

# Blake Puts Her Heart and Legal Skills Into Youth Cases

BY AFI S. JOHNSON-PARRIS

Charlotte attorney Aretha Blake was selected by the North Carolina Bar Association in 2008 as one of 11 outstanding citizen lawyers honored for contributions outside their law practice that help the community through leadership and service.



Aretha Blake

Although Blake has served in several leadership roles within the Mecklenburg County Bar, her impact in the community is most significant in her work with organizations to benefit children.

For the past three years, Blake has worked with the Council for Children's Rights as a volunteer to advocate for children in school disciplinary hearings and as a member of the board of directors.

Council volunteers, who include lawyers and non-lawyers, represent students to preserve their due process rights in the disciplinary process. Blake stresses the importance of "making sure discipline is handed down con-

sistently and not based on visual bias."

While Blake's work with the Council for Children clearly draws upon her legal skills, in other volunteer work with the H.L. McCrorey Family YMCA, Blake enjoys using non-legal skills.

"Right now," comments Blake, "the YMCA is my heart. The work is interesting because I get to help separate and apart from being a lawyer."

Blake says she developed a connection to the McCrorey YMCA, located in Charlotte's northwest corridor, and the children it serves when she started volunteering there as part of a Junior League of Charlotte placement to organize a college fair.

Blake now serves on the McCrorey YMCA's board and has spearheaded significant fundraising efforts on the YMCA's behalf with its past two annual Martin Luther King Prayer Breakfasts.

Keith Vinson, executive director of the McCrorey YMCA, identifies Blake's passion for law as the thing that connects her to volunteerism in the community.

"Her passion shines through her leader-

ship roles [on] various boards of directors and committees that she is committed to serving," says Vinson. "Ms. Blake is not only committed to service, but is well-rounded in that commitment, providing community, civic, and professional leadership."

Blake practices with the Charlotte office of Parker Poe Adams & Bernstein LLP as special counsel in the area of commercial litigation with a special focus on business torts. She is a native of Charleston, S.C., and a graduate of Florida State University and the University of Georgia School of Law. ■

JOHNSON-PARRIS PRACTICES LAW IN GREENSBORO WITH SMITH MOORE LEATHERWOOD LLP.

*The Citizen Lawyer Committee of the NCBA Young Lawyers Division, in conjunction with the NCBA Citizen Lawyer Task Force, is providing expanded coverage of the 2008 Citizen Lawyers in recognition of their volunteer service and leadership in their communities and beyond.*

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## Understanding and Avoiding Appellate Rules – Violations in Light of Dogwood

BY ELIZABETH BROOKS SCHERER

In March 2008, the North Carolina Supreme Court issued an important decision clarifying under what circumstances appellate courts should impose sanctions for appellate rules violations. **Dogwood Development & Management Co. v. White Oak Transport Co.**, 362 N.C. 191, 657 S.E.2d 361 (2008). This article explains the impact of **Dogwood** and provides practical guidance to practitioners on avoiding common appellate rules violations.

Background of Appellate Rules Violations Dismissals

As background, in **Viar v. North Carolina Department of Transportation**, 359 N.C. 400, 610 S.E.2d 360 (2005), the North Carolina Supreme Court warned that Appellate Rules were mandatory, and that rules violations "will subject an appeal to dismissal." **Viar** set off an avalanche of dismissals for appellate rules violations at the Court of Appeals with some panels adopting an almost zero-tolerance policy for appellate rules violations. While some dismissals were based on clear and obvious violations, other dismissals were predicated on rules violations that appeared almost trivial or in which litigants contended there were no rules viola-

tions at all. See **Selwyn Village Home Owners Assoc. v. Cline & Co.**, -- N.C. App. --, 651 S.E.2d 909 (2007); **Capps v. NW Sign Industries of N.C.**, -- N.C. App. --, 652 S.E.2d 372 (2007); **Jones v. Harrelson & Smith Contractors, LLC**, 180 N.C. App. 478, 638 S.E.2d 222 (2006). Assignments of error also became a major source of appellate rules dismissals, with some panels giving assignments of error an almost-quasi jurisdictional stature. The problem was exacerbated because what constituted acceptable assignments of error was and is not always clear. In

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short, assignments of error became minefields of uncertainty in an arena that left little room for misstep.

### Dogwood Development & Management Co. v. White Oak Transport Co.

While dismissals for appellate rules violations may not be as prevalent as before Dogwood, sanctions for appellate rules violations remain alive and well. In *Dogwood Development & Management Co. v. White Oak Transport Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008), the Supreme Court set out a standard for dealing with appellate rules violations. The court first explained that there were three types of appellate rules violations: 1) defects in appellate jurisdiction, 2) waiver of error occurring in the trial court, and 3) violation of nonjurisdictional requirements. Jurisdictional defects, such as failure to file a timely notice of appeal or include the notice of appeal in the record on appeal, can never be excused (even under Appellate Rule 2), and thus require an appellate court to dismiss an appeal. Legal arguments involving waiver defects should ordinarily be reviewed only in criminal appeals under plain error review or in “exceptional circumstances” in civil or criminal cases to “prevent manifest injustice to a party” or to “expedite decision in the public interest” under Appellate Rule 2.

