

4-1-2008

Allowing for Greater Leniency in the Appellate Process: How State v. Hart Both Clarified and Expanded the Use of Rule 2 of the North Carolina Rules of Appellate Procedure Following the Supreme Court's Decision in Viar v. North Carolina Department of Transportation

Robert Jordan McCarter

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>

 Part of the [Law Commons](#)

Recommended Citation

McCarter, Robert Jordan (2008) "Allowing for Greater Leniency in the Appellate Process: How State v. Hart Both Clarified and Expanded the Use of Rule 2 of the North Carolina Rules of Appellate Procedure Following the Supreme Court's Decision in Viar v. North Carolina Department of Transportation," *North Carolina Central Law Review*: Vol. 30 : No. 2 , Article 6.

Available at: <https://archives.law.nccu.edu/ncclr/vol30/iss2/6>

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact jbeeker@nccu.edu.

**ALLOWING FOR GREATER LENIENCY
IN THE APPELLATE PROCESS:
HOW STATE V. HART BOTH CLARIFIED AND
EXPANDED THE USE OF RULE 2 OF THE NORTH
CAROLINA RULES OF APPELLATE PROCEDURE
FOLLOWING THE SUPREME COURT'S DECISION IN
VIAR V. NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION**

ROBERT JORDAN MCCARTER

*"It is, therefore, necessary to have rules of procedure and to adhere to them, and if we relax them in favor of one, we might as well abolish them."*¹

INTRODUCTION

The North Carolina Supreme Court's recent decision in *State v. Hart*² both expanded and clarified the Court's vague opinion from *Viare v. North Carolina Department of Transportation*³ made two years prior, concerning an appellate court's application of Rule 2 of the North Carolina Rules of Appellate Procedure (Rule[s]).⁴ While the *Hart* opinion has delineated certain problematic aspects of the *Viare* holding, there still remain unresolved issues that the Court of Appeals has attempted to address, yet has not done so with the unanimity ex-

1. *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913).

2. *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007) (Opinion discussing whether the majority opinion at the Court of Appeals correctly used the *Viare* case when affirming the trial court's guilty verdict because the assignments of error in the appellant's brief did not adhere to the Rules. The Supreme Court explained that the Appellate Court failed to properly inquire into its use of Rule 2, and therefore, remanded the case in part for further inquiry into whether Rule 2 should be invoked.), *rev'd*, 179 N.C. App. 30, 633 S.E.2d 102 (2006).

3. *Viare v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005) (*per curiam*) (discussing whether the Court of Appeals majority was correct in overturning a decision of the Industrial Commission which denied a tort claim against the State. In a *per curiam* opinion, the Supreme Court adopted the dissenting opinion at the Court of Appeals, thereby dismissing the tort claim against the State.), *rev'd*, 162 N.C. App. 362, 590 S.E.2d 909 (2004).

4. N.C. R. APP. P. 2 (2007) ("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.").

pected from *Hart*.⁵ In North Carolina, an appeal to the Supreme Court is a right guaranteed to the appellants in any case in which the Court of Appeals issues a dissenting opinion; therefore, because of the dissent filed by Judge Hunter in *Dogwood*, that court's analysis of *Hart* would once again place Rule 2 before the North Carolina Supreme Court.⁶

First, and most importantly, *Hart* does not presume to allow all Rule irregularities to be safeguarded by Rule 2, but it is intended to clear up the uncertainty from *Viar*, while still employing restrictive measures to the application of Rule 2 so it does not become a fall back for practitioners who habitually or negligently violate the rules. The worn-out cliché that the rules are the rules, and they are made not to be broken still rings true for violations following *Hart*; however, the Court's opinion acknowledges that minor technical violations should not preclude hearing an appellant's appeal on the merits when a "manifest injustice" would occur to that party, or "to expedite decision in the public interest."⁷ By recognizing that Rule 2 continues serving a legitimate purpose in North Carolina's appellate process, the Court correctly overturned the Court of Appeals' majority opinion, which dismissed the case for failure to comply with the Rules, thereby allowing the appeal to be heard.⁸

Though the Court has not revisited *Hart*, it appears the Court will need to do so in order to further clarify the parameters of Rule 2. This note will initially focus on Justice Hudson's opinion in *Hart* along with an analysis of that opinion so that future cases may be decided in the same manner. Furthermore, the note will examine the background surrounding Rule 2 with a special emphasis on its application prior to and then after the *Viar* holding. It is necessary to understand the prior case law on this matter when reviewing *Hart*, so the proverbial dots may be connected. In conclusion, the note will consider the possible ramifications of using the *Hart* analysis in the future, along with suggestions for improvement in the area.

5. See *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 645 S.E.2d 212 (N.C. Ct. App. 2007) (Hunter, J., dissenting) (Justice Tyson, who wrote the Court of Appeals' dissenting opinion in *Viar*, which was ultimately adopted by the Supreme Court, authored the majority opinion in this case using the *Hart* analysis, while Justice Hunter dissented imploring the Court of Appeals to take an alternative view on rule violations.).

6. N.C. GEN. STAT. § 7A-30(2) (2005) ("Except as provided in G.S. 7A-28, an 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.").

