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Assignments of (T)Error and The No Mercy Rule

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Beware Appellate Practitioners! North Carolina Rule of Appellate Procedure, Rule 2, may be on life support. Until recently, Appellate Rule 2 allowed the appellate courts to admonish attorneys for minor and non-prejudicial appellate rules violations while at the same time taking mercy and deciding an appeal based on the merits. However, if you have followed our Court of Appeals' published and unpublished decisions through the past year, you will notice that the Court is now dismissing an alarming number of appeals for improper assignments of error in the record on appeal or for arguments in an appellant's brief that do not correspond precisely to the assignments of error. While such rules violations frequently have no actual or perceptible effect on the Court's ability to understand the issues on appeal or the appellee's ability to brief those issues, the Court of Appeals has concluded that it is now compelled to dismiss appeals when the Court determines such violations are present.

Appellate Rules 10 and 28, taken together, limit the scope of an appeal and the arguments in an appellant's brief to the assignments of error specifically set out in the record on appeal. The assignments of error must be "confined to a single issue of law" and state "plainly, concisely and without argumentation the legal basis upon which error is assigned." Each assignment of error must also cite to "specific record or transcript references," and each argument in an appellant's brief must then cite to specific assignments of error. Historically, Appellate Rules 10 and 28 were rarely invoked to dismiss appeals, and the Court of Appeals often used its discretionary power in Appellate Rule 2 to avoid strict application of the two rules so that an appeal could be considered on the merits when the Court viewed the rules violations as minor or non-prejudicial. *See, e.g., Anthony v. City of Shelby*, 152 N.C. App. 144 (2002).

I. Court Will Give No Quarter for Rules Violations

However, the Court of Appeals has now decided that it may rarely, if ever, use Appellate Rule 2 to overlook even minor violations of the appellate rules when it determines that assignments of error in a record on appeal are drafted improperly or are not referenced appropriately in the subsequent brief. This shift in the Court's approach to assignments of error occurred very recently following the decision in *Viar v. N.C. Dept. of Transportation*, 359 N.C. 400, 610 S.E.2d 360 (2005). In *Viar*, the Supreme Court reversed a Court of Appeals decision that had noted violations of the appellate rules in the appellant's assignments of error and brief, but elected to exercise its discretionary authority to reach the merits of the appeal under Appellate Rule 2. The Supreme Court reversed, finding that the Court of Appeals opinion had improperly "created an appeal" for the appellant by ruling based on

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Lawyers Mutual Liability Insurance Company of North Carolina Founded by the North Carolina Bar Association in 1978

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Golf as Life

Going to the Next Hole

Carl Younger, President

"As attorneys, we are like golfers . . . The best attorneys, and the best golfers, learn from their "sub-par" performances."

I love golf. I love golf with friends. I love golf alone. I especially love golf in wonderful weather on a wonderful course — without cell phones.

My love for golf leads me even to watch golf on television. While others may obtain pleasure from seeing professionals struggle as they do, I often feel the pain of someone who has a double or triple bogey (for the non-golfers, two or three over par). That pain is most evident in major tournaments. Perhaps my most memorable "pain" was seeing Jean Van de Velde have a triple bogey on the last hole to lose the British Open, one of the four most prestigious tournaments in the world.

As attorneys, we are like golfers. We have many cases or transactions to manage — just as golfers have many holes to play. The best attorneys, and the best golfers, learn from their "sub-par" performances. The best attorneys, and the best golfers, do not let events from one transaction or case, or one hole for golfers, affect their subsequent performance.

Losing a major tournament, like attorneys losing a major case, can affect one for years. It took years for Van de Velde to recover from his loss: the great irony being that he won one later tournament when someone else had a double bogey on the last hole. He won a recent tournament when he had a double, not a triple, bogey on the last hole. However, even with these difficulties, Van de Velde kept playing. He kept playing even when every time he plays, someone would note that he had lost the British Open on the last hole in disastrous fashion. He kept playing, and later won, even though people remember him most for a past failure.

Few, if any of us, will be required to face the same situation that Jean Van de Velde faces. However, like us — as attorneys, he is in a profession that focuses on individual performance, often in isolation. Our performance, like that of professional golfers, is often magnified for "our public" — our clients. Nevertheless, golf, and practicing law, gives the players other chances to perform and succeed. We all get "extra holes." What greater hope can we have. That's why I love practicing law, and playing golf, so much.

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arguments that were not the subject of the appellant's actual assignments of error.

In the last 12 months, the Court of Appeals has cited *Viar* in over 45 opinions, most frequently dismissing an appeal because of perceived shortcomings in assignments of error or a brief's reference to and argument of the assignments of error. The Court of Appeals is doing so even in appeals where appellate rules violations do not impede comprehension of the issues on appeal or frustrate the appellate process. For example, in cases such as *Wendt v. Thomas*, No. COA04-1651, (November 1, 2005), and *May v. Down East Homes of Beulaville*, __ N.C. App. __, 623 S.E.2d 345 (2006), the Court of Appeals dismissed appeals for vague or overly broad assignments of error that act "like a hoopskirt –covers everything and touches nothing," even though the appellees in those cases had not complained about the inadequacy of the assignments. The decisions citing *Viar* consistently assert that the Supreme Court has now mandated that Appellate Rule 2 may not be used by the appellate courts to overlook rules violations. The application of Appellate Rules 10 and 28 after *Viar* is now so strict that one member of the Court of Appeals has implored the Supreme Court to reconsider the necessity of assignments of error at all. *See Broderick v. Broderick*, __ N.C. App. __, __ S.E.2d __ (COA05-103)(January 17, 2006) (Judge Wynn's concurrence).

The most illustrative case of the Court of Appeals' unyielding application of the appellate rules after *Viar* is *Walker v. Walker*, __ N.C. App. __ , 624 S.E.2d 639 (2005). In an appeal where the appellant raised dozens of assignments of error that referenced each individual finding and conclusion in a final order, the Court of Appeals dismissed the appeal due to perceived inadequacies in the specificity of the assignments. The Court stated, "The office of an assignment of error, as both the rule and the innumerable cases interpreting it plainly show, is to state directly, albeit briefly, what legal error is complained of and why." *Id.*, at 642 (emphasis added).

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II. What Should You Do?

Walker and the other post-*Viar* opinions of the Court of Appeals have sent a resounding signal to appellate lawyers that assigning error on appeal requires special attention with a clear eye towards the issues that will actually be argued in the appellant's brief. Although an appellate lawyer has probably not done all of her research at the time she serves the proposed record on appeal, she must now have a concrete understanding of the issues she will argue in her appellant's brief when she drafts her assignments of error. In other words, assigning error should not be an afterthought that gets attention only a few hours before a lawyer serves the proposed record on appeal. Instead, the post-*Viar* cases dictate that lawyers take significant time earlier in the appellate process than they may be accustomed to and outline the issues that they will ultimately argue in the appellant's brief at the same time that they draft assignments of error. Lawyers who don't take this important step risk drawing motions to dismiss from appellees that are familiar with the post-*Viar* line of cases, or having their appeals dismissed on the Court of Appeals' own initiative.

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