized that these changes could not take place overnight, but such change in focus would take a number of years. After all, we are trying to chart a new course for a 2,300-passenger cruise ship!

Since that meeting, we have begun the process of reactivating our long-dormant committees to involve more section members in our work. I appreciate the tremendous response to my simple e-mail request for committee volunteers. You have surprised and humbled me by showing how very many of you care so deeply about our profession that you are willing to spend the volunteer time necessary to make it better. Further, realizing that Wake is only one of the 99 counties in North Carolina, we are making plans to get out of Raleigh more often with our section council meetings. Our first meeting was in Greensboro, our second will be in downtown Raleigh (not at the Bar Center), our third will be in Charlotte and the last will be just prior to the annual meeting at the Grandover Resort on April 26, 2007. (Mark your calendars!)

This year's annual meeting will be somewhat traditional in its flavor, but our plans for next year are to move the annual meeting to the fall and have it in Pinehurst. Thereafter we hope to develop a traditional weekend and rotate the meeting in a pattern among certain resorts/cities around the state. Our aim is to develop more camaraderie among our members centered around our annual meetings.

Always with an eye toward our educational mission, we plan to partner with the Young Lawyers Division to develop a two-part seminar tentatively titled "Tricks of the Trade" designed to allow our members to teach and share trial skills to young lawyers. The first one of these is set for June 2007. We hope that these seminars will be offered year after year to help young lawyers learn to try cases. Our council is now trading liaisons with the Dispute Resolution Section in the hope that we might work together on some future projects, particularly given that mediation is now a mandatory exercise in almost every litigation arena. If these efforts work well, we should consider formal partnerships with some of the other sections.

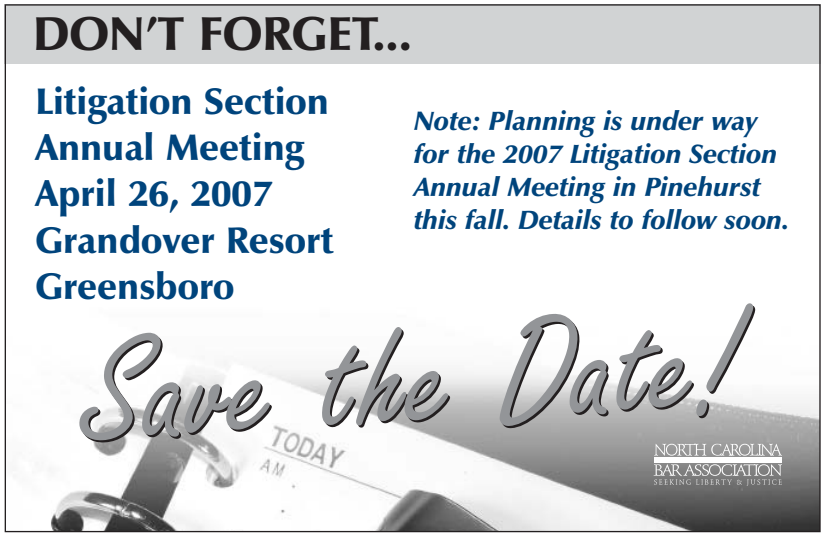
Isaac Thorp and his subcommittee have begun their work studying the recent explosion in local rules amongst the 40-something judicial districts in our state. The problem of keeping abreast of changing local judicial practices has become so chronic that there is no one central location where such local rules are available, some of which purport to supersede the Rules of Civil Procedure and the General Rules of Practice. Thorp and his committee will be studying the situation, counsel with the Administrative Office of the Courts and hopefully make a recommendation to the Board of Governors at its June 2007 meeting.

Our Vice Chair Mark Boynton recently made an appearance before a House Committee studying the issue of recoverable court costs. In light of conflicting appellate opinions, the General Assembly has chosen to study this issue in preparation for the 2007 Session.

Allison Van Laningham is chairing our annual meeting (and that date once again is Thursday, April 26, 2006 at Grandover Resort), the theme of which will be how emerging technology is changing the way we practice law. With mandatory e-filing coming soon to your county courthouse, this will be an important program for every litigator in North Carolina.

As I write this, the clock is ticking on my term, and I will be passing the baton to your next chair within four months. As your captain, I'm telling you that one year is not enough time to change this vessel's course. The ship is simply too big. However, what we can do is chart our new course and begin to steer the ship toward our new coordinates. With your help and that of our future leadership, we can make our Litigation Section the "best of the bunch" in the North Carolina Bar Association.

