UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 85
Number 6 *North Carolina Issue*

Article 8

9-1-2007

Assigning Error to Viar v. North Carolina Department of Transportation and State v. Hart: A Proposal for Revision of the North Carolina Rules of Appellate Procedure

Stephen D. Thill

Assigning Error to *Viar v. North Carolina Department of Transportation* and *State v. Hart*: A Proposal for Revision of the North Carolina Rules of Appellate Procedure*

On June 12, 1997, three sisters were traveling south on Interstate Highway 85 ("I-85") in Rowan County, North Carolina, in a car driven by Melissa Viar.[1] Perhaps due to the extremely heavy rainfall that evening, Melissa lost control of the car and collided with another southbound vehicle.[2] The car then careened across the grass median separating I-85's northbound and southbound lanes, and was broadsided by a northbound tractor-trailer.[3] Melissa was seriously injured in the accident; the car's passengers, Megan and Macey Viar, were killed instantly.[4]

The following year, Claude Viar, the girls' father, brought suit against the North Carolina Department of Transportation, alleging that the agency had been negligent in failing to install a barrier between the north- and southbound lanes along that stretch of I-85, and that this omission had proximately caused his daughters' deaths.[5] The North Carolina Industrial Commission denied his claim, concluding that the plaintiff failed to demonstrate negligence on the part of the Department of Transportation.[6] On appeal, however, a divided North Carolina Court of Appeals reversed, holding that the Industrial Commission had failed to apply the proper test for claims of negligent omission, and that the commission's findings of fact were insufficient to support its conclusion that the Department of Transportation had not been negligent.[7]

The Department of Transportation appealed that decision, and in April 2005, the Supreme Court of North Carolina filed a per curiam opinion in *Viar v. North Carolina Department of*

---

1. Viar v. N.C. Dep't of Transp., 162 N.C. App. 362, 363, 590 S.E.2d 909, 911 (2004), *vacated*, 359 N.C. 400, 610 S.E.2d 360 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).
2. *Id.*
3. *Id.* at 367, 590 S.E.2d at 914.
4. *Id.* at 363, 590 S.E.2d at 911.
5. *Id.* at 363, 590 S.E.2d at 911–12.
6. *Id.* at 363, 590 S.E.2d at 912.
7. *See id.* at 376, 590 S.E.2d at 919–20.

Transportation.[8] The state high court concluded that the court of appeals' majority should never have reached the substantive merits of the appeal, holding that the court of appeals had erred by invoking Rule 2 of the North Carolina Rules of Appellate Procedure in order to overlook the fact that the plaintiff-appellant had violated the appellate rules.[9] In vacating the court of appeals' decision and dismissing the appeal, the supreme court emphasized that "the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless."[10] Unfortunately, the court of appeals' adherence to these words, and its application of the appellate rules, has been characterized by a surprising degree of inconsistency since the supreme court handed down its decision in *Viar*.[11] This continues to be the case even after the more recent decision in *State v. Hart*,[12] in which the supreme court sought to clarify the law of appellate rules violations.[13] Although such inconsistency would seem to frustrate the intent with which the court wrote both *Viar* and *Hart*, the outcome is due in large part to the fact that the supreme court itself did not provide, in either opinion, any particular interpretation of the rules that "must be consistently applied."[14] If the Supreme Court of North Carolina desires consistent application of the appellate rules, it must articulate a clear standard for determining whether or not rules violations should result in dismissal of an appeal.[15]

This Recent Development will analyze the supreme court's *Viar* opinion with reference to the decision of the court of appeals to which it responded, and to the pertinent North Carolina Rules of Appellate Procedure. It will then demonstrate that application of the appellate rules by the court of appeals since *Viar* has failed to achieve the objective of consistency. Next, it will examine the supreme court's decision in *Hart* and attempt to define the implications of that case.

---

8. 359 N.C. 400, 610 S.E.2d 360 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

9. *Id.* at 402, 610 S.E.2d at 361.

10. *Id.*

11. *E.g.*, Broderick v. Broderick, 175 N.C. App. 501, 506, 623 S.E.2d 806, 809 (2006) (Wynn, J., concurring in the result) ("Although *Viar* mandates that we consistently apply our appellate rules, our enforcement of the appellate rules has been anything but consistent." (citation omitted)).

12. 361 N.C. 309, 644 S.E.2d 201 (2007).

13. *Id.* at 310–11, 644 S.E.2d at 202.

14. *Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

15. This Recent Development acknowledges the standards set forth in Rule 2 of the North Carolina Rules of Appellate Procedure. N.C. R. APP. P. 2. As will be explained, however, Rule 2 by itself does not provide sufficient guidance as to when it is properly invoked. *See infra* text accompanying note 38; *infra* note 24 and accompanying text.

Given the important questions still left unanswered after *Hart*, this Recent Development will then urge the supreme court to exercise the rulemaking authority conferred upon it by the Constitution of North Carolina[16] in order to amend the Rules of Appellate Procedure. Those rules should reflect a more definite standard for deciding whether the appellate division will reach the merits of an appeal. Pursuant to this recommendation, this piece will identify several possible solutions to the problem of inconsistency, and briefly weigh their relative merits and deficiencies. Finally, this Recent Development will argue that the supreme court should amend the rules to require the appellate courts, in cases involving rules violations with regard to assignments of error,[17] to address and decide upon legal issues that are *reasonably identifiable* in an appellant's brief.

Before delving further into the appellate courts' decisions in *Viar*, it will be helpful to develop an understanding of the particular rules at issue. The violations that ultimately resulted in dismissal of the *Viar* appellant's case were of rules pertaining to assignments of error.[18] Rule 10 of the North Carolina Rules of Appellate Procedure directs appellants as to how issues are properly presented for review by the appellate courts.[19] With regard to *Viar*, the most important provisions of Rule 10 are in subsection (c)(1), which specifically concerns the proper form for assignments of error.[20] An appellant's assignments of error should be concise statements of the legal bases upon which the appellant will argue that the trial court erred.[21] These declarations are to be included with the record of the trial that is submitted to the appellate court on appeal.[22] The particular directive of Rule 10 that caused difficulty in *Viar* describes the function that

16. N.C. CONST. art. IV, § 13(2).

17. This Recent Development focuses on cases involving violations of Rules 10(c) and 28(b) of the North Carolina Rules of Appellate Procedure, which pertain to assignments of error. N.C. R. APP. P. 10(c), 28(b). This focus is due primarily to the fact that assigning error is the context in which the problem of inconsistency has arisen most sharply. That these particular rules seem to be the most problematic may indicate that they are the most difficult for parties to understand and to follow. It may also suggest that North Carolina's appellate courts are more likely to enforce Rules 10(c) and 28(b) than some of their more formalistic counterparts such as Rule 28(j)(1)(B), which governs type size in briefs. *Id.* 28(j)(1)(B). Whatever the case, this Recent Development assumes that the enforcement (or non-enforcement) of the other Rules of Appellate Procedure is consistent, and therefore satisfactory.

18. *Viar*, 359 N.C. at 401–02, 610 S.E.2d at 360–61.

19. N.C. R. APP. P. 10.

20. *Id.* 10(c)(1).

21. *Id.*

22. *Id.*

each assignment of error must serve in order to properly present a legal issue for appeal: "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."[23] Thus, to strictly comply with Rule 10, an appellant must make clear to the appellate court the legal bases upon which the appeal is premised, and include citations to the particular portions of the record on appeal or trial transcript wherein the appellant argues that the errors of the trial court are contained.

The other rule that bore heavily on the courts' decisions in *Viar* is Rule 2, which gives the appellate courts the ability to suspend the Rules of Appellate Procedure:

> 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.[24]

Having established some familiarity with the rules at issue, it should be easier to see the reason for disagreement in *Viar*. Claude Viar, the appellant in that case, failed to number his assignments of error and also neglected to provide specific transcript or record references in conjunction with those assignments.[25] Both of these oversights constitute violations of Rule 10(c)(1).[26] Despite these violations, a majority of the court of appeals elected to reach the merits of the appeal. The court recognized the appellant's rules violations,[27] and even cited court of appeals precedent in acknowledging that proper assignments of error are crucial in informing both the court and the appellee of the grounds for an appeal.[28] The court also took note of Judge Tyson's dissenting opinion, in which he stated that the rules violations should result in

---

23. *Id.*

24. *Id.* 2.

25. Viar v. N.C. Dep't of Transp., 359 N.C. 400, 401, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

26. N.C. R. APP. P. 10(c)(1).

27. Viar v. N.C. Dep't of Transp., 162 N.C. App. 362, 375, 590 S.E.2d 909, 919 (2004), *vacated*, 359 N.C. 400, 610 S.E.2d 360 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

28. *Id.* (citing Shook v. County of Buncombe, 125 N.C. App. 284, 286, 480 S.E.2d 706, 707 (1997) (dismissing an appeal for rules violations where the appellant's brief presented numerous complicated issues, and where the record on appeal was extremely lengthy)).

dismissal of the appeal.[29] Nevertheless, the court distinguished the case before it from the precedent upon which Judge Tyson relied:

> 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. Unlike [*Shook v. County of Buncombe*], the record here is not lengthy, nor are the issues complicated. The violations are technical rather than substantive, and are not so egregious as to warrant dismissal.[30]

Since it was able to discern the legal issues presented in the appeal despite the appellant's rules violations, and because it believed that dismissal of the appeal "would amount to a manifest injustice," the majority invoked Rule 2 to suspend the rules.[31] The court then held in favor of the appellant, remanding the case for further consideration by the North Carolina Industrial Commission.[32]

The fact that Judge Tyson filed a dissent in the case enabled the Department of Transportation to appeal the court of appeals' holding,[33] and thus *Viar* reached the Supreme Court of North Carolina. The supreme court began its relatively brief opinion by stating: "The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' "[34] Then, after cataloging the procedural errors committed by the appellant at the intermediate level, the supreme court stated that the court of appeals, in reaching the merits of the case, had impermissibly addressed an issue not raised by the appellant.[35] The court acknowledged the court of appeals' reasoning for deciding the case on its merits, but said: "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

29. *Id.*

30. *Id.* (referring to *Shook*, 125 N.C. App. at 286, 480 S.E.2d at 707).

31. *Id.* at 375–76, 590 S.E.2d at 919–20.

32. *Id.* at 376, 590 S.E.2d at 919–20; *see also supra* note 7 and accompanying text.

33. N.C. GEN. STAT. § 7A-30(2) (2005) ("[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent.").

34. Viar v. N.C. Dep't of Transp., 359 N.C. 400, 401, 610 S.E.2d 360, 360 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005) (quoting Steingress v. Steingress, 350 N.C. 64, 65, 511 S.E.2d 298, 99 (1999)).

35. *Id.* at 402, 610 S.E.2d at 361.

appellant."[36] The court then concluded: "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."[37]

The supreme court's basic message to the court of appeals in *Viar* is clear enough: the Rules of Appellate Procedure are to be applied consistently, and Rule 2 is not to be invoked in order to consider issues not raised by the appellants themselves. However, a review of cases decided by the court of appeals since the supreme court issued *Viar* reveals that consistency is difficult to achieve in the absence of a more readily articulable standard as to when Rule 2 should be invoked. The words of Rule 2 itself[38] provide the courts with little concrete guidance: terms such as "manifest injustice" and "the public interest" are not self-defining and fail to set forth legal standards that are easy to apply. Likewise, it is not clear what it means to "create an appeal for an appellant."[39] Thus, even after seemingly specific instructions from the supreme court, the court of appeals has applied the Rules of Appellate Procedure inconsistently since *Viar*.

Some recent decisions of the court of appeals, for instance, have read *Viar* to mean that violations of the Rules of Appellate Procedure are not to be excused, "even in instances where a party's Rules violations neither impede comprehension of the issues on appeal nor frustrate the appellate process."[40] In *Consolidated Electrical Distributors, Inc. v. Dorsey*,[41] the court of appeals dismissed an appeal due to multiple rules violations, which included failure to comply with Rule 10(c).[42] The appellant in *Dorsey* also violated Rule 28(b)(6), which instructs appellants, inter alia, how to make proper references to their assignments of error in their briefs.[43] In dismissing the case,

36. *Id.* (citation omitted).

37. *Id.*

38. *See supra* text accompanying note 24.

39. *See Viar*, 359 N.C. at 402, 610 S.E.2d at 361.

40. Consol. Elec. Distribs., Inc. v. Dorsey, 170 N.C. App. 684, 688, 613 S.E.2d 518, 521 (2005) (Wynn, J., concurring).

41. 170 N.C. App. 684, 613 S.E.2d 518 (2005). The appellant in *Dorsey* argued that the trial court had erred in granting summary judgment on a breach of contract claim. *Id.* at 685–86, 613 S.E.2d at 519–20.

42. *Id.* at 687, 613 S.E.2d at 520–21. The appellant violated Rule 10(c) by failing to separately number his assignments of error. *Id.* at 687, 613 S.E.2d at 520.

43. Rule 28(b)(6) reads, in pertinent part:

the majority opinion made no mention of whether or not the rules violations had made it difficult for the court to determine the issues upon which the appellant sought the court's judgment, and took no account of the particular circumstances of the appellant.[44] In a concurring opinion, however, Judge Wynn indicated that the court could have discerned the issues raised by the appellant.[45] He also conveyed particular "displeasure" with so strict an application of the rules to the case at hand, due to the fact that the party whose appeal was being dismissed was a pro se appellant.[46] Dismissal, he wrote, was largely the result of "the dictates of *Viar*."[47]

It was likewise on the basis of the supreme court's ruling in *Viar* that an issue was deemed to be improperly before the court of appeals in the parental rights case *In re A.E.*[48] There, the appellant father provided the court of appeals with only a single assignment of error, generally challenging the trial court's finding that his children

---

> 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.

