Lawyers Mutual
LIABILITY INSURANCE COMPANY OF NORTH CAROLINA

LML TODAY

A publication for policyholders of Lawyers Mutual Liability Insurance Company of North Carolina

Directors Declare Five Percent Dividend

The Board of Directors of Lawyers Mutual takes pleasure in announcing a five percent dividend to policyholders, effective for policies in existence on the last business day of 2006 (December 29). Henry Mitchell, Chair of the Board, noted, "We are extremely pleased to be able to provide this five percent dividend to our policyholders this year." The Company saw a significant improvement in net income, helped by a dividend from Lawyers Insurance Agency and a net underwriting gain (the first in three years). Mr. Mitchell also commented that, "We are looking hopefully toward another good year in 2007 but continue to be concerned about the ever rising number and cost of our claims, particularly in the real estate area. We seek the continued support of our insureds in our mutual efforts to reduce sources of claims and to successfully resolve reported claims." The dividend will be paid in the month following the applicable policy expiration date during 2007.

Has The Bell Tolled for Appellate Rule 2?

By Warren T. Savage

If you have not been paying attention, you may have missed the dying gasp in the Court of Appeals of North Carolina Rule of Appellate Procedure, Rule 2. As we previously reported to you, until recently, Rule 2 had allowed the appellate courts to admonish attorneys for non-prejudicial appellate rules violations while at the same time showing mercy and deciding an appeal based on the merits. (*See* LML Today, *Assignments of (T)Error and the No Mercy Rule*, Volume 28, Issue 2, Spring 2006). However, in the recent Court of Appeals decision of *Stann v. Levine*, 636 S.E.2d 214 (N.C. Ct. App. 2006), the majority opinion's strict interpretation of Rule 2 indicates that at least one panel of judges thinks that the Court may no longer use its discretion under Rule 2 to reach the merits of an appeal in any civil case where there are "substantial" appellate rules violations in an appellant's brief or the record on appeal. Without specifying what "substantial" means, the *Stann* majority held that violations by the appellant for improper line spacing, "sporadic" citation to the record, an overly broad assignment of error, and improper placement of the assignment of error in the record on appeal, when combined, were "substantial" even though the violations did not prejudice the appellee's or the Court's comprehension of the issues and arguments on appeal. Most importantly, the majority held that the frequently cited Supreme Court decision in *Viar v. N.C. Dep't of Transp.*, 359, N.C. 400 (2005), required that the only proper sanction for the substantial violations of the appellate rules by the appellant was dismissal. The *Stann* majority's opinion also tacitly acknowledged that its strict interpretation of Rule 2 would result in heightened legal malpractice concerns for appellate lawyers, stating:

> [T]he number and severity of the errors in the case sub judice cannot be tolerated,

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". . . a close analysis of other post-Viar decisions from the Court of Appeals should make appellate lawyers fearful that almost any combination of rules violations by an appellant, whether egregious or not, will result in dismissal of an appeal."

> and the choice to take the "divine" step of forgiveness . . .for the appellate attorney's mistakes lies with the party in the case and the attorney's client, not with this Court.

Id., 636 S.E.2d 214, 217 (N.C.App.2006).

Although the *Stann* majority purports to understand that "to err once is indeed human" and does not require "automatic dismissal," a close analysis of other post-*Viar* decisions from the Court of Appeals should make appellate lawyers fearful that almost any combination of rules violations by an appellant, whether egregious or not, will result in dismissal of an appeal. Quite frequently, as in *Stann*, the Court explicitly states that a violation can be substantial whether or not it impedes comprehension of the issues on appeal by the appellee or the Court. Recent decisions reveal significant inconsistency among Court of Appeals panels as to the type and number of violations that constitute a "substantial" violation, and the Court rarely refers to Appellate Rule 25, which calls for imposition of a sanction only where a party or its attorney "substantially failed to comply" with the rules. Most of the post-*Viar* decisions fail to define a general standard for determining what constitutes a "substantial" violation under Rule 25, but instead, merely point out any violations found in an appellant's brief or record on appeal and declare those violations to be either substantial or not. Needless to say, different decisions have reached different conclusions on similar facts. Compare, *Stann v. Levine*, supra, with *Seay v. Wal-Mart Stores, Inc.*, — N.C. App.—(COA06-192) (Dec. 5, 2006) (where appellants made similar type and number of errors, yet the *Stann* appeal was dismissed and the *Seay* appeal was considered on the merits with no sanction).

Furthermore, and contrary to the Stann majority's assertion that dismissal is not automatic, in most post-*Viar* decisions finding the appellant's rules violations to be substantial, the Court has dismissed the appeal without showing that it exercised its discretion and considered lesser sanctions under Appellate Rules 25 and 34. Rather, in those cases, the Court almost uniformly holds that *Viar* compels the Court to dismiss the appeal.

What About Your Appeal?

The Court of Appeals appears divided regarding the proper application of the appellate rules after *Viar*. See, e.g., *Jones v. Harrellson & Smith Contractors*, L.L.C., — N.C. App. – (COA05-1183)(Dec. 19, 2006); *Bennett v. Bennett*, — N.C. App. – (COA06-175)(December 19, 2006). In order to remove as much of the uncertainty and inconsistency from the appellate process as possible, you should respond to any motion to dismiss an appeal by filing and serving both a response to the motion and **a motion to amend the record on appeal and/or appellant's brief to correct the alleged transgression.** A motion to amend may be decided prior to the appeal being assigned to a specific panel and is likely to be granted unless the appellee can show that it was prejudiced by the original error. You should also call Lawyers Mutual immediately upon receiving a motion to dismiss an appeal. We may be able to assist you in responding to the motion, or we may decide to consult or engage expert appellate counsel under our claims repair program to work with you so that your client's appeal is determined on its merits.

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LMI TODAY
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