—Perry Morrison



appeals, and the like. Rather, by and large these post-**Viar** dismissals involved deficiencies in the assignments of error and briefs filed by appellants. In many if not most of these cases, the Court has dismissed cases *on its own initiative,* without consideration of whether the errors were prejudicial to opposing parties.

Many of these cases involved technical violations that were not substantive. Indeed, even clerical errors may not be safe after **Viar:** In one case the Court of Appeals dismissed an appeal because a page of the trial court's four-page order was (presumably inadvertently) missing from the record on appeal.[10] The Court dismissed even though the appellee attached the full order to its brief, and there was no prejudice to the appellee, who at all times was aware of the order.

Below are examples of the types of violations that have contributed to dismissals by the Court of Appeals after **Viar.** As you read this list you will appreciate Judge Geer's recent warning: "legal malpractice carriers must sit up and take notice: appellate practice has become high risk . . . ."[11]

- Spacing in briefs less than double-spaced;
- Incorrect font size in footnotes;
- Failure to include procedural history of the case in the appellate brief;
- Argumentative or conclusory statement of facts in the brief;
- Omitting material facts from the statement of facts;
- Failure to include citations to the record after each assertion in the statement of facts;
- Failure to include in the brief a statement of the grounds for appellate review with citation to the relevant statute authorizing appellate review;
- Failure to include in the brief a statement and citations regarding the standard of review;
- Failure to reference assignments of error under the questions presented in the argument section of the brief (even in cases involving only one or two assignments or error, where it is obvious which errors the questions refer to);
- Failure to include supporting citations to the record after making assertions in the argument section of the brief;
- Failure to include in the record the certificate of service attached to the notice of appeal;
- Putting assignments of error at a spot in the record that's not "the conclusion";
- Failure to number each assignment of error separately in the record on appeal;
- Failure to identify in the assignments of error the specific findings of fact or conclusions of law being challenged;
- Broad or vague assignments of error;
- Failure to identify in the assignments of error the legal issues that will be briefed on appeal (the so-called "legal basis" for the error);
- Failure to reference after each assignment of error the appropriate record or transcript pages where the error appears;
- Failure to ensure that the record includes every page of the challenged order/judgment;
- Appeal Information Statement untimely filed.

Although most of the dismissal cases involved two or more violations, some were single-violation cases. For example, just two months ago a panel of the Court of Appeals invoked **Viar** and dismissed an appeal because the appellant failed to include in the record a certificate of service for the notice of appeal.[12]

Stark Division Within The Court of Appeals

To be sure, the post-**Viar** Court of Appeals has not been all one-sided in favor of dismissal. In a minority of decisions that have acknowledged violations, the Rules were suspended per Rule 2 and the merits were addressed.[13] Thus, the judges on the Court of Appeals have arrived at differing interpretations of **Viar.** Many have read **Viar** broadly as exhorting the Court of Appeals to dismiss cases (absent extraordinary circumstances) when an appellant fails to comply with the Rules, even if the error does not impede comprehension of the issues on appeal or cause prejudice to opposing parties. Other judges, however, have not read **Viar** so broadly. They have read **Viar** as holding principally that the Court of Appeals cannot "create an appeal" for an appellant by addressing issues that the appellant has not raised in its assignments of error or argued in its brief. These judges have concluded the Supreme Court likely did not intend to require dismissal for *any and all* rules violations, regardless of their magnitude and whether they impede the appellee's or the Court's ability to address the appeal.

This division has resulted in a number of split decisions.[14] And it has resulted in what appears to be inconsistent opinions for the same types of rules violations.[15] *See* **Stann v. Levine,** 636 S.E.2d 214 (N.C.App. 2006) ("panels of this Court have taken inconsistent approaches with respect to the application of Rule 2 of the Rules of Appellate Procedure and created confusion over the implications of the Supreme Court's opinion in **Viar**"); **Broderick v. Broderick,** 623 S.E.2d 806, 810 (N.C.App. 2006) (Wynn, J., concurring) (observing that the Court's "enforcement of the appellate rules has been anything but consistent," and "strongly urg[ing] our Supreme Court to provide this Court guidance on when we should invoke our discretion under Rule 2 and undertake to hear appeals that violate our appellate rules").