N.C. R. APP. P. 28(b)(6). The court of appeals in *Dorsey* found multiple violations of Rule 28, only one of which related to assignments of error: the appellant failed to make proper references to his assignments of error in his brief. *Dorsey*, 170 N.C. App. at 686, 613 S.E.2d at 520 (citing N.C. R. APP. P. 28(b)(6)). The appellant also violated Rule 28 by failing to separate the questions presented in his brief, to cite sufficient authority in support of his arguments, and to give a complete statement of the facts of the case. *Id.* at 686–87, 613 S.E.2d at 520 (citing N.C. R. APP. P. 28(b)(5), (6)). It is thus worth noting that violations pertaining to assignments of error were not the only bases for dismissal. The important point to take from *Dorsey* for purposes of this Recent Development, however, is Judge Wynn's indication that none of these errors rendered the appellant's arguments unclear, and that the case was really being dismissed because of the supreme court's holding in *Viar*. *Id.* at 688, 613 S.E.2d at 521 (Wynn, J., concurring).

44. *See Dorsey*, 170 N.C. App. at 686–87, 613 S.E.2d at 520–21.

45. *Id.* at 688, 613 S.E.2d at 521 (Wynn, J., concurring).

46. *Id.* at 687, 613 S.E.2d at 521.

47. *Id.* at 688, 613 S.E.2d at 521.

48. 171 N.C. App. 675, 680, 615 S.E.2d 53, 57 (2005). *In re A.E.* involved an appellant father's challenge to the reliability of certain expert testimony admitted at trial. *Id.* at 675, 615 S.E.2d at 54. It should be noted that the appellant's violation of Rule 10(c)(1) was not the only ground for the court of appeals' disposition of the case. The court also held that the evidentiary issue was not properly presented because the appellant had not objected to the challenged testimony at trial, and thus had failed to preserve the issue for appellate review under Rule 10(b)(1). *Id.* at 679, 615 S.E.2d at 56 (citing N.C. R. APP. P. 10(b)(1)). Preservation of issues under Rule 10(b)(1) is beyond the scope of this Recent Development. For present purposes, it is sufficient to point out that the court of appeals in *In re A.E.* did not indicate that its holding was contingent upon the Rule 10(b)(1) violation. *See id.*

had been neglected.[49] In his brief, however, the appellant argued that certain testimony admitted at trial was not competent evidence to support the adjudication of neglect.[50] The majority of the court of appeals was apparently unconcerned with the degree to which the appellant's brief clarified his legal argument and directed the court to the trial proceedings upon which the appeal was based.[51] Instead, the court focused on the appellant's failure to achieve strict compliance with Rule 10(c)(1), noting that his assignment of error did not specifically refer to the challenged testimony.[52] The court then drew directly upon *Viar*, stating that the supreme court's opinion prevented the court of appeals from addressing an issue "not raised or argued by the appellant."[53] In closing, the majority added: "Just as 'the Rules of Appellate Procedure must be consistently applied,' so too the principles in *Viar* must be consistently applied."[54] Despite this latest call for consistency, Judge Tyson, evidently able to discern the appellant's argument with regard to the disputed testimony, dissented in part and expressed his opinion that the court should have not only decided the appeal upon its merits, but also reversed the order of the trial court.[55]

With cases such as these giving rise to uneasy concurrences and even vigorous dissents, it should come as little surprise that a substantial number of cases decided by the court of appeals since *Viar* have actually come out the other way. That is, there have been numerous cases in which appellants have violated the Rules of Appellate Procedure relating to assignments of error, and yet the court of appeals has elected to reach the merits of the appeal. In *Youse v. Duke Energy Corp.*,[56] the majority opinion listed eight alleged violations of the Rules of Appellate Procedure, several of

49. *Id.*

50. *Id.*

51. *See id.* at 680, 615 S.E.2d at 57 (noting that the evidentiary challenge was, in fact, clarified in the appellant's brief).

52. *Id.*

53. *Id.* It is curious that the court of appeals would refer to the evidentiary issue as one "not raised or argued by the appellant," since the court itself observed that the issue was argued in the appellant's brief. *Id.*

54. *Id.* (citation omitted) (quoting Viar v. N.C. Dep't of Transp., 359 N.C. 400, 402, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005)).

55. *See id.* at 685–86, 615 S.E.2d at 60 (Tyson, J., concurring in part and dissenting in part).

56. 171 N.C. App. 187, 614 S.E.2d 396 (2005). *Youse* involved allegations of wrongful termination, negligent infliction of emotional distress, and violation of North Carolina's Wage and Hour Act. *Id.* at 190, 614 S.E.2d at 399.

which pertained to assignments of error.[57] Although these violations were comparable to those that provoked dismissal in *Dorsey* and *In re A.E.*,[58] in this instance the court invoked Rule 2 to reach the merits of the appeal: "Despite the Rules violations, we are able to determine the issues in this case on appeal. Furthermore, we note that defendant, in filing a brief that thoroughly responds to plaintiff's arguments on appeal, was put on sufficient notice of the issues on appeal."[59] The court even cited to the supreme court's *Viar* opinion in invoking Rule 2, interpreting the supreme court's statement that inconsistent application of the rules leaves an appellee "without notice of the basis upon which an appellate court might rule"[60] to mean that as long as the appellee has such notice, an appeal need not be dismissed.[61]

The court of appeals has subsequently used the same reasoning to justify suspension of the rules for assigning error in several cases. In *Davis v. Columbus County Schools*,[62] the court of appeals invoked Rule 2 despite the fact that the appellants' assignments of error violated Rule 10(c)(1) by failing to direct the court to the exact bases of the appellants' arguments.[63] The court stated that it had "no trouble discerning" what the appellants were challenging, and distinguished the errors in the case before it as less severe than those committed by the appellant in *Viar*.[64] The court then quoted from *Youse*, drawing on that case for the proposition that an appeal should not be dismissed if the court can determine the issues on appeal in spite of rules violations.[65] The court of appeals again held *Viar* to be

57. *Id.* at 191, 614 S.E.2d at 400. The court of appeals seemed to agree with the appellee's contention that the appellant violated Rule 28(b)(6) by "failing to reference the record page numbers on which her assignments of error appear," and by referencing the incorrect assignment of error in support of one of her arguments. *See id.*

58. *See supra* notes 41–43, 48–52 and accompanying text.

59. *Youse*, 171 N.C. App. at 192, 614 S.E.2d at 400.

60. Viar v. N.C. Dep't. of Transp., 359 N.C. App. 400, 402, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

61. *See Youse*, 171 N.C. App. at 192, 614 S.E.2d at 400.

62. 175 N.C. App. 95, 622 S.E.2d 671 (2005). *Davis* was an appeal from a workers' compensation award granted by the North Carolina Industrial Commission. *Id.* at 95, 622 S.E.2d at 672.

63. *Id.* at 97–98, 622 S.E.2d at 674. The appellant submitted three assignments of error, the first two of which failed to state any legal basis for appeal. *See id.* at 97, 622 S.E.2d at 673. The third assignment of error did make the legal assertion that the Industrial Commission's decision was unsupported by competent evidence, but, standing alone, failed to assign error to any specific findings or conclusions. *See id.* at 97, 622 S.E.2d at 674.

64. *Id.* at 97–98, 622 S.E.2d at 674.

65. *Id.* at 98, 622 S.E.2d at 674.

of limited applicability in *Welch Contracting, Inc. v. North Carolina Department of Transportation*.[66] There, the court noted that the appellant's brief had violated Rules 10 and 28,[67] but nonetheless reached the merits of the appeal because the appellees "had sufficient notice of the basis upon which our Court might rule"[68] and therefore "were not prejudiced by [the appellant's] error."[69]

The fact that the court of appeals cited *Viar* in rendering its decision in every one of the cases just described—both those that dismissed appeals for rules violations[70] and those that pardoned similar violations[71]—demonstrates that the court of appeals is well aware of *Viar* and its instructions. The problem is that various interpretations by the court of appeals have rendered the scope of those instructions every bit as ambiguous as the scope of Rule 2.[72] More recently, the Supreme Court of North Carolina attempted to clear up the uncertainty that has prevailed since *Viar* with its opinion in *State v. Hart*.[73]

According to the North Carolina Court of Appeals, the appellant in *Hart* had violated Rule 10(c)(1).[74] Reading *Viar* to mean that it would therefore be impermissible to reach the merits, the court of appeals dismissed several of the appellant's arguments.[75] As was the

66. 175 N.C. App. 45, 49–50, 622 S.E.2d 691, 694 (2005). *Welch* followed from a suit by a subcontractor for, inter alia, breach of contract and improper bidding practices. *Id.* at 47–48, 622 S.E.2d at 693.

67. *Id.* at 49, 622 S.E.2d at 693–94. The appellant's sole assignment of error was that the trial court had erred in granting summary judgment in the appellee's favor. *Id.* at 48, 622 S.E.2d at 693. In fact, the trial court had granted the appellee's motion to dismiss for lack of subject matter jurisdiction. *Id.* Though the appellant's brief properly focused on subject matter jurisdiction, the appellant was in violation of Rules 10 and 28 due to the lack of correspondence between the assignment of error and the question presented in the appellant's brief. *Id.* at 48–49, 622 S.E.2d at 693–94 (citing N.C. R. APP. P. 10(c)(1), 28(b)(6)).

68. *Id.* at 49, S.E.2d at 694.

69. *Id.* at 50, S.E.2d at 694.

70. In re A.E., 171 N.C. App. 675, 680, 615 S.E.2d 53, 57 (2005); Consol. Elec. Distribs., Inc. v. Dorsey, 170 N.C. App. 684, 687, 613 S.E.2d 518, 520–21 (2005).

71. Davis v. Columbus County Sch., 175 N.C. App. 95, 98, 622 S.E.2d 671, 674 (2005); *Welch Contracting*, 175 N.C. App. at 49, 622 S.E.2d at 694; Youse v. Duke Energy Corp., 171 N.C. App. 187, 192, 614 S.E.2d 396, 400 (2005).

72. *See supra* text accompanying note 38; *infra* note 24 and accompanying text.

73. 361 N.C. 309, 644 S.E.2d 201 (2007). The supreme court in *Hart* acknowledged that it was endeavoring "to correct the misapplication of our *Viar* decision." *Id.* at 311, 644 S.E.2d at 202.

74. State v. Hart, 179 N.C. App. 30, 36–37, 633 S.E.2d 102, 106–07, *discretionary review denied*, 360 N.C. 651, 637 S.E.2d 182 (2006), *aff'd in part, rev'd in part*, 361 N.C. 309, 644 S.E.2d 201 (2007). For a more detailed discussion of the facts and proceedings in *Hart*, see *infra* notes 155–69 and accompanying text.

75. *See id.* at 36–39, 633 S.E.2d at 106–08.

case for the appellee in *Viar*,[76] however, the appellant in *Hart* was able to appeal as of right to the supreme court on the basis of a dissenting opinion at the court of appeals level.[77] After summarizing the facts of the case and the opinions issued by the court of appeals, the supreme court in *Hart* made a point of noting that the State of North Carolina, the appellee before the court of appeals, had not actually raised the issue of the appellant's rules violations.[78] Rather, the court of appeals had taken those violations into consideration on its own initiative.[79] The supreme court clarified that the court of appeals was under no requirement to do so,[80] perhaps implying that the court of appeals has been overly concerned with procedural matters since *Viar*. It is noteworthy, however, that the supreme court neither prohibited the court of appeals from sua sponte consideration of the rules, nor said anything to preclude parties from pointing out each other's procedural faults.[81] This observation becomes more significant as one continues to consider the effects of the supreme court's decision in *Hart*.[82]

The supreme court went on to clarify the meaning of some of its more recent opinions regarding appellate rules violations. Though the court reaffirmed that the rules " 'are mandatory and not directory,' "[83] and that violation of the rules " 'will subject an appeal to dismissal,' "[84] it also explained that these statements do not mandate that all violations of the rules must inevitably result in dismissal of the appeal: "Rather, 'subject to' means that dismissal is one possible sanction."[85] The supreme court also sought to define the implications of its opinion in *Viar*, and in doing so repudiated one reading of that decision that the court of appeals has occasionally applied. The supreme court asserted that its *Viar* opinion did not

76. *See supra* note 33 and accompanying text.

77. N.C. GEN. STAT. § 7A-30(2) (2005) ("[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent."); State v. Hart, 361 N.C. 309, 310, 644 S.E.2d 201, 202 (2007); *see also* N.C. R. APP. P. 16(b) (limiting the scope of supreme court review in appeals based solely on the existence of a dissent in the court of appeals to issues "specifically set out in the dissenting opinion as the basis for that dissent").

78. *Hart*, 361 N.C. at 311, 644 S.E.2d at 202.

79. *Id.*

80. *Id.*

81. *See id.*

82. *See infra* notes 108–11 and accompanying text.

83. *Hart*, 361 N.C. at 311, 644 S.E.2d at 202 (quoting Reep v. Beck, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005)).

84. *Id.* (quoting Steingress v. Steingress, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)).