7. N.C. R. APP. P. 2.

8. *State v. Hart*, 179 N.C. APP. 30, 633 S.E.2d 102 (2006) (2-1 decision) (Hunter, J. dissenting), *aff'd in part, rev'd in part*, 361 N.C. 309, 644 S.E.2d 201 (2007).

THE CASE

On May 13, 2005, after a jury trial, the defendant-appellant, Elgin Orlandas Hart, was convicted “for possession with intent to sell and deliver cocaine, keeping and maintaining a dwelling for the use of cocaine, and possession of marijuana.”⁹ Following these convictions, Hart then “pleaded guilty to being an habitual felon.”¹⁰ After sentencing, the defendant filed his appeal with the Court of Appeals, which issued its divided opinion on August 1, 2006.¹¹ Because “the dissenting opinion only addressed the majority’s decision to dismiss one of the defendant’s arguments for violations of the Rules of Appellate Procedure,” the Supreme Court addressed only the disputed issue in its opinion, which is the focus of this note.¹²

On its face, the assignment of error in controversy concerned whether a police officer’s testimony that “a razor blade taped to cardboard and seized near defendant was a crack pipe,” violated evidentiary rules.¹³ Although the defendant assigned error to this testimony, the majority at the Court of Appeals held that the particular assignment violated Rule 10(c)(1) of the Rules of Appellate Procedure,¹⁴ and therefore, “the court did not address the merits of this argument.”¹⁵ Specifically, the majority wrote that the “defendant’s assignment of error asserting that the police officer’s testimony ‘otherwise violated the N.C. Rules of Evidence would allow defense counsel to argue on appeal any and every violation of the North Carolina Rules of Evidence.’”¹⁶

On the other hand, Judge Hunter’s dissent argued the assignment was not technically deficient, but even if a deficiency existed, it should not prohibit the court from hearing the appeal on its merits when Rule 2 could be invoked at the court’s discretion.¹⁷ The dissent stated

9. *Hart*, 644 S.E.2d at 201.

10. *Id.*

11. *Id.* at 201-02.

12. *Id.* at 202.

13. *Id.*

14. N.C. R. APP. P. 10(c)(1) (“*Form; Record References.* A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.”).

15. *Hart*, 644 S.E.2d at 202, *accord* *State v. Hart*, 179 N.C. App. 30, 36-7, 633 S.E.2d 102, 106-07 (2006).

16. *Hart*, 633 S.E.2d at 107.

17. *Hart*, 644 S.E.2d at 202, *accord* *Hart*, 633 S.E.2d at 111-13 (Hunter, J., dissenting).

that the “[d]efendant’s failure to specifically reference Rule 701 should not subject his argument to dismissal.”¹⁸ From this procedural background, the Court sought to better explain *Viar* so it would no longer be misapplied.

Prior to its Rule 10(c)(1) violation analysis, the Court addressed the first issue of “whether the Court of Appeals may review an appeal if there are any violations of the Rules . . .”¹⁹ The Court noted that the State-appellee failed to mention the appellant’s rule violations, “but that the court raised that issue on its own, which it is not required to do.”²⁰ The opinion then began citing various, and extensive case law concerning the “mandatory” nature of the Rules, and that “compliance with the Rules is required.”²¹ Though rule violations may lead to an appeal’s dismissal, the Court quickly noted that dismissal is not the sole remedy, and that Rule 25(b),²² or Rule 34,²³ may provide alternative sanctions, thereby, allowing an appellate court to hear an appeal on its merits.²⁴ After explaining the legal underpinnings surrounding Rule violations, the Court began its clarification of *Viar*.

Relying on its decisions from *Steingress v. Steingress*,²⁵ *Viar*,²⁶ *State v. Buchanan*,²⁷ and *Munn v. North Carolina State University*,²⁸ the Court began its analysis of past cases where appeals were dismissed for rule violations.²⁹ From *Steingress*, the Court relied on the language

18. *Hart*, 633 S.E. 2d at 111 (Hunter, J., dissenting).

19. *Hart*, 644 S.E.2d at 202.

20. *Id.* at 202.

21. *Id.* (citing *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005) (quoting *State v. Fennell*, 307 N.C. 258, 261-62, 297 S.E.2d 393, 396 (1982) (citation and internal quotation marks omitted)); *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126, 127 (1930) (citing *Calvert v. Carstarphen*, 133 N.C. 25, 45 S.E. 353 (1903)); *Viar v. N.C. Dep’t of Transp.*, 359 N.C. at 400; *Steingress v. Steingress*, 350 N.C. 64, 65-66, 511 S.E.2d 298, 299 (1999)).

22. N.C. R. APP. P. 25(B) (“A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.”).

23. N.C. R. APP. P. 34(A)-(B) (“(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous . . . (b) A court of the appellate division may impose one or more of the following sanctions: (1) dismissal of the appeal; (2) monetary damages including, but not limited to, a. single or double costs, b. damages occasioned by delay, c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding; (3) any other sanction deemed just and proper.”)

24. *Hart*, 644 S.E.2d at 202.

25. *Steingress*, 350 N.C. 64, 511 S.E.2d 298.

26. *Viar*, 610 S.E.2d 360.

27. *State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356 (2005).

28. *Munn v. N.C. State Univ.*, 360 N.C. 353, 626 S.E.2d 270 (2006) (per curiam) *rev’d* 173 N.C. App. 144, 617 S.E.2d 335 (2005).