The division has produced some debates in several recent decisions, most notably in **Stann v. Levine**[16] and **Jones v. Harrelson & Smith Contractors, LLC,**[17] both decided late in 2006. Both appeals were dismissed by Judges Jackson and Tyson over dissents from Judge Geer, who concluded in each case that the merits of the appeal should have been addressed. These two cases highlight the two schools of thought on the **Viar** controversy, so we discuss them at length below.

In her dissents in **Stann** and **Jones,** Judge Geer states this standard: "Substantial compliance" with the Rules "precludes dismissal," and the Court should dismiss an appeal only if the violations "substantially affect the ability of the appellee to respond and this court to address the appeal."[18] In support of that standard, she makes the following points:

- The Supreme Court's focus in **Viar** was on the impropriety of reviewing issues not raised by an appellant; the Supreme Court did not necessarily intend "to require dismissal for all rules violations regardless of their magnitude and regardless [of] whether they impede the appellee's or this Court's ability to address the issues on appeal."
- The restrictive approach effectively eviscerates Rule 2, which is a rule of discretion.
- The restrictive approach, if faithfully applied, would lead to "wholesale dismissals" since "[m]any, if not most, appeals involve some violation of the appellate rules . . . ."
- "Automatic dismissal of an appeal for rules violations—regardless of the significance of the violations—is particularly unfair to the parties" since a client "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 due to the need to prove that the appellant would have prevailed both on appeal and upon remand."
- The restrictive approach encourages appellees' counsel to file motions to dismiss for rules violations, which may adversely effect the legal culture by undermining "[c]ollegiality and principles of professionalism."
- "The emphasis on dismissal as the only sanction for appellate rules violations allows appellees

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to violate the rules with impunity."

♦Other sanctions short of dismissal are available, such as taxing counsel with costs.[19]

On this latter point—the availability of lesser sanctions—Judge Geer's dissent in **Jones** observes that a rigid dismissal-based approach to violations is in tension with Rule 25(b) and Rule 34, which seem to provide for dismissal only when an appellant has "substantially failed to comply" with and "grossly violated" the Rules.[20]

Judge Jackson's majority opinion in **Stann** (joined by Judge Tyson) delivered a rebuttal to Judge Geer, making these points:

♦North Carolina attorneys have no excuse not to be familiar with the Rules, and a strict standard of compliance does not impose an unreasonable burden on them.

♦To err is human, but to forgive is "divine," and "the choice to take the 'divine' step of forgiveness for the appellate attorney's mistakes lies with the party in the case and the attorney's client, not with this Court" (footnote omitted).

♦An "*ad hoc* application of the rules, with inconsistent and arbitrary enforcement, could lead to allegations of favoritism for one counsel over another."

♦Employing a "harmless error" approach would create "a classic slippery slope dilemma" in which the rules no longer would be rules but instead would merely be "guidelines."

♦A "substantial compliance" exception has not been expressly endorsed by the Supreme Court, and the notion that the only violations that warrant dismissal are those "that substantively affect the ability of the appellee to respond and this Court to address the appeal" was rejected by the Supreme Court in **Viar.**

♦The ability to "comprehend the issues on appeal is irrelevant with regard the invocation of Rule 2," because the text of Rule 2 is more stringent than that, requiring "manifest injustice" or "public interest."

♦The Supreme Court with rare exception "has confined its invocation of Rule 2 to extraordinary matters affecting the life or liberty of a criminal defendant or the constitutionality of a statute."

The Supreme Court Must Resolve The Controversy

Only the Supreme Court can clarify its intentions and resolve the split in the Court of Appeals over the meaning of **Viar.** Some of the very recent split decisions ultimately will be heard by the Supreme Court as appeals of right based on dissenting opinions, but the Supreme Court now has an opportunity to confront this issue in a pending case: **Walsh v. Town of Wrightsville Beach.**[21] That case, which is in the Supreme Court based on a dissenting opinion filed by Judge Hunter, was argued on January 9, 2007.

In **Walsh** the trial court dismissed a complaint under Rule 12(b)(1) for lack of standing, and a majority of the Court of Appeals dismissed plaintiff's appeal based on two violations arising from his lone assignment of error: (1) although his assignment of error referenced the two findings of fact deemed erroneous, it did not reference the pages in the record where those findings appeared (i.e., the trial court judgment); and (2) the argument section of his brief did not reference the lone assignment of error.