85. *Id.* at 313, 644 S.E.2d at 203.

direct the court of appeals to avoid invoking Rule 2 altogether.[86] The true holding of *Viar*, the *Hart* court declared, is that the court of appeals may not invoke Rule 2 in order to address issues "not raised or argued" by an appellant.[87] In other words, *Viar* merely prohibits the appellate courts from "creat[ing] an appeal for the appellant."[88]

It is important to understand the distinction the supreme court drew in elucidating the meaning of *Viar*. When the court of appeals elected to ignore the appellant's procedural violations and reach the merits in *Viar*, it partially justified its choice on the grounds that the violations did not "impede comprehension of the issues on appeal" or "otherwise frustrate[]" the appellate process.[89] According to the supreme court in *Hart*, when the high court rejected this reasoning in *Viar*, it did not hold that all violations must result in dismissal regardless of whether the court can discern the issues presented.[90] Instead, the *Viar* court held that the court of appeals' ability to perceive the issues could not justify invoking Rule 2 where the court of appeals then "created an appeal for the appellant" by addressing issues "not raised or argued."[91]

It is not difficult to envision circumstances in which this distinction would be useful. Imagine, for example, a case in which an appellant's only argument on appeal is that the trial court erred by failing to hold the appellee liable for negligence. Imagine further that the appellant commits some violation of the North Carolina Rules of Appellate Procedure. What is absolutely clear following the supreme court's opinion in *Hart* is that the court of appeals in this hypothetical could not permissibly invoke Rule 2 to excuse that violation, and then go on to decide the appeal on the basis of a question plainly not

86. *Id.* at 312, 644 S.E.2d at 203. The *Hart* court specifically rejected the interpretation of *Viar* put forth by the court of appeals in *State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356 (2005). *Hart*, 361 N.C. at 312, 644 S.E.2d at 203. In *Buchanan*, the court of appeals stated that the supreme court in *Viar* had "admonished [the court of appeals] to avoid applying Rule 2." *Buchanan*, 170 N.C. App. at 693, 613 S.E.2d at 356. The *Hart* court disavowed this reading as a "misappli[cation]" of *Viar*. *Hart*, 361 N.C. at 312, 644 S.E.2d at 203. This erroneous reading of *Viar* apparently also affected the court of appeals' decision in *Broderick v. Broderick*, 175 N.C. App. 501, 623 S.E.2d 806 (2006),: "[I]n *Viar*, our Supreme Court admonished this Court for applying Rule 2 . . . ," *id.* at 506, 623 S.E.2d at 809. For more on *Broderick*, see *infra* notes 179–82 and accompanying text.

87. *Hart*, 361 N.C. at 313, 644 S.E.2d at 203.

88. *Id.*

89. Viar v. N.C. Dep't of Transp., 162 N.C. App. 362, 375, 590 S.E.2d 909, 919 (2004), *vacated*, 359 N.C. 400, 610 S.E.2d 360 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

90. *Hart*, 361 N.C. at 312–13, 644 S.E.2d at 203.

91. *Id.*

raised or argued by the appellant, such as breach of contract.[92] Even though the court of appeals may understand that the contract issue would have been a more fruitful basis on which to appeal, *Viar* would require the court to ignore—or "dismiss," as it were—the contract issue.[93]

What *is* difficult to imagine, however, is that such a shameless and unambiguous case of the court of appeals "creating an appeal for an appellant" would ever arise. In reality, the recent cases in which the court of appeals has debated whether or not to dismiss due to rules violations have been ones in which some portion of the court seemed honestly able to understand the issues presented on appeal, based entirely on the materials that the appellant presented to the court.[94] For that to be the case, one would expect some degree of correlation between the appellant's assignments of error, the arguments actually presented in that party's brief, and the questions that might be taken up by the court itself. Indeed, this assumption is borne out by the cases. In *Viar*, for instance, the key question was whether the court of appeals could permissibly consider the issue of reasonableness, where the appellant argued more generally that the trial court had erred in failing to hold the appellee liable for negligence.[95] Similarly, the court of appeals in *Hart* was unable to come to a consensus as to whether it would violate *Viar* by considering questions that were presented with greater legal specificity in the appellant's brief than they were in the assignments of error.[96] Even acknowledging the technical violations of the appellate rules in these two cases, one must seriously question the accuracy of accusing a judge who would reach the merits on such facts of attempting to "create an appeal."[97]

No judge on the court of appeals has argued that the appellate courts ought to be able to consider issues that clearly have not been

92. *Id.* at 313, 644 S.E.2d at 203.

93. *Id.* at 312–13, 644 S.E.2d at 203. Presumably, such an obvious attempt to "create an appeal for the appellant" would be impermissible regardless of whether the appellant had violated the appellate rules. The supreme court's elucidation of this point thus does little to clarify matters in the particular context of rules violations.

94. *See, e.g.*, *supra* notes 30–31 and accompanying text; *infra* notes 166–69 and accompanying text.

95. *See infra* notes 207–11 and accompanying text.

96. *See infra* notes 155–69 and accompanying text.

97. Similarly, it would be hyperbole to suggest that a judge opting to consider the issue of negligence in *Viar*, or the questions fully presented in the appellant's brief in *Hart*, would be addressing questions "not raised or argued" by the appellant. *Hart*, 361 N.C. at 313, 644 S.E.2d at 203.

raised or argued by an appellant.[98] Rather, the court of appeals has struggled with the question of what constitutes a sufficient correlation between the assignments of error, the brief, and the legal question the court understands it is being asked to answer, such that the court should elect to reach the merits of the appeal. Put simply, the court of appeals has understandably found it difficult to define the outer margins of what it means to "create an appeal for an appellant."[99] Given this problem, and because the close cases involving violations of the rules for assigning error will call on the court of appeals to give definition to those very margins, the *Hart* court's simple reaffirmation of this language as the prevailing standard is not very helpful. In the typical case in which the "creating an appeal" standard is applied, the distinction drawn by the supreme court in *Hart*—between a court's ability to discern the issues on appeal on the one hand, and "creating an appeal for an appellant" on the other—will be one without any clear difference. Like the "creating an appeal" standard itself, that distinction is therefore of dubious utility.

After clarifying that dismissal is not necessarily required whenever the slightest rules violation has been committed, the supreme court in *Hart* attempted to delineate when it is permissible for the appellate courts to invoke Rule 2 in order to suspend the Rules of Appellate Procedure. The court cautioned that Rule 2 is to be applied carefully and in limited circumstances, quoting the commentary of the committee that drafted the rule for the assertion that "Rule 2 'expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases *where this is necessary to accomplish a fundamental purpose of the rules*.' "[100] The court failed, however, to offer any definitive statement of what might qualify as such a

98. In *Broderick v. Broderick*, 175 N.C. App. 501, 623 S.E.2d 806 (2006), Judge Wynn proposed in his concurring opinion that the supreme court "abolish assignments of error" altogether, *id.* at 503, 623 S.E.2d at 807 (Wynn, J., concurring in the result). This does not amount to an argument in favor of removing all limits on the scope of review, however. In fact, Judge Wynn specifically acknowledged that assignments of error are intended to identify issues that are actually "before the court." *Id.* at 505, 623 S.E.2d at 808. He simply declared his belief that the purposes of assignments of error "can be achieved through other means." *Id.* For more on *Broderick* and Judge Wynn's proposal, see *infra* notes 179–89 and accompanying text.

99. The inconsistency of the court of appeals' handling of rules violations in the wake of *Viar* amply demonstrates this difficulty. *See supra* notes 40–72 and accompanying text.

100. *Hart*, 361 N.C. at 316, 644 S.E.2d at 205 (emphasis in original) (quoting N.C. R. APP. P. 2 cmt. (1975), *reprinted in* 287 N.C. 671, 680 (1975)).

"fundamental purpose," and instead simply emphasized that "the greater object of the rules" will rarely be at stake.[101]

The court did provide *some* guidance regarding fundamental purposes, in the form of references to past cases in which the supreme court has invoked Rule 2 in order to protect "substantial rights of an appellant."[102] Presumably, then, protection of "substantial rights" is one fundamental purpose of the Rules of Appellate Procedure. Ultimately, however, the tenor of the court's words is cautionary. Although the court cited a number of cases in which it has found invocation of Rule 2 to be proper, its emphasis was on the assertion that "Rule 2 should only be used in 'exceptional circumstances.' "[103]

Upon reading these words of warning, one cannot help but notice the inconsistency of the supreme court's tone within its *Hart* opinion. As already noted, the court began by stating in no uncertain terms that dismissal of an appeal is not required in every instance in which the Rules of Appellate Procedure are violated.[104] What this means is that Rule 2 is alive and well, a realization that has led some to speculate that "the Court of Appeals in the future is likely to be more flexible in dealing with appellate rule violations."[105] This outlook seems to ignore the latter portion of the supreme court's opinion, however, in which the high court instructed the court of appeals to exercise Rule 2 only in rare cases. Though the *Hart* opinion begins by reviving Rule 2, it concludes by confining the rule's applicability within a very narrow range. The assumption that the court of appeals will be more flexible regarding rules violations might therefore be true only to the extent the court previously interpreted the supreme court's *Viar* opinion to mean that any violation must result in automatic dismissal.[106]

The court of appeals can now rest assured that such a broad reading of *Viar* is incorrect; but this does not mean that the appellate rules can now be freely suspended, for the Rule 2 inquiry does not

---

101. *Id.*

102. *Id.* at 316–17, 644 S.E.2d at 205 (citing seven cases).

103. *Id.* at 316, 644 S.E.2d at 205 (quoting Steingress v. Steingress, 350 N.C. 64, 66, 511 S.E.2d 298, 299 (1999)).

104. *See supra* notes 83–85 and accompanying text.

105. Guy Loranger, *Supreme Court: Errors Don't Mean Automatic Dismissal*, N.C. LAW. WKLY. (Raleigh), May 14, 2007, at 1.

106. Whether or not *Hart* actually affords the court of appeals greater flexibility when confronted with rules violations depends upon how *Hart* is properly to be interpreted. For a discussion of possible readings of *Hart*, see *infra* notes 110–17 and accompanying text.

stop there.[107] If the appellate rules have been violated in a manner that does not require the court of appeals to "create an appeal for the appellant," the court may still have to decide whether it would be proper to invoke Rule 2 by determining whether a fundamental purpose of the appellate rules is in the balance.[108] Given the supreme court's emphasis of the view that fundamental purposes are rarely at stake, it is likely that the court of appeals will actually exercise Rule 2 discretion less frequently now than it did prior to the supreme court's decision in *Hart*. After all, certain panels of the court of appeals were willing, before *Hart*, to invoke Rule 2 as long as the issues on appeal were understandable.[109] In light of the supreme court's admonitions in *Hart*, one should expect the court of appeals to be more hesitant to conclude that a case implicates a fundamental purpose of the Rules of Appellate Procedure than the court would be to declare merely that the issues on appeal are discernable.

Put another way, it would be easier for an appellee to convince a court that no fundamental purpose is at stake than it would be to convince the court that the issues raised by the appellant cannot be understood. Since nothing in *Hart* precludes parties from drawing attention to each other's rules violations, and since it is quite possible to read *Hart* to mean that dismissal is required whenever the rules are violated and there is no fundamental purpose at stake,[110] attorneys might seize upon this opportunity by being more vigilant than ever before in policing opposing parties' adherence to the rules. After all, under such a reading of *Hart*, all that would stand between an appellee and a successful motion to dismiss once a violation is found would be to convince the court that no fundamental purposes of the

107. *Hart*, 361 N.C. at 315, 644 S.E.2d at 205 (noting that although the court of appeals still has authority to invoke Rule 2, the rule must be applied with caution).

108. Again, whether or not a full Rule 2 inquiry would be necessary on these facts depends upon the proper interpretation of the supreme court's opinion in *Hart*. For a discussion of possible readings of *Hart*, see *infra* notes 110–17 and accompanying text.

109. *E.g.*, Davis v. Columbus County Sch., 175 N.C. App. 95, 97–98, 622 S.E.2d 671, 674 (2005) (reaching the merits despite violations where the court had "no trouble discerning" the basis of the appeal); Youse v. Duke Energy Corp., 171 N.C. App. 187, 192, 614 S.E.2d 396, 400 (2005) (reaching the merits despite violations where both the court and the appellee were able to determine the issues on appeal).

110. Whether this is the proper reading depends upon whether it is always necessary to invoke Rule 2 in order to reach the merits of an appeal that has violated the appellate rules. The supreme court noted in *Hart* that the Rules of Appellate Procedure provide for sanctions less severe than dismissal, *Hart*, 361 N.C. at 311, 644 S.E.2d at 202, but the question remains whether an appellate court may impose some lesser form of sanction, and then proceed to consider the merits without conducting any fundamental purpose inquiry. For discussion of the possible answers to that question, see *infra* notes 113–17 and accompanying text.

rules are implicated. Thus, the supreme court's reminder in *Hart* that the court of appeals is not required to seek out procedural violations on its own initiative may do little to decrease the number of appeals decided on procedural grounds. Moreover, the stringent fundamental purpose standard may mean that *Hart* has done little to enhance the court of appeals' flexibility in deciding how to impose sanctions for rules violations.[111]

However one chooses to interpret *Hart*, one sure effect of the opinion is that the propriety of invoking Rule 2 will depend upon the fundamental purpose inquiry in most cases.[112] As discussed above, it is therefore likely that Rule 2 will now be applied less often than it was prior to *Hart*. The question, then, is whether there is any way for the appellate courts to reach the merits of an appeal without invoking Rule 2. *Hart* unfortunately does not offer any definitive answer to this question. One plausible reading of *Hart* in this regard has already been noted.[113] A second possible interpretation of the case is that the Rule 2 inquiry is not always necessitated by rules violations. In the course of establishing that dismissal is not required in every case of rules violations, the supreme court noted in *Hart* that the North Carolina Rules of Appellate Procedure themselves provide for other forms of penalties against parties who commit violations.[114] Rules 25(b) and 34, the court pointed out, enable the appellate courts to levy sanctions against parties for failure to comply with the

111. *Hart* explicitly repudiates the notion that any violation of the Rules of Appellate Procedure must result in automatic dismissal. *Hart*, 361 N.C. at 313, 644 S.E.2d at 203. However, if Rule 2 provides the only means of reaching the merits of an appeal in which the rules have been violated, and if Rule 2 is to be invoked as seldom as the supreme court indicated in *Hart*, *id.* at 315–16, 644 S.E.2d at 205, then the results yielded under the *Hart* scheme may not be very different from what they would be if all violations resulted in automatic dismissal. Put simply, only very rarely would a case avoid dismissal once appellate rules violations have been found.