29. *Hart*, 644 S.E.2d at 202-03.

2008] GREATER LENIENCY IN THE APPELLATE PROCESS 193

“that mandatory rules will subject an appeal to dismissal.”³⁰ Expanding upon the language in *Steingress*, the Court then noted its recent decision in *Viar*, where the Court admonished the Court of Appeals for ruling on “issues not raised or argued by the plaintiff,” by its invocation of Rule 2.³¹ The Court then turned to *Buchanan* where it determined that the Court of Appeals incorrectly held that the appellant’s failure to adhere to the rules mandated dismissal under the *Viar* rubric even though *Buchanan* had not been decided by the Supreme Court, nor was its analysis at issue in *Hart*.³² *Buchanan*, however, is important in *Hart* because of its application in *Munn* where Judge Jackson’s dissent, which cited *Buchanan* as controlling law,³³ was ultimately adopted by the Court in reversing the lower court.³⁴ The *Hart* Court is clear that while the *Munn* dissent correctly dismissed the appellant’s appeal: “[W]e did not intend to adopt the *Buchanan* analysis cited therein.”³⁵ Analyzing the various opinions about rule violations allowed the Court to reach its conclusion on the issue of whether rule violations automatically required dismissal.

To alleviate the discrepancies, and in so doing, conclude that not all rule violations require automatic dismissal, the Court wrote that, “when this Court said an appeal is “subject to” dismissal for rules violations, it did not mean that an appeal *shall be* dismissed for any violation.”³⁶ Furthermore, the Court held that “to the extent . . . *Steingress*, *Viar*, and *Munn* . . . require dismissal in every case in which there is a violation of the Rules . . . we expressly disavow this interpretation.”³⁷ Determining that rule violations do not amount to automatic dismissal allowed the Court to then address the second issue.³⁸

The second issue before the Court was “whether the majority correctly concluded that defendant violated Rule 10(c)(1)” when assigning error to the police officer’s testimony.³⁹ In addition to citing the majority’s rationale that the appellant’s fourth assignment was too broad; the Court further noted that “defendant presented a different legal argument before the Court of Appeals, namely that the lay opinion testimony regarding the alleged ‘crack pipe’ should not have been

30. *Id.* at 202 (citing *Steingress*, 511 S.E.2d at 299).

31. *Hart*, 644 S.E.2d at 202 (citing *Viar*, 610 S.E.2d at 361).

32. *Hart*, 644 S.E.2d at 203.

33. *Munn*, 617 S.E.2d at 339 (Jackson, J. dissenting).

34. *Munn*, 626 S.E.2d at 271.

35. *Hart*, 644 S.E.2d at 203.

36. *Id.* (quoting BLACK’S LAW DICTIONARY 1466 (8th ed. 2004) (defining “subject to liability” as: susceptible to a lawsuit)).

37. *Hart*, 644 S.E.2d at 203.

38. *Id.* at 204.

39. *Id.*

admitted because the testimony violated Rule [of Evidence] 701.”⁴⁰ The Court then affirmed the majority’s conclusion that Rule 10(c)(1) had been violated, which left one more issue for the Court to decide.⁴¹

Having found the defendant’s appeal violated the Rules, but that this violation would not automatically subject his case to dismissal, the Court then commenced its analysis of when an appellate court should invoke Rule 2.⁴² Because the Court of Appeals used *Viar* to justify its non-application of Rule 2, the Supreme Court quickly noted that “the *Viar* holding does not mean that the Court of Appeals can no longer apply Rule 2 at all,” which reversed “this portion of the majority opinion.”⁴³

Expanding upon this conclusion, the Court referenced the two circumstances when Rule 2 may be invoked, but held that this decision rested solely “in the discretion of the Court” hearing the appeal.⁴⁴ Quoting *Steingress*, “we reaffirm that Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court, and only in such instances.”⁴⁵ The Court then held that using Rule 2 to alter or suspend the Rules “should only be undertaken with a view toward the greater object of the rules.”⁴⁶

Delineating from this broader legal theory, the Court wrote that when “substantial rights of an appellant are affected,” then typically a manifest injustice has occurred to that party which would enable a tribunal’s invocation of Rule 2.⁴⁷ The Court explained that while Rule 2 has been applied in civil cases, its more common use has been in criminal cases involving “severe punishments.”⁴⁸ The opinion emphasized that prior to suspending the Rules to prevent a “manifest injustice,” an appellate court must understand and be ready to explain why that drastic step is necessary in conjunction with the “fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed.”⁴⁹ In keeping with this principle, the Court explains that federal habeas courts will be less likely to disregard the Rules.⁵⁰ “Thus, if the Rules are not applied

40. *Id.*

41. *Id.*

42. *Id.* at 204-05.

43. *Id.* at 205.

44. *Id.*

45. *Id.* (quoting *Steingress*, 511 S.E.2d at 299-300.).

46. *Hart*, 644 S.E.2d at 205.

47. *Id.*

48. *Id.*

49. *Id.* at 206.