Judge Hunter dissented. "Because petitioner's assignment of error and brief sufficiently direct this Court to the sole error assigned and do not impede respondent's comprehension of the issue," Judge Hunter would have used Rule 2 to review the merits.[22] He emphasized the appellee did not raise the violations and filed a brief thoroughly responding to the appellant's arguments. "Here, due to the limited facts and highly specific nature of petitioner's sole assignment of error, petitioner's rules violations had little to no impact on this Court's ability to readily discern the question of law presented, and did not deprive respondents of notice as to the issue on appeal," Judge Hunter observed.[23] Judge Hunter did not deem **Viar** controlling: "**Viar** admonished this Court not to use Rule 2 to 'create an appeal for an appellant'" and "specifically noted that the underlying majority opinion in that case . . . addressed an issue not raised or argued by the appellant, leaving the appellee 'without notice of the basis upon which an appellate court might rule.' "[24] Judge Hunter continued: "[D]ismissal of petitioner's case for such technical rules violations . . . would require mandatory dismissal of all cases where a minor violation of our appellate rules has occurred, even those which neither impede the work of the Court nor disadvantage the appellant. To require the automatic dismissal of all cases for hyper-technicalities was surely not the intention of our Supreme Court in its decision in **Viar** . . . ."[25]

If that *is* the Supreme Court's intention, **Walsh** gives the Court an opportunity to say so. (As of the printing of this article, **Walsh** has not yet been decided.)

Whatever the Supreme Court Does, Counsel Must Take the Rules Very Seriously, Particularly Rules 10(c) and Rule 28(b)

Even if the Supreme Court embraces a more permissive approach—holding that dismissal may or should be reserved for those violations that substantially affect the ability of the appellee to respond and the Court to address the appeal—one cannot be sure a violation will be deemed to satisfy that standard. Thus, no matter what the Supreme Court does, counsel must step up their efforts to comply with the rules. In this connection, we offer this general advice.

1) When you are preparing assignments of error for the record on appeal, study carefully Rule 10(c) and the examples for assignments of error set forth in Appendix C to the rules. Generally follow these steps.

a) First, identify each specific finding of fact or conclusion of law you intend to challenge in your appellate brief, and make each finding and conclusion the basis of a separate assignment of error. Draft each assignment of error in a way that clearly identifies the specific finding/conclusion that you contend is erroneous.

b) Second—and this is key—after identifying the specific finding/conclusion you believe is erroneous, explain *why* you contend it is erroneous. See Rule 10(c) ("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 upon which error is assigned.*" (emphasis added)). This requirement has been the number one culprit for dismissals in the wake of **Viar.** Simply put, you should forecast in your assignment of error the *precise* contention you will be making in your appellate brief as to *why* the trial court's particular finding or conclusion was wrong. Broad or vague or circular contentions will not suffice. Thus, for example, if you believe the trial court's finding or conclusion is contrary to a legal doctrine, be specific and identify the legal doctrine in your assignment of error. You should think ahead and give serious thought about what your brief will contend, because discrepancies between the phrasing of the argument in your brief and your assignment of error may be used against you. Err on the side of specificity. (For examples of assignments of error that have been deemed to fail this Rule 10(c) requirement after **Viar,** see the cases cited in the attached note; opinions are available on the Court's Web site at:

www.aoc.state.nc.us/www/public/html/opinions.htm[26])

c) After each assignment of error, be sure to identify the specific page(s) in the record or transcript on which the particular trial court finding/conclusion appears. Before you file the record on appeal with the Court of Appeals, double-check for accuracy.

2) Before and after you prepare your brief, study Rule 28 carefully. Rule 28 identifies the necessary components of the appellate brief. Many lawyers are omitting pieces required by this rule—such as the statement of grounds for appellate review, the statement regarding the standard of review governing each question presented (with citations to authority), and references to the assignments of error after the questions presented.

Suggested Reform: Abolish Assignments Of Error

By far the number one compliance problem that has contributed to dismissals in the wake of **Viar** has concerned assignments of error. Last year, in the case **Broderick v. Broderick,** Judge Wynn wrote a concurrence "to urge our Supreme Court to abolish assignments of error.[27] (In **Broderick** the Court of Appeals dismissed a pro se appeal because the appellant's lone assignment of error did not state the legal basis for the challenge and was not followed by a record or transcript reference.) As Judge Wynn observed, abolishing assignments of error would be consistent with the Federal Rules of Appellate Procedure and the appellate rules of other states, which no longer require or recognize assignments of error.