112. Whether or not an appellate court may invoke Rule 2 will not *always* turn on the fundamental purpose inquiry, because the court must dismiss any appeal that would otherwise require the court to "create an appeal for the appellant," presumably without regard to fundamental purposes of the Rules of Appellate Procedure. *See* Viar v. N.C. Dep't of Transp., 359 N.C. 400, 402, 610 S.E.2d 360, 361 (per curiam) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Similarly, the supreme court held in *Munn v. N.C. State Univ.*, 360 N.C. 353, 626 S.E.2d 270 (2006) (per curiam), that the court of appeals should have dismissed an appeal in which the assignments of error were not accompanied by transcript or record references, and the appellant had otherwise failed to properly preserve the issue that the court of appeals considered, *Hart*, 361 N.C. at 313, 644 S.E.2d at 203. Given that the supreme court in *Munn* did not explicitly consider fundamental purpose, this quantum of rules violations also presumably results in automatic dismissal.

113. *See supra* note 110 and accompanying text.

114. *Hart*, 361 N.C. at 311, 644 S.E.2d at 202.

appellate rules.[115] These sanctions can be as severe as dismissal of an appeal, but they can also come in the form of monetary damages or simply "any . . . sanction deemed just and proper."[116]

By drawing attention to these alternative forms of sanction, the supreme court *may* have intended to say that some violations of the rules (violations that do not require the court to "create an appeal for the appellant," for starters) warrant something less than dismissal of the appeal, and that dismissal can be avoided without resorting to Rule 2 to suspend or vary the rules.[117] If this is the proper reading, a showing that no fundamental purposes of the rules are at stake would not mandate dismissal (though it may result in some other form of sanction), and the court of appeals is indeed more flexible in deciding how to treat rules violations than it would be under a scheme of automatic dismissal.

---

115. *Id.*

116. N.C. R. APP. P. 34. Rule 25(b) enables the appellate courts to impose sanctions "of the type and in the manner prescribed by Rule 34" for substantial failure to comply with the appellate rules. *Id.* 25(b). Rule 34 sets forth the various types of sanctions that the appellate courts are authorized to impose. *Id.* 34(b).

117. For example, imagine that a case comes before the North Carolina Court of Appeals, and the appellate rules have been violated in some way. Rather than dismiss the case, the court elects to impose some lesser sanction, pursuant to Rule 25(b) and Rule 34. In order to proceed to the merits of the case, would the court of appeals nonetheless have to invoke Rule 2 in order to suspend or vary the requirements of the rule that has been violated? An affirmative answer to this question means that whether or not a North Carolina appellate court reaches the merits of a flawed appeal will almost always depend upon a fundamental purpose inquiry. *See supra* note 112 and accompanying text.

A negative answer seems more sensible. If other sanctions are imposed, then the rules are not being suspended. They are instead being enforced by way of a penalty that is provided for within the rules themselves. It should be pointed out, however, that Rule 2 enables the appellate courts to "suspend *or vary* the requirements or provisions of [the Rules of Appellate Procedure]." N.C. R. APP. P. 2 (emphasis added). One might argue that reaching the merits of an appeal despite rules violations, though not a complete suspension due to the sanctions imposed, constitutes at least a variance. Even more noteworthy is the fact that the Supreme Court of North Carolina has in the recent past indicated that Rule 2 discretion *would* have to be exercised in order to reach the merits, even where lesser sanctions were imposed. In *Steingress v. Steingress*, 129 N.C. App. 430, 500 S.E.2d 777 (1998), *aff'd*, 350 N.C. 64, 511 S.E.2d 298 (1999), the court of appeals dismissed an appeal for violations of the appellate rules, Steingress v. Steingress, 350 N.C. 64, 64, 511 S.E.2d 298, 298 (1999). One judge dissented, however, voting to impose monetary sanctions and to reach the merits of the appeal. *Id.* at 67, 511 S.E.2d at 300. In affirming the court of appeals, the supreme court stated that "the dissenting opinion in this case presents no dividing issue and is merely a vote in favor of the exercise of discretion *to suspend the rules*." *Id.* (emphasis added). Thus, the supreme court in *Steingress* treated a vote for other sanctions as a vote in favor of invoking Rule 2. When *Hart* is read together with *Steingress*, the supreme court seems to have indicated that all violations of the Rules of Appellate Procedure must result in dismissal unless a fundamental purpose of the rules is at stake.

It is not possible to simply read the supreme court's opinion in *Hart* and know which of these interpretations is correct; though neither is it necessary to do so for purposes of this Recent Development. Whether or not Rule 2 is the sole means of reaching the merits of a procedurally flawed appeal is merely one of several important questions that the supreme court has not answered. For example, the meaning of "creating an appeal for an appellant" remains unclear. *Hart* clarifies that it is possible to reach the merits despite rules violations without offending the "creating an appeal" standard,[118] but, despite the difficulty the court of appeals has encountered in applying that standard since *Viar*, the opinion provides no further guidance as to the quantum of rules violations that should trigger dismissal. *Hart* also does little to define the circumstances in which Rule 2 may be invoked. It is clear enough that Rule 2 should only be applied when a fundamental purpose of the appellate rules is at stake,[119] but *Hart* is of little help in determining what constitutes a fundamental purpose.[120] Finally, although *Hart* serves as a reminder that dismissal of an appeal is not the only possible sanction for violation of the rules,[121] the opinion provides no direction whatsoever regarding the circumstances in which dismissal would be too severe and lesser sanctions should be employed. The supreme court said only 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."[122]

Without doubt, there is no easy answer to any of the questions that linger after *Hart*. In addition, it is possible that the supreme court refrained from attempting to answer questions that did not need to be resolved in order for the court to render a decision regarding the sole issue that was before it.[123] It should therefore be noted that it is not the intent of this Recent Development merely to criticize the supreme court's opinion. The reason for drawing attention to these unanswered questions is rather to demonstrate that *Hart* will not likely spell the end of "two years of automatic dismissals and divided panels in the Court of Appeals," as some had hoped it would.[124]

---

118. *Hart*, 361 N.C. at 312–13, 644 S.E.2d at 203.

119. *Id.* at 316, 644 S.E.2d at 205.

120. *See supra* notes 101–03 and accompanying text.

121. *Hart*, 361 N.C. at 311, 644 S.E.2d at 202.

122. *Id.* (emphasis added).

123. *See id.* at 310, 644 S.E.2d at 202 ("The dissent presents the only issue before this Court.").

124. Loranger, *supra* note 105.

Indeed, the first court of appeals decisions to take account of the supreme court's opinion in *Hart* demonstrate that these problems have not been resolved. On the very same day in June 2007, the court of appeals filed opinions in both *Dogwood Development & Management Co. v. White Oak Transport Co.*[125] and *McKinley Building Corp. v. Alvis.*[126] In *Dogwood*, Judge Tyson wrote for the court and explained that the appellant had violated both Rule 10(c)(1) and Rule 28(b).[127] According to the court, any one of the appellant's numerous violations standing alone constituted adequate grounds for dismissal of the appeal.[128] The court acknowledged the continued vitality of Rule 2 under *Hart*,[129] but ultimately declined to excuse the rules violations, and dismissed the appeal.[130] Judge Hunter filed a dissent in *Dogwood*, arguing that "when rules violations do not impede an evaluation of the case on the merits, the appropriate remedy should not be dismissal, but rather the imposition of monetary sanctions."[131]

In *McKinley*, the court of appeals likewise identified several violations of the rules pertaining to assignments of error.[132] In fact, the violations in *McKinley* were almost identical to those that resulted in dismissal in *Dogwood*.[133] In *McKinley*, however, the court of appeals' majority took note of the supreme court's reminder in *Hart* that dismissal is not the only available penalty for rules violations.[134] Believing that dismissal of the *McKinley* appeal "would be a step backward rather than the step forward that *Hart* asks us to take,"[135] the court elected to impose other sanctions under Rule 34(b) and to

125. __ N.C. App. __, 645 S.E.2d 212 (2007).
126. __ N.C. App. __, 645 S.E.2d 212 (2007).
127. *Dogwood*, __ N.C. App. at __, 645 S.E.2d at 214–16.
128. *Id.* at __, 645 S.E.2d at 215–16.
129. *Id.* at __, 645 S.E.2d at 216.
130. *Id.* at __, 645 S.E.2d at 217.
131. *Id.* at __, 645 S.E.2d at 218 (Hunter, J., dissenting).
132. McKinley Bldg. Corp. v. Alvis, __ N.C. App. __, __, 645 S.E.2d 219, 221 (2007).
133. *Compare id.* at __, 645 S.E.2d at 225–27 (Tyson, J., dissenting) (using the following headings to introduce the appellants' rules violations: "Defendants' Assignment of Error Lacks Clear and Specific Record or Transcript References," "Failure to Refer to the Assignment of Error in Defendants' Brief," "Failure to Adequately State Grounds for Appellate Review," and "Failure to Adequately State the Standard of Review"), *with Dogwood*, __ N.C. App. at __, 645 S.E.2d at 214–16 (using the following headings: "Assignments of Error Lack Clear and Specific Record or Transcript References," "Failure to Refer to the Assignments of Error," "Failure to State Grounds for Appellate Review," and "Failure to State the Standard of Review").
134. *McKinley*, __ N.C. App. at __, 645 S.E.2d at 222.
135. *Id.* at __, 645 S.E.2d at 222.

reach the merits.[136] As in *Dogwood*, Judge Tyson was part of the panel deciding *McKinley*. In the latter case, however, Judge Tyson was in the minority, offering a dissent in which he reiterated his opinion that any one of the violations in question was a sufficient basis for dismissal,[137] and then concluded that the circumstances did not warrant invocation of Rule 2.[138]

For the moment, there is no way to be sure which of these results is more consistent with what the Supreme Court of North Carolina had in mind when it handed down *Hart*. Did Judge Tyson and the *Dogwood* majority err in concluding that violations of Rule 10(c)(1) and Rule 28(b) warrant dismissal? Or did the majority in *McKinley* "create an appeal for the appellant" in considering the merits of that case? These questions might be answered in the foreseeable future: by virtue of the dissenting opinions in the court of appeals, the parties in both *Dogwood* and *McKinley* have the right to appeal to the supreme court.[139] Even if the supreme court is asked to review these cases, however, the uncertainty that remains following the *Hart* court's attempt to clarify *Viar* serves to show that bringing an end to the controversy surrounding assignments of error through a series of case-by-case decisions would likely prove to be a long, slow process.

Resolution of this inconsistency problem by increments is not the supreme court's only option, however. The court has the power under the Constitution of North Carolina to amend the Rules of Appellate Procedure,[140] and can solve the problem by exercising that power. Continued inconsistency in the application of *Viar* and of the Rules of Appellate Procedure should not simply be accepted. The court of appeals' current schizophrenic application of the rules leaves

136. *Id.* at __, 645 S.E.2d at 222.

137. *Id.* at __, 645 S.E.2d at 226–27 (Tyson, J., dissenting).

138. *Id.* at __, 645 S.E.2d at 228.

139. N.C. GEN. STAT. § 7A-30 (2005) ("[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent."). It should be noted that further review of the appellate rules issue is highly unlikely in *McKinley*. The appellee is probably satisfied, having prevailed in the court of appeals. *McKinley*, __ N.C. App. at __, 645 S.E.2d at 225. As for the appellants, the Rules of Appellate Procedure limit the scope of supreme court review in appeals based solely on the existence of a dissent in the court of appeals to issues "specifically set out in the dissenting opinion as the basis for that dissent." N.C. R. APP. P. 16(b). Since Judge Tyson argued in his *McKinley* dissent that the appellants' case should have been dismissed, *McKinley*, __ N.C. App. at __, 645 S.E.2d at 228 (Tyson, J., dissenting), it would be quite bizarre for the appellants to seek review on the basis of that opinion. In *Dogwood*, on the other hand, the appellant may very well challenge the dismissal of its appeal on the basis of Judge Hunter's dissent.

140. N.C. CONST. art. IV, § 13(2).

the parties to an appeal to wonder about the scope of the rules and about how strictly they will be applied. Such unpredictability also induces parties (appellees in particular) to go to unnecessary expense to convince the court that the rules should or should not be strictly applied to their case.[141] Meanwhile, from the perspective of the court of appeals, the lack of a coherent standard is a drain on judicial economy, forcing the court to expend resources in trying to discern a workable standard on the basis of conflicted case law. Perhaps less important, though no less valid, is the desire of the court of appeals to avoid being overturned and rebuked by the supreme court for its interpretations of a *Viar* opinion about which reasonable minds can clearly differ.[142]

The most important reason to avoid inconsistency in the application of the rules, however, is that all parties who come before North Carolina's appellate courts should be treated equally.[143] Already there have been indications that the Rules of Appellate Procedure might apply differently based on the type of case at hand. For example, in *Hammonds v. Lumbee River Electric Membership Corp.*,[144] the court of appeals described the appellants' rules violations as "troublesome,"[145] but nonetheless reached the merits because "at the heart of this case are issues of potential racial discrimination.

141. *See, e.g.*, Youse v. Duke Energy Corp., 171 N.C. App. 187, 191–92, 614 S.E.2d 396, 400 (2005) (appellee unsuccessfully argued that appellant's rules violations should result in dismissal).

142. *See, e.g.*, Davis v. Columbus County Sch., 175 N.C. App. 95, 98, 622 S.E.2d 671, 674 (2005) (stating that the supreme court in *Viar* "admonished" the court of appeals).

143. The supreme court aptly stated this concern in *Hart* when it said: "Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of [Rule 2] authority." State v. Hart, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007). The *Hart* court also noted that if state procedural rules are not applied consistently, federal courts may not consider petitioners' failure to abide by those rules to be adequate to preclude habeas review. *Id.* The issue of consistency is also of apparent constitutional significance: "[No State shall] deny to any person within its jurisdiction the *equal protection* of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

144. 178 N.C. App. 1, 631 S.E.2d 1, *discretionary review denied*, 360 N.C. 576, 635 S.E.2d 598 (2006). The appellants in *Hammonds* challenged the dismissal of their claims by the trial court, where they had alleged that the appellee electric cooperative used racially discriminatory methods to elect its board of directors. *Id.* at 3–4, 631 S.E.2d at 3–4.