50. *Id.*

consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring review,” resulting in the Rules’ purpose and effect becoming moot.⁵¹ In conclusion, the Court remanded *Hart* to the Court of Appeals for determination on whether to invoke Rule 2, and disregard the Rule 10(c)(1) violation, and if it chooses to do so, whether sanctions should be assessed against the violating attorney pursuant to Rule 25 or Rule 34.⁵²

BACKGROUND

A. Application of Rule 2 Prior To Viar

One of the leading precedent cases surrounding appellate rule violations and the attempted application of Rule 2 is *Steingress*. *Steingress* came to the Court as a matter of right following “a divided panel of the Court of Appeals,” which chose to not invoke Rule 2, thereby, dismissing the appellant’s appeal.⁵³ Initially, the appeal was based upon a district court’s equitable distribution order in a divorce proceeding.⁵⁴ The issue, however, was not whether the district court’s decision was correct, but whether the Court of Appeals choice to not invoke Rule 2, and hear the merits of the case despite the defendant-appellant’s failure to comply with Rules 26(g)(1)⁵⁵ and 28(b)(5)⁵⁶ was an abuse of its discretion.⁵⁷

In a 4-3 decision, the Court affirmed the Court of Appeals decision.⁵⁸ Citing mandatory precedent, the *Steingress* Court began its opinion by stating that, “[T]he appellate courts of this state have long

51. *Id.*

52. *Id.*

53. *Steingress*, 511 S.E.2d at 298.

54. *Id.*

55. N.C. R. APP. P. 26(G)(1) (“Papers presented to either appellate court for filing shall be letter size (8 1/2 x 11) . . . All printed matter must appear in at least 12-point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. No more than 27 lines of double-spaced text may appear on a page, even if proportional type is used. Lines of text shall be no wider than 6 1/2 inches. The format of all papers presented for filing shall follow the additional instructions found in the Appendixes to these Appellate Rules.”).

56. N.C. R. APP. P. 28(B)(5) (“An appellant’s brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order: A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.”).

57. *Steingress*, 511 S.E.2d at 298.

58. *Id.* at 300 (“[W]e cannot say that there was any abuse of discretion with respect to the application of Rule 2, and we therefore conclude that the opinion of the Court of Appeals should be . . . affirmed.”).

and consistently held that the rules of appellate practice, now designated the Rules of Appellate Procedure, are mandatory and that failure to follow these rules will subject an appeal to dismissal.”⁵⁹ The opinion explained that the appellant’s failure to double space her brief and not provide page references to her assignments of error constituted a rule violation, and it was a matter of the Court of Appeals’ discretion to refuse to hear the appeal on its merits.⁶⁰ While the appellant’s appeal was dismissed, the Court, in *dicta*, “reaffirm[ed] that Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances.”⁶¹ Along the same logic, and resulting in the same conclusion as the dissent at the Court of Appeals, the dissenting justices at the Supreme Court would have applied Rule 2 and heard the appeal despite its technical deficiencies.⁶²

Writing for the Court’s minority, Justice Frye first analyzed the plain language of the Rules, which the appellant violated.⁶³ In addition to referencing these Rules, the dissent gave added attention to the monetary sanctions elucidated under Rule 34 for frivolous appeals.⁶⁴ Moreover, the dissent admonished the Court of Appeals for its failure to consider penalizing the attorney pursuant to Rule 25(b) governing “substantial failure to comply with the appellate rules.”⁶⁵ Though the dissent offered case law⁶⁶ rebutting the majority’s contention “that failure to follow the appellate rules has consistently subjected an appeal to dismissal”⁶⁷; its main rationale in remanding the case to the Court of Appeals hinged on applying appropriate sanctions pursuant to Rules 25 and 34 rather than dismissing the appeal in its entirety.⁶⁸ While the dissent’s argument was well reasoned in both

59. *Id.* at 299.

60. *Id.*

61. *Id.* at 299-300.

62. *Id.* at 300-02 (Frye, J., dissenting, with whom Parker, J., and Orr, J., concur).

63. *Id.* at 300-01.

64. *Id.* at 300-01.

65. *Id.* at 301.

66. *Id.* at 301-02 (citing *State v. Glenn*, 333 N.C. 296, 306, 425 S.E.2d 688, 695 (1993) (holding that certain assignments of error were deemed waived for failure to comply with Rule 28(d), but not dismissing the appeal); see *Jim Walter Corp v. Gilliam*, 260 N.C. 211, 213, 132 S.E.2d 313, 315 (1963) (reviewing the record despite numerous violations of the General Statutes and Rules of Practice in the Supreme Court, but affirming the trial court’s dismissal of the appeal for failure to timely serve the case on appeal); see also *State v. Newton*, 207 N.C. 323, 326, 177 S.E. 184, 187 (1934) (reviewing the record despite defendant’s violation of Rule 28 and finding no prejudicial or reversible error)).

67. *Id.* at 301.

68. *Id.* at 302 (“[T]hey [the sanctioning rules] do provide a procedure whereby the offending party is afforded the opportunity to show cause why this most drastic sanction should not be imposed.”).