The Supreme Court, in adopting our current Rules requiring assignments of error be set out in the record, adopted a limited record review. In other words, in this state it is not the entire record of the trial court that goes to the appellate court but instead only that portion of the record necessary for the reviewing court to understand the issues to be raised on appeal. This is in contrast to the complete record approach taken by some appellate courts, including the Fourth Circuit and some states. In theory, this limited record approach saves the parties time and money and reduces the bulk of documents before the appellate court. In practice, most appeals nowadays include the entire record, as the appellant and appellee feel uncomfortable not including the entire record for the appellate court review. Thus, in practice the assignments of error no longer serve their purpose and now serve only as a trap for lawyers doing their best to have the appeal properly presented for decision. With a strict reading of **Viar,** it is almost impossible to prepare proper assignments of error without first thoroughly researching all the possible issues that might arise in the case and the appellant's legal position on each of those positions. It is like being required to write your brief before the brief is due. It can be an expensive process.

If this state is going to continue its adherence to limited record review, thus sustaining the continued use of assignments of error, it is vitally important the Supreme Court reaffirm that Rule 2 may be applied by the appellate court, in its discretion and in exceptional situations. This was the holding of that Court in **Steingress,** and the holding in **Viar** made no attempt to overrule this long-standing application.

GREENE IS WITH WYRICK ROBBINS YATES & PONTON LLP IN RALEIGH AND SERVED AS A JUDGE ON THE NORTH CAROLINA COURT OF APPEALS FOR 16 YEARS.

ANDRUSSIER IS WITH WOMBLE CARLYLE SANDRIDGE & RICE, PLLC AND RUNS A BLOG CALLED NORTH CAROLINA APPELLATE BLOG.

Endnotes

1. 610 S.E.2d 360 (N.C. 2005) (per curiam).
2. N.C. Const. Art. IV, § 13(2).
3. **Spencer v. Spencer,** 156 N.C. App. 1, 8, 575 S.E.2d 780, 785 (2003) (emphasis added).
4. 511 S.E.2d 298 (N.C. 1999).
5. *Id.* at 299-300.
6. 590 S.E.2d 909 (N.C.App. 2004), vacated, 610 S.E.2d 360 (2005) (per curiam).
7. 590 S.E.2d at 919 (citations omitted).
8. 610 S.E.2d 360 (2005) (per curiam).
9. *Id.* at 361 (citations omitted).
10. *See, e.g.,* **Terrell v. Chatham County,** 2006 WL 1319909 (N.C.App. May 16, 2006).
11. **Stann v. Levine,** 636 S.E.2d 214, 224 (N.C.App. 2006) (Geer, J., dissenting).
12. **Ribble v. Ribble,** 637 S.E.2d 239 (N.C.App. 2006).
13. *See* **Cordell Earthworks, Inc. v. Town of Chapel Hill,** 2005 WL 1331060 (N.C.App. June 7, 2005); **Youse v. Duke Energy Corp.,** 614 S.E.2d 396 (N.C.App. 2005); **Wallace v. TLP Intern., Inc.,** 2005 WL 1805039 (N.C.App. Aug. 2, 2005); **Munn v. N.C. State. Univ.,** 617 S.E.2d 335 (N.C.App. 2005), *rev'd,* 626 S.E.2d 270 (N.C. 2006); **Coley v. State,** 620 S.E.2d 25 (N.C.App. 2005); **Davis v. Columbus County Sch.,** 622 S.E.2d 671 (N.C.App. 2005); **Welch Contracting, Inc. v. N.C. Dept. of Transp.,** 622 S.E.2d 691 (N.C.App. 2005); **Nelson v. Hartford Underwriters Ins. Co.,** 630 S.E.2d 221 (N.C.App. 2006); **Hammonds v. Lumbee River Elec. Membership Corp.,** 631 S.E.2d 1 (N.C.App. 2006); **Davis v. Macon County Bd. of Educ.,** 632 S.E.2d 590 (N.C.App. 2006); **Hedingham Community Assn. v. GLH Builders, Inc.,** 634 S.E.2d 224 (N.C.App. 2006); **State v. Hill,** 632 S.E.2d 777 (N.C.App. 2006); **Cornelius v. Corry,** 2006 WL 2947389 (N.C.App. Oct. 17, 2006); **State v. Risher,** 2006 WL 2947050 (N.C.App. Oct. 17, 2006); **Seay v. Wal-Mart Stores, Inc.,** 637 S.E.2d 299 (N.C.App. 2006); **In re S.F.,** 2007 WL 3767 (N.C.App. Jan. 2, 2007); **State v. Lockhart,** --- S.E.2d --- (N.C.App. Jan. 2, 2007); **Caldwell v. Branch,** 638 S.E.2d 552 (N.C.App. 2007).
14. *See* **Youse v. Duke Energy Corp.,** 614 S.E.2d 396 (N.C.App. 2005); **Munn v. N.C. State. Univ.,** 617 S.E.2d 335 (N.C.App. 2005), *rev'd,* 626 S.E.2d 270 (N.C. 2006); **Walsh v. Town of Wrightsville Beach,** 632 S.E.2d 271 (N.C.App. 2006); **State v. Hart,** 633 S.E.2d 102 (N.C.App. 2006); **Stann v. Levine,** 636 S.E.2d 214 (N.C.App. 2006); **Bennett v. Bennett,** 638 S.E.2d 243 (N.C.App. 2006); **Jones v. Harrelson & Smith Contractors, LLC,** 638 S.E.2d 222 (N.C.App. 2006); **State v. McDougald,** 638 S.E.2d 546 (N.C.App. 2007).
15. To take a recent example, the Court of Appeals recently reviewed two appeals even though the appellants had not complied with Rule 28(b)(6), which requires that the argument section of the brief contain a statement of the applicable standard(s) of review with citations to authorities. **Caldwell v. Branch,** 638 S.E.2d 552 (N.C.App. 2007); **State v. Lockhart,** --- S.E.2d --- (N.C.App. Jan. 2, 2007). But six months earlier the Court dismissed an argument based on the same violation. **State v. Summers,** 629 S.E.2d 902 (N.C.App. 2006). Another example: In **State v. Locklear,** 636 S.E.2d 284, 287 (N.C.App. 2006), the Court dismissed an appeal because the appellant's brief omitted a statement of grounds for appellate review, deeming this a "significant section," but a year earlier different panels deemed the same omission minor and not substantive or egregious enough to warrant dismissal, **Coley v. State,** 620 S.E.2d 25, 27 (N.C.App. 2005); **Wallace v. TLP Int'l, Inc.,** 2005 WL 1805039 (N.C.App. Aug. 2, 2005). For another recent example, compare **Seay v.**