145. *Id.* at 15, 631 S.E.2d at 10. The appellants in *Hammonds* failed to provide any record or transcript references in conjunction with their initial assignments of error. *Id.* at 14, 631 S.E.2d at 10. Then, when referring to those assignments of error in their brief, the appellants simply cited the trial court's order, without challenging any specific findings of fact or conclusions of law. *Id.* The court of appeals thus found the appellants in violation of Rule 10. *Id.* at 14–15, 631 S.E.2d at 10. The appellants also violated Rule 28(b)(6) in a manner unrelated to assignments of error. *Id.* at 15, 631 S.E.2d at 10.

This Court would not serve the citizens of this State well if it elected to pass on issues with far-reaching implications."[146] Similarly, in *State v. Hill*,[147] the court of appeals considered the merits of an appeal despite multiple rules violations, due to "the seriousness of [the] allegations of juror misconduct" at issue.[148] Possible racial discrimination and juror misconduct are undoubtedly important legal issues that our courts should resolve whenever circumstances permit. However, it is safe to assume that the appellants whose cases have been dismissed as a result of *Viar* would likewise consider their appeals to be serious, and the implications of the issues raised to be far-reaching. Parties' legitimate fears of judicial favoritism (and judges' fears of being accused thereof) should be allayed by the imposition of a common, workable standard under which the procedural aspects of all cases coming before North Carolina's appellate courts could be judged.

The simplest and surest way to do away with uncertainty and with discretion would be to demand strict compliance with the Rules of Appellate Procedure from all parties at all times, and to dismiss any appeal that fails to satisfy the rules. The repeal of Rule 2 would accomplish this result by depriving the appellate courts of their ability to suspend the rules.[149] Strict application of the Rules of Appellate Procedure would yield predictable results, provide judges with clear directives on how to handle procedural flaws, and result in equal treatment of all parties. Such a system would also be quite easy to administer, as judges would no longer be required to painstakingly identify and inventory each of an appellant's rules violations and argue as to why they do or do not warrant dismissal of the appeal.

Along with these advantages, however, come the inevitable disadvantages of this extreme solution. Repeal of Rule 2 would place form above function, requiring the appellate courts to dismiss appeals even when rules violations have not rendered appellants' arguments

146. *Id.* at 15, 631 S.E.2d at 10–11.

147. 179 N.C. App. 1, 632 S.E.2d 777 (2006). The *Hill* appellant contended, inter alia, that the trial court had erred in failing to declare a mistrial when it became aware that a juror had violated the court's instruction not to conduct any independent investigation. *Id.* at 20, 22, 632 S.E.2d at 789–90.

148. *Id.* at 21–22, 632 S.E.2d at 790. The court of appeals found the appellant in *Hill* to be in violation of Rule 28(b)(6) for failure to cite any legal authority in support of his juror misconduct argument. *Id.* at 20, 632 S.E.2d at 789. Although this violation did not directly relate to assignments of error, *Hill* nonetheless provides an example of a case in which the court's decision whether to dismiss for rules violations was influenced by the nature of the legal issues at stake.

149. N.C. R. APP. P. 2.

unclear to either the court or the appellee. Such a measure would also mean that the considerations that currently drive Rule 2 would be lost: "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest"[150] would no longer be among the goals of the appellate courts when faced with cases involving rules violations. To date, however, the supreme court has not repealed Rule 2. Similarly, the court's opinion in *Hart* confirms that *Viar* does not go so far as to say that Rule 2 may no longer be invoked to excuse violations of the rules for assigning error.[151] It is thus evident that the supreme court does not intend unyielding application of the Rules of Appellate Procedure in this area. This is sound policy in light of the purposes that assignments of error are intended to serve, because automatic dismissal for all violations of Rules 10(c) and 25(b) would not necessarily vindicate those purposes.[152] The court of appeals' opinion[153] to which the supreme court responded in *Hart* demonstrates this point nicely, due to the fact that the court of appeals seemed to interpret *Viar* to mean that all violations of the rules for assigning error must result in dismissal.[154]

The appellant in *Hart* assigned error to the trial court's admission of certain testimony, arguing that the challenged testimony " 'constituted an opinion as to an ultimate issue for the jury and a legal conclusion.' "[155] The corresponding argument in the appellant's brief was that the challenged testimony should not have been admitted because it was an expression of the witness's opinion that the appellant was guilty of the offense charged.[156] On this issue, the court of appeals wrote: "This assignment of error states nothing about the challenged testimony being impermissible as testimony regarding [the appellant's] guilt. Accordingly, the underlying assignment of error does not identify the issue briefed on appeal and is in violation of [Rule] 10(c)(1)."[157] Thus, although this assignment of error indicated the appellant's contention that the trial court had

150. *Id.*

151. State v. Hart, 361 N.C. 309, 312–13, 644 S.E.2d 201, 203 (2007); *see* Viar v. N.C. Dep't of Transp., 359 N.C. 400, 401, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

152. *See infra* notes 170–78 and accompanying text.

153. State v. Hart, 179 N.C. App. 30, 633 S.E.2d 102, *discretionary review denied*, 360 N.C. 651, 637 S.E.2d 182 (2006), *aff'd in part, rev'd in part*, 361 N.C. 309, 644 S.E.2d 201 (2007).

154. *See id.* at 38–39, 633 S.E.2d at 107–08.

155. *Id.* at 36, 633 S.E.2d at 106 (quoting Record on Appeal at 25, *Hart*, 179 N.C. App. 30, 633 S.E.2d 102 (2006) (No. COA05-1488)).

156. *Id.*

157. *Id.*

impermissibly admitted opinion testimony, it was deemed insufficient because it failed to state the exact nature of the opinion that was allegedly expressed.[158]

In another assignment of error, the *Hart* appellant challenged another portion of the same witness' testimony, and included in his assignment of error the assertion that admission of the testimony had violated the North Carolina Rules of Evidence.[159] Only in his brief, however, did the appellant reveal exactly which rule of evidence he was invoking.[160] The court of appeals responded:

> Nowhere in [the appellant's] assignment of error does he assign error on this specific basis; rather, he states generally that the challenged testimony "otherwise violated the N.C. Rules of Evidence." Accordingly, this assignment of error is broad, vague, and unspecific, and it fails to identify the issues on appeal. Therefore, we do not address this argument because it is beyond the scope of appellate review.[161]

It seems that if the appellant had simply included the number of the rule of evidence that he claimed was violated, this assignment of error would have been sufficient for the court to consider the issue.[162]

In dismissing multiple portions of the appeal, the court of appeals in *Hart* did not contend that the appellant's assignments of error had failed to direct its attention (or the attention of the appellee) to relevant portions of the record on appeal or the trial transcript.[163] The majority simply dismissed multiple portions of the appeal because the appellant's assignments of error stated the legal bases of some of the issues raised in terms somewhat broader than were necessary to fully identify the appellant's arguments. It may be true that the appellant in *Hart* failed to achieve strict compliance with Rule 10(c)(1).[164] However, it is difficult to imagine a case in which an

158. *Id.* The extent to which the appellant pursued this line of argument in his brief to the court is unclear from the court of appeals' majority opinion. It may be that the appellant offered little actual argument on this point and cited no authority in support of his position, in which case, even if the argument had been deemed properly within the scope of appellate review, it would have been considered by the court to be abandoned by the appellant. N.C. R. APP. P. 28(b)(6). Whatever the case, Judge Hunter did not concern himself with this assignment of error in his dissent in *Hart*. *See Hart*, 179 N.C. App. at 43–47, 633 S.E.2d at 111–13 (Hunter, J., concurring in part and dissenting in part).

159. *Hart*, 179 N.C. App. at 37, 633 S.E.2d at 107.

160. *Id.*

161. *Id.* (citations omitted) (quoting Record on Appeal, *supra* note 155, at 25).

162. *See id.* (declining to address the issue, due entirely to appellant's failure to cite the specific rule of evidence in question).

163. *See id.* at 36–39, 633 S.E.2d at 106–08.

164. State v. Hart, 361 N.C. 309, 314–15, 644 S.E.2d 201, 204 (2007).

appellant could possibly come any closer to compliance with the rules for assigning error without achieving *actual* compliance.

As discussed above, the case left the court of appeals divided once again. Judge Calabria was the lone signatory to the opinion she authored for the court, with Judge Bryant concurring only in the result.[165] Judge Hunter, meanwhile, offered a dissent in which he focused not on the "legal basis" language of Rule 10(c)(1),[166] but rather on the appellant's compliance with the portion of that rule stating that " '[a]n 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.' "[167] Judge Hunter worried that the majority's dismissal of the appellant's arguments "would require appellants to include every detail of their planned argument in the assignment of error for fear of dismissal,"[168] and ventured to guess that "[t]o require the automatic dismissal of all cases for hyper-technicalities was surely not the intention of our Supreme Court in its decision in *Viar*."[169]

The result reached by the court of appeals in *Hart*, though repudiated in part by the supreme court, nonetheless demonstrates that repeal of Rule 2 would make little sense as far as assignments of error are concerned. Consider the purposes the court of appeals has ascribed to assignments of error:

> One of the purposes of Rule 10(c) is "to identify for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position." This rule also enables the appellate court to "fairly and expeditiously" consider the assignments of error as framed without "making a voyage of discovery" through the record in order to determine the legal questions involved.[170]

The procedural shortcomings identified by the court of appeals in *Hart* did not frustrate either of these purposes. With regard to the first stated purpose, although the appellant's assignments of error did

---

165. *Hart*, 179 N.C. App. at 33, 43, 633 S.E.2d at 105, 111.

166. N.C. R. APP. P. 10(c)(1) ("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.").

167. *Hart*, 179 N.C. App. at 44, 633 S.E.2d at 111 (Hunter, J., concurring in part and dissenting in part) (alteration in original) (quoting N.C. R. APP. P. 10(c)(1)).

168. *Id.*

169. *Id.* at 47, 633 S.E.2d at 112.

170. Kimmel v. Brett, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988) (citation omitted) (quoting N.C. R. APP. P. 10(c) cmt. (1975), *reprinted in* 287 N.C. 671, 703 (1975)).

not make perfectly clear the *legal* bases for his arguments, they left no doubt as to the *factual* premises upon which those arguments would proceed. Both of the assignments of error that the court of appeals deemed overbroad and insufficient were adequate to at least notify the appellee that the appellant intended to argue in his brief that certain testimony had been improperly admitted at trial.[171] Armed with this information, the appellee would have been able to examine the appellant's proposed record on appeal to ensure that the portion of the trial transcript covering the challenged testimony (as well as any other information that might be pertinent to the issue) had been included for possible consideration by the court of appeals.[172] Knowledge of the precise legal theory underlying the appellant's argument as to why this testimony should not have been admitted would have been of no help to the appellee in accomplishing this task.

Regarding the second purpose that the court of appeals has identified for assignments of error, the failure of the appellant's assignments of error in *Hart* to identify with perfect specificity the legal bases for his arguments did not present a significant barrier to the court's understanding of the legal questions posed.[173] The assignments of error gave notice of whose testimony was being challenged, and were even supplemented with direct references to the trial transcript, meaning that the court could have consulted the record or transcript and located the challenged evidence without difficulty.[174] In addition, assignments of error are not the court's only means of determining the legal issues presented by an appellant. The court also has the benefit of reading the entirety of the appellant's legal argument as it appears in the appellant's brief.[175] If an appellant advances no argument whatsoever in favor of a flawed assignment of error, then such assignment of error is simply deemed abandoned.[176] However, if the appellee is able to determine the factual basis of the appellant's argument from the assignments of error, and the court is able to understand the legal basis of the argument from the

171. *See Hart*, 179 N.C. App. at 36–37, 633 S.E.2d at 106–07 (revealing that the appellant's assignments of error succeeded in giving notice of which particular testimony was being challenged).

172. *See* N.C. R. APP. P. 9(b)(5) ("On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content.").

173. *Hart*, 179 N.C. App. at 44–47, 633 S.E.2d at 111–12 (Hunter, J., concurring in part and dissenting in part).

174. *See id.* at 44, 633 S.E.2d at 111.

175. *See generally* N.C. R. APP. P. 28 (regarding function and content of briefs).

176. *Id.* 28(b)(6).

appellant's brief, there seems to be no rationale for dismissing an appeal simply because the appellant did not specifically identify legal arguments in the assignments of error.[177] Thus, other than adherence to an incorrect interpretation of *Viar*,[178] there was no good reason for the court of appeals to dismiss the appeal in *Hart*.

If North Carolina's appellate courts are to avoid such senseless outcomes, they should adopt a different approach. At the opposite end of the spectrum from unyielding application of the rules regarding assignments of error would be *no* application of those rules. This is a solution that has actually been proposed by at least one member of the court of appeals. In *Broderick v. Broderick*,[179] the court of appeals dismissed yet another appeal for the appellant's failure to comply with Rule 10(c)(1).[180] Judge Wynn, once again unenthusiastically concurring, took the case as an opportunity to suggest a resolution to the assignments of error problem, writing:

> Because dismissing this appeal is mandated by our Supreme Court's decision in *Viar*, I most reluctantly join my colleagues in declining to decide the merits of this appeal.
>
> I write separately to urge our Supreme Court to abolish assignments of error under [the] North Carolina Rules of Appellate Procedure . . . .
>
> In my opinion, 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.[181]

Judge Wynn went on to list many jurisdictions that do not require appellants to submit assignments of error, most of which required assignments of error at one time and later abolished them.[182]

---

177. *Cf.* Kimmel v. Brett, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988) (explaining the purposes of assignments of error). Note that assignments of error are not necessarily intended to give notice of an appellant's legal arguments to the appellee. This may be due to the fact that an appellee has at least thirty days after receiving the appellant's brief to read it and respond to the legal arguments contained therein. N.C. R. APP. P. 13(a).

178. State v. Hart, 361 N.C. 309, 315, 644 S.E.2d 201, 205 (2007).

179. 175 N.C. App. 501, 623 S.E.2d 806 (2006). The appellant in *Broderick* sought to challenge an order modifying his alimony obligations. *Id.* at 502, 623 S.E.2d at 807.