2008] GREATER LENIENCY IN THE APPELLATE PROCESS 197

its application of the Rules, and the case law surrounding the Rules, the majority's holding subjecting appeals to dismissal for rule defects became the law, and a pertinent aspect of the *Viar* holding.⁶⁹

B. *The Viar Decision and Its Impact on Applying Rule 2*

As noted before, *Viar* is the case *Hart* sought to clarify following the confusion after its publishing. Unlike many of the cases cited in this note, *Viar* was an appeal from the Industrial Commission, which is statutorily vested⁷⁰ with deciding tort claims arising against the State, and/or one of its agencies.⁷¹ The tort action was commenced against the N.C. Department of Transportation for the Department's alleged negligence in failing to construct proper barricades on state maintained highways; the plaintiff's two daughters were killed when their car crossed a median and was then struck by a tractor-trailer.⁷² Though the Industrial Commission dismissed the plaintiff's claim, a divided Court of Appeals overturned this decision after invoking Rule 2.⁷³ Judge Tyson's dissent in the Court of Appeals allowed the case to reach the Supreme Court as a matter of right.⁷⁴ The issue became whether the Court should adopt Tyson's dissent for the appellant's violation of Rules 10(c)(1)⁷⁵ and 28(b)(6),⁷⁶ thereby, overturning

69. *Viar*, 610 S.E.2d at 360.

70. N.C. GEN. STAT. § 143-291(A) (2005) "TORT CLAIMS ACT" ("The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against . . . the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.").

71. *Viar*, 610 S.E.2d at 360.

72. *Viar v. N.C. Dept. of Transp.*, 162 N.C. App. 362, 590 S.E.2d 909, 911 (2004), *overruled by Viar*, 610 S.E.2d at 360.

73. *See Viar*, 590 S.E.2d at 913 ("In the instant case, we conclude that the Industrial Commission's legal conclusions are based upon erroneous application of the law to the facts, and are not supported by its findings of facts."); *see also* 590 S.E.2d at 919 ("[T]he 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." The Court of Appeals invoked Rule 2 on this rationale.).

74. *Viar*, 610 S.E.2d at 360.

75. *See supra* note 14, at 3, providing the complete language of N.C. R. APP. P. 10(c)(1).

76. N.C. R. APP. P. 28(b)(6) ("An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order: An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

the Court of Appeals decision, and precluding the plaintiff's recovery.⁷⁷

In a *per curiam* opinion, the Court not only adopted Tyson's dissent in its entirety, but also elucidated its own rationale in admonishing the majority's application of Rule 2.⁷⁸ Because of the Court's ratification of Tyson's dissent, it is necessary to illustrate that dissent prior to delving into the Court's opinion.

Prior to any analysis, the dissent's first step was to set forth that while the appellant's case should be dismissed for non-compliance with the Rules, the appeal could, in the alternative, be dismissed because the Industrial Commission correctly applied the facts to the applicable law.⁷⁹ The opinion rebutted the majority's Rule 2 invocation by citing not only to the Rules, but also to case law supporting Tyson's findings.⁸⁰ Specifically, Rules 10(a),⁸¹ 10(c)(3),⁸² 28 (a),⁸³ and 28(b)(6)⁸⁴ were cited as being transgressed in his opposition.⁸⁵ First, the opinion notes that the appellant's failure to number his assignments of error violated Rule 10(a), which sets out that only those assignments preserved in the record may be argued in the brief.⁸⁶ Next, the dissent found that the plaintiff had committed not one, but two Rule 10(c)(3) violations.⁸⁷ The opinion remarked that, "since plaintiff failed to assert error to any of the Commission's findings of fact, the Commission's findings are binding on our Court and we must conclude they are supported by competent evidence."⁸⁸ Not only were no errors asserted to the Commission's findings of fact, but also, no attri-

77. *Viar*, 610 S.E.2d at 360.

78. *Id.*

79. *Viar*, 590 S.E.2d at 920 (Tyson, J. dissenting).

80. *Id.* at 920-22.

81. N.C. R. APP. P. 10(a) ("The scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . .").

82. N.C. R. APP. P. 10(c)(3) ("In civil cases, questions that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single assignment of error raising both contentions *if the record references and the argument under the point sufficiently direct the court's attention to the nature of the question* made regarding each such issue or finding or legal conclusion based thereon.") (emphasis added).

83. N.C. R. APP. P. 28(a) ("Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned . . .").

84. N.C. R. APP. P. 28(b)(6) ("Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal . . .").

85. *Viar*, 590 S.E.2d at 920-22.

86. *Id.* at 920.

87. *Id.* at 921.

88. *Id.* (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

2008] GREATER LENIENCY IN THE APPELLATE PROCESS 199

bution was given to the record, which further violates Rule 10(c)(3).⁸⁹ Violations of Rules 10(a) and 10(c)(3) relate to the plaintiff's deficiencies surrounding the assignments of error made in the record, whereas, the Rule 28(a) and 28(b)(6) violations concern the plaintiff's argument in the appellate brief itself.⁹⁰

Particularly, the dissent focused on the appellant's citation to the Commission's minority opinion as opposed to its majority.⁹¹ Judge Tyson explains that "citing only to the dissenting opinion violates the appellate rules and is insufficient to identify 'the pages at which [the assignments of error] appear in the printed record on appeal,'" and therefore, runs afoul of Rule 28(b)(6).⁹² Furthermore, the plaintiff's brief contained only one question presented, which was argued before the Court of Appeals, and this question presented did not correlate to the first assignment of error made in the record.⁹³ The dissent reasoned that because there was no homogeneity between these two sections, the argument was abandoned for violating Rule 28(a).⁹⁴ Concluding his discussion of the appellant's rule violations Judge Tyson wrote, "not only did plaintiff improperly make assignments of error, but he also failed to properly argue the portions assigned as error. This appeal is not properly before us and should be dismissed."⁹⁵ There is no indication whether, individually, one of these violations would have subjected the appeal to dismissal; however, it appears from the dissent that when one technicality is coupled with other unrelated violations, then the dismissal option may become more ominous.