See ***VIAR* CONTROVERSY** *page 8*

Do You Have an Opinion?

What are your thoughts about the **Viar** controversy? Voice your opinion by submitting your comments on the article "To Err Is Human, But To Forgive Is Divine: The *Viar* Controversy and What It Means to Appellate Practice." Your comments will be published in an editorial column in the next issue of *The Litigator*.

E-mail your comments to Pankaj Shere: *pankaj.shere@troutmansanders.com.*

Editor's Note: The Litigator *is proud to announce a new column entitled "Dear Learned Litigator." The purpose of this column is to provide our legal community with a forum to ask, and have answered, practical legal questions that come up in everyday practice. Please e-mail any questions you would like to have answered by Learned Litigator to pankaj.shere@troutmansanders.com.*

Dear Learned Litigator:

I recently opened up my own solo practice in Raleigh, North Carolina. I have a legal secretary and paralegal assisting me on a daily basis. I generally handle 10-20 cases at one time for the same client. The nature of my practice (particularly since I opened my own practice) requires me to be out of the office for depositions and meetings on a regular basis. I handle a large volume of similar cases for the same client. Because written discovery is very similar in all of the cases, I often times allow my paralegal to sign my name to the pleadings. Do you see a problem with this practice?

Sincerely,
John Doe, Esq.

Dear John Doe:

Be careful! A lawyer should always sign court documents and pleadings and should only delegate the signing of his/her name to a nonlawyer when the lawyer is unavailable and no other lawyer in the firm is able to do so. However, if exigent circumstances require the signing of a pleading in the lawyer's absence, a lawyer may delegate this task to a paralegal or other nonlawyer staff only if 1) the signing of a lawyer's signature by an agent of the lawyer does not violate any law, court order, local rule, or rule of civil procedure; 2) the responsible lawyer has provided the appropriate level of supervision under the circumstances and 3) the signature clearly discloses that another has signed on the lawyer's behalf. The following two rules are relevant to a lawyer's responsibilities under the circumstances:

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

Rule 5.5 Unauthorized Practice of Law

(d) A lawyer shall not assist another in the unauthorized practice of law.