180. *Id.* at 503, 623 S.E.2d at 807. The *Broderick* appellant provided only one assignment of error, which violated Rule 10(c) by failing to set forth a specific legal basis for challenging the trial court's order. *Id.* at 502–03, 623 S.E.2d at 807.

181. *Id.* at 503–04, 623 S.E.2d at 807–08 (Wynn, J., concurring in the result).

182. *Id.* at 505, 623 S.E.2d at 808–09 (listing the federal courts generally, the Fourth Circuit specifically, Alabama, Indiana administrative agencies, Florida, Georgia, Connecticut, Illinois, and the United States Supreme Court); *see also Critics Point to Rule 10 as Root of the Problem*, N.C. LAW. WKLY. (Raleigh), May 14, 2007, at 1 (stating that

Judge Wynn's proposal is an interesting option that would have several benefits. As Judge Wynn himself noted, abolishing assignments of error would mean that appellants would have greater access to the appellate process, since such access would be less dependent on compliance with formal rules. Relieved of the need to concern themselves so extensively with form,[183] the appellate courts could employ their resources more fruitfully, determining whether or not records on appeal and appellants' briefs adequately frame the legal issues presented, and then applying the law accordingly. Such new instructions from the supreme court would also enable the court of appeals to exercise discretion, as the court has shown a tendency to do since *Viar*,[184] without the embarrassing prospect of possibly misinterpreting supreme court precedent.

An obvious response to the suggestion of abolishing assignments of error in North Carolina would be to point to the desirable aspects of their continued use. As noted earlier, when employed properly, assignments of error serve at least two useful purposes. First, they notify appellees of the factual bases for appellants' legal arguments so that appellees can be sure that adequate factual information is included in the record on appeal.[185] Simple abolition of assignments of error may increase the frequency with which insufficient records are submitted to the appellate courts. At best, amending such records would slow the appellate process.[186] At worst, insufficient records

---

North Carolina is one of only five jurisdictions that require assignments of error, and that most of the others interpret their requirements such that most cases are decided on the merits).

183. The supreme court indicated in *Hart* that the court of appeals is already not required to be on the lookout for rules violations. *Hart*, 361 N.C. at 311, 644 S.E.2d at 202. However, as noted above, one result of *Hart* may be that attorneys will bring violations to the attention of the court more frequently. *See supra* notes 110–11 and accompanying text. If assignments of error were abolished, there would at least be fewer bases upon which appellees' lawyers could argue for dismissal.

184. *See supra* notes 56–69 and accompanying text. This Recent Development does *not* advocate implementing a reasonableness standard as a means of legitimizing preferential treatment of appellants whose cases the North Carolina appellate courts feel are particularly "important." Instead, the reasonableness standard should simply be viewed as a means for the appellate division to relax its enforcement of the North Carolina Rules of Appellate Procedure, such that strict compliance with the rules would no longer be required—even in cases that do not implicate any fundamental purposes of the rules. All parties bringing appeals before this state's appellate courts should still be treated equally, and the proposed amendment would help accomplish this by ensuring that all parties would be subject to a unitary, relatively well-defined standard.

185. *See supra* note 170 and accompanying text.

186. *See* N.C. R. APP. P. 9(b)(5) (allowing amendment of the record).

could go unamended and have prejudicial effects upon appellees.[187] A second purpose of assignments of error is to notify the appellate courts exactly where in the transcript to look for the relevant factual information, which serves to improve the economy of the appellate process and to help define appellants' legal contentions.[188] Abolition may force judges to search through records and transcripts in order to find documentation of the facts upon which appellants base their arguments.[189]

At least one other state that has done away with assignments of error has addressed the first of these concerns by replacing assignments of error with a less demanding "declaration of issues."[190] In Tennessee, assignments of error have been expressly abolished, and in their place an appellant must provide a declaration of issues in tandem with "the appellant's description of the parts of the transcript he intends to present on appeal."[191] The function of this declaration is simple:

> The appellant's declaration need merely advise the appellee of the issues the appellant intends to present on appeal so that the appellee can determine whether the parts of the transcript the appellant intends to order are adequate. If the appellant misleads the appellee, the latter may seek modification of the record . . . .[192]

Such a change could be instituted in North Carolina's appellate courts, and the minimal requirements associated with the declaration of issues would ensure that appellants would not be turned away by the appellate courts simply because they fail to provide enough specificity regarding their legal arguments at such an early stage in the appellate process.[193] This change would not do much to answer concerns about judicial economy, however. Judges would still lack guidance on where to find the factual information pertinent to the appeal, and may have to pore over very lengthy trial transcripts in order to find the documentation they need.

---

187. An appellant could possibly victimize an unwary appellee by placing in the record on appeal only the material from trial that is favorable to the appellant's arguments.

188. *See supra* note 170 and accompanying text.

189. *See supra* note 170 and accompanying text.

190. *See* John L. Sobieski, Jr., *The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure*, 46 TENN. L. REV. 1, 42 (1978); *see also* TENN. R. APP. P. 24(a).

191. *See* Sobieski, *supra* note 190, at 42; *see also* TENN. R. APP. P. 24(a).

192. Sobieski, *supra* note 190, at 43.

193. From the time the clerk of the appellate court mails copies of the record on appeal to the parties, appellants in North Carolina have at least thirty days in which to develop the legal arguments they will present to the court. N.C. R. APP. P. 13(a).

Thus, it makes more sense to attempt to fix only those aspects of assignments of error that are broken. When the Rules of Appellate Procedure regarding assignments of error are properly adhered to, they yield positive results. The problem with strictly requiring such adherence is that these same positive results can often be achieved, or at least approximated, without perfect compliance with the rules. This is particularly evident in those decisions of the court of appeals that have distinguished *Viar* where the rules violations did not impede discernment of the legal issues presented.[194] Such cases illustrate that the court of appeals is averse to applying the rules strictly, and, indeed, the supreme court itself indicates an inclination to account for the circumstances of each individual case through the continued existence and effectiveness of Rule 2. The objective, then, is simply a more workable standard for determining whether to pardon faulty assignments of error than the court of appeals has been left to apply since *Viar*.

Because the two extreme solutions discussed above are diametrically opposed, it is impossible to bring together all their positive aspects. It *is* possible, however, to formulate a standard that minimizes the negative. In the absence of clearer direction from the supreme court, the court of appeals has attempted to articulate an intermediate standard of its own. In *Hammonds v. Lumbee River Electric Membership Corp.*,[195] the court wrote:

> 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. We will conduct the same analysis here.[196]

This weighing of the various circumstances of a particular case requires a good deal of subjective judgment, and, as noted above, excessive judicial discretion is undesirable.[197] Another problem with this analysis is that it is unnecessarily complicated. Fortunately, there already exists within the competence of the judiciary another standard that is simpler, and which avoids a good deal of the

194. *See supra* notes 56–69 and accompanying text.

195. 178 N.C. App. 1, 631 S.E.2d 1, *discretionary review denied*, 360 N.C. 576, 635 S.E.2d 598 (2006).

196. *Id.* at 15, 631 S.E.2d at 10.

197. *See supra* notes 40–69, 125–38 and accompanying text (detailing cases in which substantially similar rules violations have yielded different outcomes).

subjectivity with which the court of appeals has been deciding cases involving violations of the rules regarding assignments of error.[198]

This Recent Development urges the Supreme Court of North Carolina to exercise the rulemaking authority granted to it by the Constitution of North Carolina[199] to amend Rules 10(c) and 28(b) of the North Carolina Rules of Appellate Procedure[200] by adding to each a proviso that states, at least in substance: "Insofar as it relates to assignments of error, this subsection shall be suspended pursuant to Rule 2 if, and only if, the legal issue presented by the party assigning error is reasonably identifiable in a brief filed with the appellate division by that party."[201]

Before weighing the pros and cons of this proposed solution, some illustration of how it would operate is in order. This can be

198. *See infra* notes 226–32 and accompanying text.

199. N.C. CONST. art. IV, § 13(2).

200. As an alternative to amending the rules, the supreme court could achieve much the same effect by laying out this new standard in an opinion of the court. This Recent Development recommends amending the rules for multiple reasons. First, the Rules of Appellate Procedure are likely among the first sources of authority consulted by any party to a case that reaches North Carolina's appellate division, since they

> govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

N.C. R. APP. P. 1(a). Also, the supreme court has quasi-legislative authority in establishing rules of procedure for the appellate courts, and therefore need not wait until another case involving violations of Rules 10(c) and 28(b) comes before it to establish the proposed change. *See* N.C. CONST. art. IV, § 13(2). For discussion of the justifications for the court's authority to establish its own rules, see generally Amanda G. Ray, Recent Development, *The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power*: State v. Tutt, 84 N.C. L. REV. 2100 (2006).

201. The word "shall" is used because, in order for the amendments to have their intended curative effects, suspension of Rules 10(c) and 28(b) must be mandatory with regard to all issues that are reasonably identifiable in appellants' briefs. If the application of Rule 2 in such circumstances were instead left to the courts' discretion, the amendment would do little to alleviate the concern over excessive judicial subjectivity. *See supra* notes 143–48 and accompanying text. The phrase "Insofar as it relates to assignments of error" is used in order to preserve unaffected those provisions of Rule 28(b) that are unrelated to assignments of error, such as the requirement that the standard of review applicable to each question presented be stated in the appellant's brief.

A word is in order here regarding the supreme court's reminder in *Hart* that dismissal is not the only sanction available when the appellate courts are faced with rules violations. State v. Hart, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007). Even in cases where the "reasonably identifiable" standard is satisfied, there is nothing in the proposed amendment that precludes the imposition of sanctions less severe than dismissal. To make this clear, explicit language to that effect could be included in the amendment.

accomplished by way of a hypothetical: imagine, for example, that the proposed amendment had been in effect at the time *Viar* came before the court of appeals. The appellant in *Viar* violated Rule 10(c)(1) by neglecting to number his assignments of error and by failing to provide specific references to the portions of the transcript or record upon which those assignments of error were based.[202] Since the appellant failed to comply with one of the rules pertaining to assignments of error, the amendment would be triggered, and the next step would be to read the appellant's brief in order to determine whether the appellant's argument renders any legal issues reasonably identifiable. With regard to any such issues, the amendment would mandate that Rule 2 be invoked to excuse the appellant's violations of Rule 10(c). Any issues not reasonably identifiable after considering the appellant's brief, on the other hand, would have to be dismissed.

The record on appeal in *Viar* contained two assignments of error.[203] The first of these dealt with the North Carolina Industrial Commission's refusal to admit certain deposition testimony at trial.[204] The appellant's brief did not pursue this line of argument, however,[205] and so even with the proposed amendment in place, this issue would be deemed abandoned under Rule 28(b)(6).[206] The appellant's second assignment of error read as follows:

> "The North Carolina Industrial Commission, in its majority opinion, committed reversible error by not finding the named respondents negligent in the deaths of the minor petitioners for not installing median barriers on a deadly stretch of Highway I-85 after the Department of Transportation found an acute need for the barriers approximately 8 years earlier."[207]

The appellant then argued in his brief "that the Industrial Commission erred by failing to find that the NCDOT's negligence in not installing median barriers in the section of I-85 where the accident

---

202. Viar v. N.C. Dep't of Transp., 359 N.C. 400, 401, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

203. Viar v. N.C. Dep't of Transp., 162 N.C. App. 362, 377, 590 S.E.2d 909, 920 (2004) (Tyson, J., dissenting), *vacated*, 359 N.C. 400, 610 S.E.2d 360 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

204. *Id.*

205. *Id.* at 379, 590 S.E.2d at 921.

206. N.C. R. APP. P. 28(b)(6).

207. *Viar*, 162 N.C. App. at 377, 590 S.E.2d at 920 (Tyson, J., dissenting) (quoting Record on Appeal at 77, *Viar*, 162 N.C. App. 362, 590 S.E.2d 909 (2004) (No. COA03-25)).

occurred was the proximate cause of the decedents' death."[208] In its *Viar* opinion, the supreme court held that in reaching the merits of this issue, the court of appeals impermissibly "addressed the issue, not raised or argued by [the appellant], which was the basis of the Industrial Commission's decision, namely, the reasonableness of [the department's] decision to delay installation of the median barriers."[209] It may be true that the appellant in *Viar* did not technically argue that the Department of Transportation's failure to install median barriers along the stretch of I-85 where Megan and Macey Viar were killed satisfied North Carolina's legal definition of negligence, in that he did not explicitly contend that the department breached a duty of care owed to Megan and Macey.[210] Despite this technical shortcoming, however, the argument the appellant presented in his brief succeeded in making the legal issue he was arguing reasonably identifiable: namely, that the Industrial Commission erred in failing to conclude that the Department of Transportation was liable for actionable negligence.[211] Thus, with the proposed amendment in place, it would have been not only permissible, but mandatory, for the court of appeals in *Viar* to consider the merits and render judgment on this issue.[212]

This amendment would leave the rules pertaining to assignments of error in effect, encouraging appellants to continue to abide by those rules and thereby continuing to foster the positive consequences that properly presented assignments of error bring.[213] Meanwhile, even in cases of improperly presented assignments of error, a reasonableness standard would still be responsive to the reasons for which assignments of error are desirable in the first place. As the court of appeals' majority opinion in *State v. Hart*[214] explained, "[t]he purpose of assignments of error is to limit the scope of the appeal, and to put the other party on notice of the issues to be

208. *Id.* at 363, 590 S.E.2d at 912 (majority opinion).

209. Viar v. N.C. Dep't of Transp., 359 N.C. 400, 402, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

210. *Viar*, 162 N.C. App. at 369, 590 S.E.2d at 915 (stating the elements of actionable negligence in North Carolina).

211. "To establish actionable negligence, plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Id.*

212. *See supra* note 201 and accompanying text.

213. *See supra* notes 170, 185, 188 and accompanying text.