Adding to Judge Tyson's dissent, the Court explained that the Court of Appeals majority erred because it "addressed the issue, not raised or argued by plaintiff, which was the basis of the Industrial Commission's decision, namely, the reasonableness of defendant's decision to delay installation of the median barriers."⁹⁶ In dismissing the appeal in accord with Tyson's dissent, the Court held that, "It was not the role of the appellate courts, however, to create an appeal for an appel-

89. *Viar*, 590 S.E.2d at 921

90. *Id.* (explaining that Rule 28(a) and 28(b)(6) deficiencies occurred at the 'Questions Presented' section of the brief, and the Rule 10(a) and 10(c)(3) violations occurred in the 'Assignments of Error' found in the record on appeal).

91. *Id.*

92. *Id.* (quoting N.C. R. APP. P. 28(6)).

93. *Viar*, 590 S.E.2d at 921. ("Plaintiff's brief does not address the Commission's failure to admit certain deposition testimony from other cases as set forth as error in the first assignment of error.").

94. *Id.* at 921-22.

95. *Id.* at 922.

96. N.C. Dep't of Transp., 359 N.C. 400, 610 S.E.2d 360, 361 (2005).

lant.”⁹⁷ This is the holding, which took center stage before the Court in *Hart* following misapplications in the Court of Appeals.⁹⁸

C. *Misapplication of Rule 2 Cases Following Viar*

Munn was not only one of the most important cases construing *Viar* to mean that Rule violations must result in an appeal’s dismissal, but also, *Hart* expressly cited *Munn* when disavowing the notion that Rule violations automatically mandate dismissal.⁹⁹ In *Munn*, the dispute arose over an employment contract. The defendant cancelled the plaintiff’s phased-retirement agreement after two unrelated sexual harassment complaints were lodged against the plaintiff by two of his students.¹⁰⁰ At trial, the jury awarded the plaintiff nominal damages of \$1.00 instead of the \$43,228.00, alleged.¹⁰¹ The trial court denied the plaintiff’s JNOV motion and motion for a new trial on damages for the jury’s nominal damages award. The plaintiff then appealed the court’s denial of these motions.¹⁰² After succinctly referencing the plaintiff-appellant’s Rule violations,¹⁰³ a divided Court of Appeals reversed the trial court’s denial, however, in an appeal of right; the Supreme Court, in a *per curiam* decision, reversed the Court of Appeals and adopted Judge Jackson’s dissent.¹⁰⁴

The issue in Judge Jackson’s dissent became whether the plaintiff’s violation of Rules 10(c)(1)¹⁰⁵ and 10(c)(2)¹⁰⁶ should subject his appeal to dismissal.¹⁰⁷ Specifically, the dissent finds that “plaintiff makes no attempt to direct the attention of this Court to any portion of the record on appeal or to the transcript with any references thereto,” amounting to a Rule 10(c)(1) violation.¹⁰⁸ Additionally, the dissent notes the plaintiff did not properly preserve his objections to the jury

97. *Id.*

98. *Hart*, 644 S.E.2d at 202.

99. *Id.* at 203.

100. *Munn v. N.C. State Univ.*, 173 N.C. App. 144, 617 S.E. 2d 335 (2005).

101. *Id.* at 337.

102. *Id.*

103. *Id.* at 338. (“The dissent argues, however, that this case should not be remanded because plaintiff neither objected to nor assigned error to the jury instructions.”).

104. *Munn v. N.C. State Univ.*, 360 N.C. 353, 354, 626 S.E. 2d 270, 271 (2006).

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

106. N.C. R. APP. P. 10(c)(2) (“Where a question concerns instructions given to the jury, the party shall identify the specific portion of the jury charge in question by setting it within brackets or by any other clear means of reference in the record on appeal. A question of the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance in the record on appeal immediately following the instructions given, or findings or conclusions made.”).

107. *Munn v. N.C. State Univ.*, 173 N.C. App. 144, 617 S.E. 2d 335 (2005) (Jackson, J. dissenting).

108. *Id.*

2008] GREATER LENIENCY IN THE APPELLATE PROCESS 201

instructions at trial, nor did he properly do so in his actual appeal pursuant to Rule 10(c)(2), which provides specific instructions for appeals concerning jury instructions.¹⁰⁹ Quoting the *Buchanan* holding, Jackson justified her dismissal of the appeal for non-compliance with the Rules.¹¹⁰ Eventually, *Hart* clarified the Court's *per curiam* acceptance of Jackson's dissent noting that *Buchanan* was not the proper precedent; however, Munn's appeal had already been dismissed following the misapplication of *Viari* in *Buchanan*.¹¹¹