Before permitting your paralegal to sign your name to any court document, you must carefully review pertinent case law, local rules, or rules of civil procedure to determine whether such delegation is permissible and therefore, compatible with the lawyer's professional obligations. Rule 5.3 (see above). In addition, as the lawyer, you must exercise the appropriate level of supervision of your paralegal to avoid aiding in the unauthorized practice of law. Rule 5.5(d). Keep in mind that the preparation of a pleading is the practice of law. G.S. A7 84-2.1 (2004). You must carefully and thoroughly review both the substance and form of a pleading prepared by a paralegal before filing the document with the court. You may not permit a paralegal to sign your name to a pleading, even in exigent circumstances, if you have not afforded the appropriate level of review and supervision. Finally, the signature must evidence, on its face, that it is by another's hand to avoid misleading the court. Also, a paralegal or paraprofessional may never sign and file court documents in his/her own name. To do so violates the statutes prohibiting the unauthorized practice of law.

Good luck with your new practice John Doe, Esq. ❐

Viar Controversy *from page 7*

Wal-Mart Stores, Inc., 637 S.E.2d 299, 300-01 (N.C.App. 2006) (invoking Rule 2 and reviewing the merits despite two rules violations) with **Walsh v. Town of Wrightsville Beach,** 632 S.E.2d 271, 272-73 (N.C.App. 2006) (dismissing appeal based on the same two violations).

16. 636 S.E.2d 214 (N.C.App. 2006).

17. 638 S.E.2d 222 (N.C.App. 2006).

18. **Jones,** 638 S.E.2d at 232 (Geer, J., dissenting); **Stann,** 636 S.E.2d at 223 (Geer, J., dissenting). Judge Elmore has recently adopted this standard in dissent. *See* **State v. McDougald,** 638 S.E.2d 546 (N.C.App. Jan. 2, 2007) (Elmore, J., dissenting). Several other judges have applied Rule 2 in a way that is substantially similar to this standard.

19. **Stann,** 636 S.E.2d at 222-26 (Geer, J., dissenting).

20. **Jones,** 638 S.E.2d at 232-33 (Geer, J., dissenting).

21. 632 S.E.2d 271 (N.C.App. 2006).

22. **Walsh,** 632 S.E.2d at 274-76 (Hunter, J., dissenting).

23. *Id.* at 275 (Hunter, J., dissenting).

24. *Id.* (Hunter, J., dissenting) (citations and quotation marks omitted).

25. *Id.* at 275-76 (Hunter, J., dissenting).

26. *See* **Womack Newspapers, Inc. v. Town of Kitty Hawk,** --- S.E.2d --- (N.C.App. Jan. 2, 2007); **Bennett v. Bennett,** 638 S.E.2d 243 (N.C.App. 2006); **State v. Mullinax,** 637 S.E.2d 294 (N.C.App. 2006); **State v. Hart,** 633 S.E.2d 102 (N.C.App. 2006); **Calhoun v. WHA Medical Clinic, PLLC,** 632 S.E.2d 563 (N.C.App. 2006); **Hedingham Community Assn. v. GLH Builders, Inc.,** 634 S.E.2d 224 (N.C.App. 2006); **Anderson v. McTaggart,** 2006 WL 1319839 (N.C.App. May 16, 2006); **Huang v. Huang,** 2006 WL 1320112 (N.C.App. May 16, 2006); **Hubert Jet Air, LLC v. Triad Aviation, Inc.,** 628 S.E.2d 806 (N.C.App. 2006); **Shue v. Shue,** 2006 WL 1147710 (N.C.App. May 2, 2006); **In re Election Protest of Fletcher,** 625 S.E.2d 564 (N.C.App. 2006); **Broderick v. Broderick,** 623 S.E.2d 806 (N.C.App. 2006); **May v. Down East Homes of Beulaville, Inc.,** 623 S.E.2d 345 (N.C.App. 2006); **Walker v. Walker,** 624 S.E.2d 639 (N.C.App. 2005); **Vetere v. Lepanto,** 2005 WL 3046399 (N.C.App. Nov. 15, 2005); **Mitchell v. Hicks,** 2005 WL 1805236 (N.C.App. Aug. 2, 2005); State v. Cannon, 2005 WL 1572117 (N.C.App. July 5, 2005).

27. 623 S.E.2d 806 (N.C.App. 2006).