214. 179 N.C. App. 30, 633 S.E.2d 102, *discretionary review denied*, 360 N.C. 651, 637 S.E.2d 182 (2006), *aff'd in part, rev'd in part*, 361 N.C. 309, 644 S.E.2d 201 (2007).

presented."[215] Skeptics of the proposed standard might contend that requiring substantive consideration of any issues that can reasonably be identified in appellants' briefs will broaden the scope of appeals and place a great burden on the appellate courts.[216] In reality, however, the reasonableness standard would simply give greater definition to the outer limits of the scope of appellate review. If the court is unable to identify an appellant's argument after examining the assignments of error and the appellant's brief, then that appellant has failed the reasonableness test, and the unidentifiable argument must be dismissed. Thus, a reasonableness standard would actually thwart the problem the supreme court sought to prevent in *Viar* when it stated that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant."[217] The appellate division would be required to dismiss any issue truly "not raised or argued"[218] by an appellant.

Imposing a reasonableness standard would also have no detrimental effect on the notice that the opposing party receives regarding the issues to be presented. Because the proposed amendment focuses on what is ascertainable from the appellant's brief, it may seem that the appellee will be left with no way of ensuring that the record on appeal—which is submitted to the court in advance of the appellant's brief[219]—contains the necessary factual documentation. However, the change to Rules 10(c) and 28(b) would have no effect upon Rule 9(b)(5), which allows any appellate court to order amendment of a deficient record on appeal "[o]n motion of any

215. *Id.* at 37, 633 S.E.2d at 107 (citation omitted) (citing Broderick v. Broderick, 175 N.C. App. 501, 503, 623 S.E.2d 806, 807 (2006)).

216. *E.g.*, *id.* at 37–38, 633 S.E.2d at 107 (arguing that, if the court of appeals were to accept an assignment of error that broadly asserted that the trial court had violated the North Carolina Rules of Evidence, the court would thereby "allow [the appellant's] counsel to argue on appeal any and every violation of the North Carolina Rules of Evidence"). While it is true that the more lenient reasonableness standard might allow appellants to argue a greater range of issues than is currently possible, the proposed amendment would have no effect on Rule 28(j)(2), which prescribes limitations for the length of briefs filed with the North Carolina Court of Appeals. N.C. R. APP. P. 28(j)(2). Of course, parties under the proposed standard might simply attempt to fit as many issues as possible within the length limitations. Cursory arguments would, however, risk failing the reasonableness inquiry. For example, a mere citation to a past case or a statute, without sufficient explanation of how it bears upon the appeal at hand, would probably fail to reasonably identify any issues.

217. Viar v. N.C. Dep't of Transp., 359 N.C. 400, 402, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

218. *Id.*

219. *See supra* note 193.

party or on its own initiative."[220] Thus, regardless of whether the court will actually decide to reach the merits of all the issues presented in an appellant's brief, the appellee is already empowered to make certain that the record on appeal is sufficient with respect to all such issues. Under the proposed standard, the appellee could also look to the appellant's brief for guidance on which issues to argue in the appellee's own brief, with the knowledge that the court will decide upon all issues that can reasonably be identified in the appellant's brief.

Another beneficial aspect of the reasonableness standard is that it would be easily applied by the courts. First of all, reasonableness is a familiar standard that is already applied in many judicial contexts.[221] More importantly, a unitary standard would allow the court of appeals to take a well-defined approach to all cases in which the rules for assigning error have been violated. The court would be relieved of the difficult task of trying to elucidate the "creating an appeal" standard by synthesizing the inconsistent case law that has developed under *Viar* and *Hart*. This would simplify the decision of whether or not to reach the merits of an appeal and thus allow the court to devote its time to straightforward substantive analysis. Along those same lines, parties would have less incentive to attempt to persuade the appellate courts that issues should be either considered or dismissed, and would thus be encouraged to focus on substantive rather than procedural issues. The more definite standard would give parties less procedural ambiguity to work with, and therefore less room to offer novel interpretations of precedent. A determination of reasonableness would also involve less judicial discretion than is implicated under the various standards the court of appeals has recently applied. For example, a determination of reasonableness would—at least on its face—require less subjectivity than a balancing of the public policy implications of a particular appeal against the importance of upholding the Rules of Appellate Procedure.[222]

The proposed standard is also preferable to the confusing sequence of inquiries that might be necessary under the supreme

220. N.C. R. APP. P. 9(b)(5).

221. *See, e.g.*, MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD 1 (2003) (noting the use of the "reasonable person" standard in tort law, criminal law, contract law, and administrative law, and describing such standards as "ubiquitous").

222. *See, e.g.*, Hammonds v. Lumbee River Elec. Membership Corp., 178 N.C. App. 1, 15, 631 S.E.2d 1, 10–11, *discretionary review denied*, 360 N.C. 576, 635 S.E.2d 598 (2006) (concluding that it was more important to address the substantive issues in the case at bar than to uphold "the integrity of the Rules").

court's decision in *Hart*. As noted above, *Hart* leaves a number of important questions unanswered.[223] In terms of judicial economy, it would be significantly more efficient for a court to engage in a single reasonableness inquiry than it would be for the court to conduct a series of relatively difficult analyses. For that matter, a reasonableness analysis would likely be easier than trying to ascertain which analyses are even necessary under *Hart*. Moreover, each of the questions left unanswered by *Hart* provides a separate ground for the exercise of judicial discretion, and the difficulty of the questions makes such discretion all the more necessary.[224] By contrast, a reasonableness inquiry, though it would not entirely eliminate judges' discretion, would call for a relatively simple and distinct analysis. For example, deciding whether an appeal implicates any fundamental purpose of the Rules of Appellate Procedure would require more subjective judgment than would a decision about whether an issue is reasonably identifiable within a party's brief. Whereas a court considering fundamental purpose must make a policy judgment

223. *See supra* notes 112–22 and accompanying text.

224. Take, for example, the possible inquiry into whether a case implicates any fundamental purpose of the Rules of Appellate Procedure. This question might be described as requiring the exercise of "strong discretion," which "can be defined as the possibility to choose among different equally valid or legally admissible courses of action." MARISA IGLESIAS VILA, FACING JUDICIAL DISCRETION 6 (2001). There is, after all, no settled norm as to precisely what constitutes a fundamental purpose of the appellate rules. Because cases requiring strong discretion present judges with a variety of legitimate approaches, "decisions that result from the exercise of strong discretion are unpredictable." Ricardo Caracciolo, Discretion, Right Answers and the Judicial Function IV-88 (Seminar in Latin America on Constitutional and Political Theory 2000), *available at* http://www.law.yale.edu/documents/pdf/Caracciolo_Discretion_Right_Answers_and_the_Judicial_Function.pdf.

On the other hand, one might argue that the questions left open by *Hart* necessitate only "weak discretion," which "refers to those situations in which, although law offers an answer to the case under consideration, this answer is not obvious. A complex intellectual process is necessary to identify the course of action prescribed by the law." IGLESIAS VILA, *supra*, at 5. Such an argument would contend that the fundamental purpose standard itself holds the correct answer, and that courts must simply use good judgment in order to arrive at that answer.

Regardless of how one characterizes the fundamental purpose inquiry, some form of "complex intellectual process" is needed to arrive at an answer, due to the fact that it is not obvious what constitutes a fundamental purpose of the rules. *See id.* "[W]hen it is the case that semantic rules are indeterminate . . . the interpreter [is] granted the freedom to choose between open alternatives." *Id.* at 46. Due to the high level of semantic indeterminacy in the standards that might apply under *Hart*, a judge employing those standards would have significant freedom of choice, which would lead to unpredictable results. Meanwhile, given that reasonableness standards are particularly well developed, *see supra* note 221 and accompanying text, one would expect such standards to be better defined, and thus to require a weaker form of judicial discretion, resulting in more predictable outcomes.

regarding the ultimate importance of the issues it might address, a court considering reasonableness must simply focus on the qualities of the particular appeal at hand.

In the same vein, the relative simplicity of a reasonableness inquiry would leave less room for inconsistency than would the more complicated inquiry outlined in *Hart*. This is important because, as the supreme court itself stated in *Hart*, "[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 [Rule 2] authority."[225]

Another interesting observation regarding the proposed amendment in light of *Hart* is that, although the *Hart* court suggested that the court of appeals consider imposing sanctions other than dismissal when the appellate rules are violated, the reasonableness standard may provide greater opportunity to do so than the standard that exists after *Hart*. If it is the case that Rule 2 must be invoked in order to reach the merits of any appeal that violates the rules, regardless of the form of sanction the court chooses to impose, then the fundamental purpose inquiry will force dismissal of most flawed cases—including those in which the court would have chosen more lenient sanctions.[226] If the proposed reasonableness standard were applied, on the other hand, dismissal would be much less likely. The appellate courts would be free to impose any lesser sanctions deemed appropriate, and to then proceed to the merits.[227]

A reasonableness standard would also do more than *Hart* to encourage both the parties and the appellate courts to focus more on appeals' substantive merit, rather than on the parties' ability to comply with procedural rules that are obviously difficult to satisfy.[228] Attorneys would have less incentive to point out procedural miscues, since it would likely be more difficult for an appellee to convince a court that an issue is not reasonably identifiable in an appellant's brief than it would be to convince the court that dismissal is appropriate under *Hart*. This is true regardless of which

225. State v. Hart, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007).

226. *See supra* notes 100–03, 108–11 and accompanying text.

227. Although the proposed amendment would require suspension of the rules for assigning error with regard to any reasonably identifiable issues, the change would not preclude the appellate courts from imposing sanctions less than dismissal. *See supra* note 201 and accompanying text.

228. *See* Loranger, *supra* note 105 (stating that in the twenty months after the supreme court handed down *Viar*, "the Court of Appeals cited *Viar* in 124 separate cases: 50 of those were dismissed outright, and 29 were partially dismissed"). If the appellate rules were easy to follow, one would not expect *Viar* to come up nearly so often.

interpretation of *Hart* is the correct one. Recall that if Rule 2 must be invoked to reach the merits of any appeal that fails to achieve compliance with the appellate rules, then a court's decision whether or not to reach the merits will usually depend upon a fundamental purpose inquiry.[229] Given that fundamental purposes of the appellate rules are rarely implicated,[230] it would probably be easier to convince the court in a given case that no such purpose is at stake than it would be to demonstrate that the appellant's brief fails to reasonably identify the issues on appeal. If, on the other hand, imposition of lesser sanctions removes Rule 2 from consideration, then the decision will still hinge on a subjective standard, such as whether or not the court would have to "create an appeal for the appellant" in order to consider the merits of the appeal. Again, it would likely be easier to convince a court not to reach the merits under such an indefinite standard than it would be to show that the appellant's brief does not reasonably identify any issues. The courts themselves, meanwhile, would have to consider the substantive content of parties' briefs in order to determine which issues are reasonably identifiable. These inquiries would have more of a substantive focus than, for example, attempts to determine whether the assignments of error provided a sufficient forecast of an appellant's arguments.

Naturally, there are also a number of criticisms that could be aimed at this proposed change. First, any amendment that claims to leave rules in effect, and yet results in some reduction of their efficacy, could encourage parties to ignore those rules. The imposition of a reasonableness standard, however—unlike a full abolition of assignments of error—would preserve parties' incentives to take the rules seriously. Even aided by the protection of the reasonableness standard, appellants would still be well advised to be as persuasive as possible by making clear legal arguments and by ensuring that the court can discover and understand the factual bases of those arguments. Likewise, appellees would still have just as much incentive as before to offer well-argued responses and to provide their own bases for those arguments.

Another critique of the reasonableness standard is that it fails to truly solve some of the most serious problems that exist under *Viar* and *Hart*. Since reasonableness is a pliable standard, parties would still be unable to define with certainty the necessary level of compliance with the Rules of Appellate Procedure regarding

229. *See supra* note 112 and accompanying text.

230. *See supra* notes 101–03 and accompanying text.

assignments of error. Also, since a reasonableness standard can be manipulated, unwarranted judicial discretion would remain a concern.[231] Imposition of the reasonableness standard would, however, result in less uncertainty than currently characterizes the application of the rules for assigning error. Presently, the extent to which the court of appeals will require compliance with the rules in any given case seems to depend upon which judge is selected to author the opinion.[232] With a clear reasonableness standard in place, at least parties would have a better conception of the basic criterion against which their compliance would be judged.

The reasonableness standard is admittedly not a panacea. It is, however, an explicit and objective standard that avoids the drawbacks of more extreme solutions to the problems plaguing the use of assignments of error in North Carolina.[233] Had such a test been applied to the appeal brought by Claude Viar on behalf of his daughters, the appellate division probably would not have dismissed the case.[234] Instead, the courts would have been free to consider the merits of the claim, and the State of North Carolina may eventually have been required to bear some responsibility for the auto accident at issue.[235] The tragic facts of his case may cast Mr. Viar as a particularly sympathetic appellant, but that has no bearing upon whether or not his case should have been heard. All appellants, regardless of circumstance, should be treated honestly and equally by the courts.[236] The facts of *Viar* do, however, serve as a reminder of the substantial rights at stake in North Carolina's appellate courts, and thus speak in favor of greater clarity and certainty in the law.

Justice was not well served when the Supreme Court of North Carolina dismissed Viar's appeal on the basis of harmless technical faults, nor has it been served by the court of appeals' inconsistent handling of subsequent cases. Unfortunately, the supreme court's opinion in *Hart* has failed to solve the problem of inconsistency.

231. MORAN, *supra* note 221, at 281–82.

232. Loranger, *supra* note 105 (quoting the attorney for the Office of the Appellate Defender who argued *Hart* before the supreme court as follows: " 'I think [*Viar*] created a state of panic within the appellate bar. You were giving it your best shot, and you thought you were complying with the rules. But depending on what panel [of the court of appeals] you got, you could have your case dismissed.' "). As demonstrated above, *Hart* appears to have failed to solve the inconsistency problem. *See supra* notes 125–38 and accompanying text.

233. *See supra* notes 149–50, 179–89 and accompanying text.