D. Application of Rule 2 Following Hart

One month after the publication of *Hart*, a divided Court of Appeals published its opinion in *Dogwood*, which heavily cited *Hart* both in the majority, and the dissent.¹¹² At trial, the trial court denied the defendant's JNOV motion, which the defendant hoped would overturn the jury's verdict finding that the defendant breached its contract with the plaintiff.¹¹³ On appeal, the plaintiff-appellee filed a motion to dismiss defendant's appeal for violating Rules 10(c)(1),¹¹⁴ 28(b)(6),¹¹⁵ and 28(b)(4),¹¹⁶ which the majority granted.¹¹⁷ Because of *Hart*, the issue before the Court of Appeals became "whether or not to invoke and apply Rule 2 . . . to excuse defendant's appellate rule violations and review the merits of its appeal."¹¹⁸

After a brief analysis of *Hart*, the majority sought to distinguish *Dogwood* from *Hart* to rationalize its non-application of Rule 2.¹¹⁹ First, the opinion brought attention to the fact that despite the appellant's ability to amend its appeal to correct technical flaws following the appellee's motion to dismiss, the appellant still failed to do so.¹²⁰ Specifically, in reference to *Hart*, the court noted that *Dogwood* was a

109. *Id.* at 340.

110. *Id.* at 339 (quoting *State v. Buchanan*, 170 N.C. App. 692, 693, 613 S.E.2d 356, 357 (2005) ("Our Supreme Court has stated that this Court may not review an appeal that violates the Rules of Appellate Procedure even though such violations neither impede our comprehension of the issues nor frustrate the appellate process." (citing *Viari v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360-61(2005))).

111. See *State v. Hart*, 361 N.C. 309, 313, 644 S.E.2d 201, 202 (2007) ("...we did not intend to adopt the *Buchanan* analysis cited therein.").

112. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 645 S.E.2d 212 (N.C. Ct. App. 2007) (referencing *Hart* a total of roughly ten times).

113. *Id.* at 214.

114. N.C. R. App. P. 10(c)(1).

115. N.C. R. App. P. 28(b)(6) ("The argument shall contain a concise statement of the applicable standard(s) of review for each question presented . . .").

116. N.C. R. App. P. 28(b)(4) ("A statement of grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review . . .").

117. *Dogwood*, 645 S.E.2d at 214-16.

118. *Id.* at 217.

119. *Id.* at 216-17.

120. *Id.* at 217.

civil action as opposed to the criminal indictment in *Hart*.¹²¹ Additionally, in *Dogwood*, “[T]here are multiple and egregious rule violations instead of one violation as in *Hart*.”¹²² Though *Hart* clarified *Viar*, the majority still applied *Viar* to reject the dissent’s argument that monetary sanctions would be a more suitable remedy than dismissal.¹²³ In conclusion, the Court chose not to invoke Rule 2 because, “No showing [was] made and the record [did] not indicate any reasons to justify the Court’s invocation of its discretionary power under Appellate Rule 2,” and ultimately, dismissed the appeal for the defendant’s numerous rule violations.¹²⁴

Applying *Hart*, Judge Hunter’s dissenting opinion in *Dogwood* reads *Hart* as reminding “this Court that exercising our discretion to overlook rules violations pursuant to Rule 2 is *not our only option* when confronted with those violations.”¹²⁵ Like the *Steingress* dissent, the dissent here suggests that Rules 25 and 34 sufficiently cover permissible monetary sanctions against attorneys who violate the rules, while still allowing for those appeals to be heard on the merits.¹²⁶ Along a similar rationale, the dissent implored the Court to realize that “Doling out dismissals without consideration of their type or degree is a too simplistic method of enforcing the appellate rules and ignores the discretion those rules give this Court.”¹²⁷ The dissent’s holding combined these two principles and found that “when rules violations do not impede an evaluation of the case on its merits,” monetary penalties should be assessed against the offending attorney rather than dismissing the appeal outright.¹²⁸ Applying this standard, Judge Hunter concludes that “[R]ather than dismissing the case . . . I would hear the case on its merits and impose monetary sanctions.”¹²⁹ Judge Hunter’s dissent in this case allows it to be decided by the Supreme Court, however, the Court has not published an opinion on the matter.

121. *Id.* at 216-17 (“Although this Court has exercised Rule 2 in civil cases. . . the Court has done so more frequently in the criminal context when severe punishments were imposed.” (quoting *Hart*, 361 N.C. at 315, 644 S.E.2d at 205)).

122. *Dogwood*, 645 S.E.2d at 217.

123. *Id.* (“It is not the role of the appellate courts, however, to create an appeal for an appellant.”) (quoting *Viar*, 359 N.C. at 400, 610 S.E.2d at 361 (2005)).

124. *Dogwood*, 645 S.E.2d at 217.

125. *Id.* (Hunter, J. dissenting).

126. *Id.* at 218.

127. *Id.*

128. *Id.*

129. *Id.* at 219.

ANALYSIS

The development of case law surrounding Rule 2 precedes the benchmark *Steingress* case, and, as *Dogwood* illustrates, this development will not end with *Hart*. *Hart*, however, does provide some insight into how the current Court will analyze future Rule 2 cases due to its recency. Though *Hart* provides clarity to Rule 2, after the opaque *Viar* decision, the Court must address certain issues that were not addressed in *Hart*, so the various Court of Appeals panels, and practitioners in general, will have better guidance so the confusion following *Viar* will not be repeated.

It is rare to find an opinion, which alleviates all issues in a particular case or legal area, but arguably most opinions do provide some remedies to the situation. *Hart* is no different. Although *Hart* does not set forth an explicit black letter rule of law, the decision sufficiently corrected the misapplication of Rule 2 following *Viar*. Namely, the Court's authoritative position that *Viar* in no way suggested that Rule 2 could never be applied when a party violates one of the appellate rules, but that the stance taken in *Viar* was limited to circumstances where an appellate court invoked Rule 2 creating an appeal for the appellant when an appeal did not otherwise exist. Moreover, the Court opined that while an appellate court could invoke Rule 2 and hear a case on its merits, it should be done so within the considerations enunciated in *Hart*.

Though the Court failed to explain whether one of the four factors it listed would automatically halt a court's Rule 2 analysis, it appears that if a court can explain its decision to use Rule 2 with all four factors then its decision will most likely be upheld. First, the Court cautioned that the application of Rule 2 is an extreme measure, which should be reserved only for rare circumstances. Next, the Court further limited application to only those two situations covered by Rule 2 itself. Adding to this line of jurisprudence, the Court reminded the two appellate divisions that unless the Rules are applied "consistently and uniformly" with "fundamental fairness and the predictable operation of the courts" as the two key components then a federal court could choose not to give the Rules deference; therefore, subjecting the Rules to an interpretation not intended, or wanted by North Carolina courts.¹³⁰ With these considerations in mind, the Court emphasized that if an appellate court chose to adopt Rule 2 then it "should only be undertaken with a view toward the greater object of the rules."¹³¹ This four-step analysis, on its face, is made better by the definition

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

131. *Id.* at 205.

given to “manifest injustice.” However, the Court fell short on this point because it failed to also define what a ‘decision in the public interest’ would entail. While *Hart* notably omitted defining the second basis for a court’s exercising Rule 2, it does not negate the effectiveness of the rule’s overall analysis, which did set an appropriate standard for applying Rule 2.

Realizing that Rule 2 would basically be used only as a means to hear cases despite technical deficiencies in a party’s appeal, the Court emphasized that the Rules do provide for monetary sanctions for violations of the Rules. In certain instances, such as if Rule 2 were invoked, those remedies would be appropriate against the offending attorney who violated the Rules, but would still allow that attorney’s client to have his or her case heard on the merits. Applying monetary sanctions was the position advocated in the respective dissents of both *Steingress* and *Dogwood* and it appears that now such a remedy may be better received if an appeal on that issue were to make it to the Court. The Court must be careful, however, that it does not fall down the slippery slope of allowing too many meritorious cases with substantial technical deficiencies to be heard while simply applying monetary sanctions. A balance between the severity of a case’s Rule violations and application of Rule 2 with subsequent monetary penalties assessed against an offending lawyer must be found. *Hart* does well to begin this inquiry, but it appears that *Hart* could be easily distinguishable from other cases that come to the Court.

It is foreseeable that one could distinguish *Hart* from a future case with relative ease. First, *Hart* dealt with only one Rule violation, whereas the other cases illustrated in this note had multiple violations. This is important because it is more likely that an appellate court would be willing to disregard one rule violation as opposed to numerous violations that make it more difficult to comprehend the issue[s] on appeal. Furthermore, *Hart* involved a habitual criminal defendant who received a severe punishment for his offenses as opposed to the appellant in *Munn*, for instance, who took issue with the verdict from his civil breach of contract case. It makes sense that an appellate court would be more willing to show leniency pursuant to Rule 2 when a person’s freedom is on the line than when a person has a contract breached against him. These two distinguishing characteristics could work against the *Hart* framework, therefore, it is imperative that the Court maintain the same rationale in future Rule 2 cases it decides.

CONCLUSION

The two legal principles enunciated in *State v. Hart* give guidance to appellate courts. First, the Court determined that *Viar* had been mis-

2008] GREATER LENIENCY IN THE APPELLATE PROCESS 205

applied when courts automatically dismissed appeals based upon Rule violations. Second, *Hart* reaffirmed that Rule 2 could be invoked in certain circumstances. Though *Hart* was explicitly more lenient than *Viar*, the Court carefully noted that the decision to invoke Rule 2 should not be taken arbitrarily, and that a court must provide a thorough analysis of the situation to justify its application.

Furthermore, *Hart* represents the premise that, while Rule 2 should be applied cautiously, the court of appeals may hear a case on its merits despite an attorney's negligent or reckless disregard of the Rules. In so doing, it appears that the long-standing legal principle of not imputing an attorney's negligence to the client, which here would entail the client's case being dismissed for an action he or she could not otherwise control – attorney's Rule violation(s) – then it should not prohibit that client from having his case heard on the merits.¹³² In closing, *Hart* begins the necessary steps of reconciling the hard-line stance taken in *Viar* with the need to ensure justice is served, while also realizing that “the rules are not merely ritualistic formalisms, but are essential to our ability to ascertain the merits of an appeal. Furthermore, the appellate rules promote fairness by alerting both the Court and appellee to the specific errors appellant ascribes to the court below.”¹³³

132. See generally *Gaster v. Goodwin*, 263 N.C. 441, 443, 139 S.E.2d 716, 717(1965). (“[I]f a judgment is obtained due to the negligent failure of the attorney to appear and defend the cause when called for trial, the client may have the judgment set aside for surprise and excusable neglect.”).

133. *Shook v. County of Buncombe*, 125 N.C. App. 284, 480 S.E.2d 706, 707 (1997).