234. *See supra* notes 202–12 and accompanying text.

235. *See supra* notes 7, 32 and accompanying text.

236. *See supra* note 143 and accompanying text.

Ultimately, amendment of the North Carolina Rules of Appellate Procedure to include a reasonableness standard with regard to assignments of error would establish a sensible and coherent basis for granting access to the appellate courts, and thus would result in better administration of justice in North Carolina.

STEPHEN D. THILL**

** With love and gratitude to my grandfathers, Frank Kolakowski and Donald Thill.


VNIVERSITAT CAROL
SEPTENT SIGILLVM
LVX
LIBERTAS

North Carolina Law Review

INDEX TO VOLUME 85, NOS. 1–6

The views expressed in signed contributions to the Review *do not necessarily reflect the opinions of the Board of Editors.*

THE UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW

Administration

ERSKINE BOWLES, B.S., M.B.A., *President of the University of North Carolina*
JOHN CHARLES BOGER, A.B., M.Div., J.D., *Dean and Wade Edwards Distinguished Professor of Law*
LAURA N. GASAWAY, B.A., M.L.S., J.D., *Associate Dean for Academic Affairs and Professor of Law*
HIROSHI MOTOMURA, B.A., J.D., *Associate Dean for Faculty Affairs and Kenan Distinguished Professor of Law*
MEREDITH L. WEISS, B.S., M.I.S., M.B.A., *Associate Dean for Administration, Finance, and Information Technology*
SYLVIA K. NOVINSKY, B.S., J.D., *Associate Dean for Student Affairs*
MICHAEL J. STATES, B.A., J.D., *Assistant Dean for Admissions*
MARY MURRAY, B.A., *Assistant Dean for External Relations*
LOUISE HARRIS, B.A., *Assistant Dean of Alumni and Special Programs*
STEVEN J. MELAMUT, B.A., B.S., J.D., M.S.L.S., *Interim Assistant Dean for Information Technology, Information Technology Services Librarian for the Law Library, and Clinical Assistant Professor of Law*
SARAH WALD, A.B., J.D., *Interim Assistant Dean of Career Services and Special Assistant to the Dean*

Faculty

SCOTT BAKER, B.A., J.D., Ph.D., *Professor of Law*
TAMAR R. BIRCKHEAD, B.A, J.D., *Assistant Professor of Law*
WALKER JAMESON BLAKEY, A.B., J.D., *Professor of Law*
BOBBY JO BOYD, B.S., J.D., *Clinical Professor of Law and Deputy Director of the Writing and Learning Resources Center*
LISSA LAMKIN BROOME, B.S., J.D., *Wachovia Term Professor of Banking Law and Director of the Center for Banking and Finance*
KENNETH S. BROUN, B.S., J.D., *Henry Brandis Professor of Law*
CAROLINE NICHOLSON BROWN, B.A., M.A., J.D., *Professor of Law*
PATRICIA L. BRYAN, B.A., J.D., LL.M., *Professor of Law*
JOHN OTIS CALMORE, B.A., J.D., *Reef C. Ivey II Professor of Law*
JULIUS CHAMBERS, B.A., J.D., *Clinical Professor of Law and Director of the Center for Civil Rights*
SCOTT CHILDS, B.S., J.D., M.L.S., *Assistant Director of Public Services for the Law Library and Clinical Assistant Professor of Law*
ANDREW CHIN, B.S., Ph.D., J.D., *Associate Professor of Law*
JOHN MARTIN CONLEY, A.B., J.D., Ph.D., *William Rand Kenan, Jr., Professor of Law*
MICHAEL L. CORRADO, B.A., B.S., A.M., Ph.D., J.D., *Arch T. Allen Distinguished Professor of Law*
MARION G. CRAIN, B.S., J.D., *Paul Eaton Professor of Law and Deputy Director of the Center on Poverty, Work and Opportunity*
ADRIENNE D. DAVIS, B.A., J.D., *Reef C. Ivey II Professor of Law*
CHARLES EDWARD DAYE, B.A., J.D., *Henry Brandis Professor of Law and Deputy Director of the Center for Civil Rights*
MAXINE N. EICHNER, B.A., J.D., Ph.D., *Associate Professor of Law*
ADAM FEIBELMAN, B.A., J.D., *Associate Professor of Law*
AMY FLANARY-SMITH, B.A., J.D., *Clinical Professor of Law and Deputy Director of the Writing and Learning Resources Center*
THOMAS P. GALLANIS, B.A., J.D., LL.M., Ph.D., *Visiting Professor of Law*
MICHAEL J. GERHARDT, B.A., M.Sc., J.D., *Samuel Ashe Distinguished Professor in Constitutional Law*
S. ELIZABETH GIBSON, B.A., J.D., *Burton Craige Professor of Law*
THOMAS LEE HAZEN, B.A., J.D., *Cary C. Boshamer Distinguished Professor of Law*
DONALD THOMAS HORNSTEIN, B.A., J.D., *Aubrey L. Brooks Professor of Law*
MELISSA B. JACOBY, B.A., J.D., *Professor of Law*
JOSEPH JOHN KALO, B.A., J.D., *Graham Kenan Professor of Law*
THOMAS A. KELLEY III, A.B., J.D., *Associate Professor of Law*
JOSEPH E. KENNEDY, B.A., J.D., *Associate Professor of Law*
P. ANNE KLINEFELTER, B.A., M.L.S., J.D., *Interim Director and Associate Director of the Law Library and Clinical Assistant Professor of Law*
KIMBERLY D. KRAWIEC, B.A., J.D., *Professor of Law*
WILLIAM P. MARSHALL, B.A., J.D., *William Rand Kenan, Jr., Distinguished Professor of Law*
RUTH ANN MCKINNEY, B.A., M.Ed., J.D., *Clinical Professor of Law and Director of the Writing and Learning Resources Center*
ERIC L. MULLER, A.B., J.D., *George R. Ward Distinguished Professor of Law*
RICHARD E. MYERS, B.A., M.A., J.D., *Assistant Professor of Law*
ALISTAIR NEWBERN, A.B., J.D., *Assistant Professor of Law*
JOHN V. ORTH, A.B., J.D., M.A., Ph.D., *William Rand Kenan, Jr., Professor of Law*
GERALD J. POSTEMA, B.A., Ph.D., *Cary C. Boshamer Professor of Philosophy and Professor of Law*
ALICE A. RATLIFF, B.A., M.A.T., J.D., *Clinical Professor of Law*
RICHARD A. ROSEN, B.A., J.D., *Professor of Law*
MELISSA SAUNDERS, B.A., J.D., *Professor of Law*
MARIA SAVASTA-KENNEDY, B.A., J.D., *Clinical Professor of Law and Director of the Externship Program*
JAMES W. SHERWOOD, B.A., J.D., LL.M., M.L.I.S., *Reference/Faculty Services Librarian and Clinical Assistant Professor of Law*

TERESA C. STANTON, B.A., J.D., M.A., *Reference/Foreign and International Law Librarian and Clinical Assistant Professor of Law*
WILLIAM J. TURNIER, B.S., M.A., J.D., *Willie Person Mangum Professor of Law*
JUDITH WELCH WEGNER, B.A., J.D., *Professor of Law*
ARTHUR MARK WEISBURD, A.B., J.D., *Martha M. Brandis Professor of Law*
DEBORAH M. WEISSMAN, B.A., J.D., *Professor of Law and Director of Clinical Programs*

Adjunct Faculty

MICHAEL W. BALLANCE, B.A., J.D., *Adjunct Professor of Law*
THE HONORABLE M. PATRICIA DEVINE, B.A., J.D., *Adjunct Professor of Law*
ANITA EARLS, B.A., J.D., *Director of Advocacy, Center for Civil Rights*
CAITLIN FENHAGEN, B.A., J.D., *Visiting Clinical Assistant Professor of Law*
ANTHONY GAETA, JR., B.A., J.D., *Adjunct Associate Professor of Law*
DEBORAH R. GERHARDT, A.B., J.D., *Copyright and Scholarly Communications Director and Adjunct Professor of Law*
DANIEL P. GITTERMAN, B.A., M.A., Ph.D., *Adjunct Assistant Professor of law*
THE HONORABLE K. EDWARD GREENE, B.A., J.D., LL.M., *Adjunct Professor of Law*
SALLY GREENE, B.A., M.A., Ph.D., J.D., *Adjunct Professor of Law*
DEAN M. HARRIS, B.A., J.D., *Adjunct Associate Professor of Law*
HARPER HECKMAN, B.A., J.D., *Adjunct Associate Professor of Law*
ROBERT O. JENKINS, B.A., M.P.A., J.D., *Adjunct Associate Professor of Law*
GABRIEL JIMENEZ, B.B.A., J.D., *Adjunct Professor of Law*
MICHAEL KADENS, A.B., J.D., *Adjunct Professor of Law*
MARIA M. LYNCH, B.A., J.D., *Adjunct Professor of Law*
AMANDA MARTIN, B.S., J.D., *Adjunct Professor of Law*
THE HONORABLE MARK MARTIN, B.S., B.A., J.D., LL.M., *Adjunct Professor of Law*
CHRISTINE C. MUMMA, B.S., J.D., *Adjunct Associate Professor of Law*
ROBERT MOSTELLER, B.A., J.D., *Adjunct Professor of Law*
PATRICK OGLESBY, B.A., J.D., *Adjunct Lecturer*
SAMUEL T. OLIVER, JR., B.A., J.D., *Adjunct Associate Professor of Law*
THE HONORABLE ROBERT F. ORR, A.B., J.D., *Adjunct Professor of Law*
BARBARA OSBORNE, B.A., M.Ed., J.D., *Adjunct Associate Professor of Law*
DAVID W. OWENS, B.A., M.R.P., J.D., *Adjunct Professor of Public Law and Government*
ALLAN PARNELL, A.B., M.A., Ph.D., *Visiting Professor*
J. DICKSON PHILLIPS III, A.B., J.D., *Adjunct Professor of Law*
BETH POSNER, A.B., M.A., J.D., *Visiting Assistant Clinical Professor of Law, Civil Law Clinic*
AVIVA ROSENBERG, B.A., J.D., *Adjunct Professor of Law*
ELLIOT M. SILVERSTEIN, B.A., J.D., Ph.D., *Adjunct Associate Professor of Law*
JOANNA CAREY SMITH, B.A., J.D., LL.M., *Adjunct Associate Professor of Law*
MATTHEW STIEGLER, B.A., J.D., *Adjunct Professor of Law*
MARK WEIDEMAIER, B.A., J.D., *Assistant Professor of Public Law and Government*
HOLLAND WEST, B.A., J.D., *Adjunct Professor of Law*
MELVIN F. WRIGHT, JR., B.A., J.D, *Adjunct Professor of Law*

Faculty Emeriti

WILLIAM BRANTLEY AYCOCK, B.A., A.M., J.D., LL.D., *Kenan Professor of Law Emeritus*
ROBERT G. BYRD, B.S., B.A., J.D., *Burton Craige Professor of Law Emeritus*
DONALD F. CLIFFORD, JR., A.B., J.D., *Aubrey L. Brooks Professor of Law Emeritus*
EUGENE GRESSMAN, A.B., J.D., LL.D., *William Rand Kenan, Jr., Professor of Law Emeritus*
HARRY E. GROVES, B.A., J.D., LL.M., *Henry Brandis Professor of Law Emeritus*
PAUL HARDIN, *Professor of Law Emeritus*
PAUL G. HASKELL, A.B., J.D., *William Rand Kenan, Jr., Professor of Law Emeritus*
RONALD CHARLES LINK, A.B., M.A., J.D., *Dan K. Moore Distinguished Professor of Law Emeritus*
ARNOLD H. LOEWY, *Graham Kenan Professor of Law Emeritus*
WILLIAM PATRICK MURPHY, B.A., LL.B., J.S.D., *Henry Brandis Professor of Law Emeritus*
DANIEL HUBBARD POLLITT, B.A., J.D., *Graham Kenan Professor of Law Emeritus*
SALLY BURNETT SHARP, B.A., M.A., J.D., LL.M., *Professor of Law Emeritus*

The *North Carolina Law Review* (ISSN #0029-2524) is published six times a year, in December, January, March, May, June, and September, by the North Carolina Law Review Association.

Subscriptions: Annual subscriptions are $42.00 for domestic subscribers and $48.00 for foreign subscribers. Applicable state sales taxes are included in the annual rates. Subscriptions are accepted for complete volumes only and will be renewed automatically unless the subscriber provides adequate notice of cancellation. Notification as to change of address should include both the old and new addresses and should be made at least one month before publication date to ensure prompt delivery. Subscriptions and address changes should be directed to the Publication Editor at the following address:

North Carolina Law Review
School of Law
The University of North Carolina
CB# 3380, Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599-3380
(919) 962-3926
FAX (919) 962-1527
www.nclawreview.org
e-mail: nclrev@unc.edu

Single and Back Issues: Single copies of current and back issues from the previous five Volumes are available from the North Carolina Law Review Association for $9.50 per copy for Issues 1–5 and $12.00 for Issue 6 (add $5.00 for international deliveries). Back issues and complete sets of the *North Carolina Law Review* are available from William S. Hein & Co., 1285 Main Street, Buffalo, NY 14209, at prices that may vary. Back issues are also available in PDF format on HeinOnline at http://heinonline.org.

Publication Information: The text and citations of the *Review* conform to *The Bluebook: A Uniform System of Citation* (18th ed. 2005). The *Review* is printed by Joe Christensen, Inc. in Lincoln, Nebraska. Publication number ISSN 0029-2524.

Materials cited "on file with the North Carolina Law Review" will be retained for a maximum of five years from date of publication.

Periodicals postage paid at Chapel Hill, N.C. and additional mailing offices.

POSTMASTER: Send address changes to: North Carolina Law Review, School of Law, The University of North Carolina, CB# 3380, Van Hecke-Wettach Hall, Chapel Hill, North Carolina 27599-3380.