The final category of appellate rules violations involves nonjurisdictional rules designed primarily to keep the appellate process “flowing in an orderly manner.” Examples of nonjurisdictional violations include the “form of assignments of error” under Appellate Rule 10(c) and the contents of an appellant’s brief under Appellate Rule 28. The *Dogwood* court created a three-part test for dealing with nonjurisdictional rules violations. First, under Appellate Rules 25 and 34, an appellate court must decide whether the appellate rules violations were either “substantial” or “gross” violations. The determination of whether appellate rules violations are substantial or gross is a fact-specific inquiry that considers, among other factors, 1) whether and to what extent the non-compliance impairs the court’s task of review, 2) whether and to what extent review on the merits despite the violations would frustrate the adversarial process, and 3) the number

and degree of violations. Appellate courts may not even consider sanctions unless the rules violations are “gross” or constitute a “substantial failure to comply” with the Appellate Rules.

Second, if the appellate court determines that the rules violations are gross or substantial, the appellate court should then determine “which, if any sanction” to impose under Appellate Rule 34(b). While dismissal is one of the sanctions contemplated by Appellate Rule 34(b), “noncompliance with the rules falls along a continuum, and the sanction imposed should reflect the gravity of the violation.” *Dogwood* stressed that the sanction of dismissal should be reserved for the most egregious of appellate rules violations.

Finally, even if the appellate court determines that under Appellate Rule 34(b), dismissal for rules violations is an appropriate sanction, nonetheless, a court may still hear the appeal under Appellate Rule 2 to “prevent manifest injustice to a party” or to “expedite decision in the public interest.”

While *Dogwood* stressed that most non-jurisdictional appellate rules violations should not ordinarily lead to dismissal, the Supreme Court has not changed its stance regarding compliance with the appellate rules. The appellate rules *are and remain mandatory*. The prevalence of appellate rules violations in appellate filings is at the root of this appellate rules drama. While the Supreme Court appears willing to grant appellate practitioners a provisional reprieve from the wave of post-*Viar* dismissals, the court’s patience with inattentiveness to the appellate rules is finite. If attorneys continue to submit documents which are not in compliance with the appellate rules, the court can (and likely will) impose serious sanctions, which could include substantial fines, attorneys fees, or restricting offending attorneys from practicing in the appellate courts.

Finally, if you thought *Dogwood* had resolved the dispute within the Court of Appeals regarding dismissals for appellate rules violations, think again! For instance, the Court of Appeals continues to reach conflicting results regarding dismissal in cases when the record on appeal was not timely filed or served. Compare *Yorke v. Novant Health, Inc.*, COA07-503, 2008 WL 4004533 (N.C. App. 2008) (hearing merits of appeal even though record on appeal was not timely filed)

with *Strong v. Gateway Homes, LLC*, COA08-854 (N.C. App. 2008) (dismissing appeal for failure to timely file record on appeal). Moreover, Court of Appeals’ panels disagree on whether *Dogwood* requires the Court of Appeals to modify its traditional approach of dismissing overbroad assignments of error, and instead decide issues on the merits. Compare *Odom v. Clarke*, COA07-775-2, 2008 WL 3834049 (N.C. App. Aug. 19, 2008) (publication forthcoming) (refusing to dismiss defective assignments of error and deciding case on merits) with *Dogwood Development & Management Co. v. White Oak Transport Co.*, -- N.C. App.--, 665 S.E.2d 493 (2008) (dismissing assignments of error as overbroad).

### Practical Tips for Avoiding and Dealing with Appellate Rules Violations.

**Read the Appellate Rules and the Appendix (and then read them again).** Do not rely on what you think the appellate rules require. A good chance exists that you may have misread some requirement. Also, remember that just because one appellate rule appears to address an issue does not mean that another rule, the appellate rules appendix, or case law does not expand on that point in an unexpected way. You must keep abreast of all three resources.

**Your notice of appeal and certificate of service must be in the record on appeal.** This continues to be a zero-tolerance error.

**Do not miss record on appeal deadlines.** Carefully track all deadlines for ordering and preparing any transcripts, the deadline for serving the proposed record on appeal, the appellee’s deadline for serving objections to the proposed record, and the appellant’s deadline for filing the final record on appeal with the Court of Appeals. Also, remember that the appellant is responsible for getting extensions of time for serving the proposed record if the court reporter does not finish the transcript within the time allotted by the Appellate Rules.

**Format your assignments of error very, very carefully.** In today’s environment, assignments of error should never be an after-

thought. Your assignments should closely track the arguments that will actually be made in your brief. Also, remember that the Court of Appeals is particularly sensitive to overbroad assignments of error. To the extent possible, limit each assignment to a single and specific legal challenge. Appellate Rule 10(c), Appendix C to the appellate rules, and case law should all be consulted in drafting assignments of error. In addition, assignments of error should at a minimum answer the following questions:<sup>1</sup>

- **What** is the challenged ruling? If there is more than one challenged ruling, each ruling should be made part of its own separate assignment of error.
- **Why** is there a problem with the trial court's ruling? The "why" is usually preceded by "on the ground that." Each assignment of error must set out a specific legal reason why the appellant contends the trial court's ruling was wrong. If there are multiple legal arguments for why the trial court got it wrong, put each into a separate assignment of error.
- **Where** in the record and transcript can one look to find the challenged ruling? After each assignment of error, provide specific record and transcript citations to the trial court's challenged rulings and/or order.
- **Which** number is the assignment? Give each assignment a number and make sure your final brief refers back to the number and record pages containing the applicable assignments of error.

**Briefs must contain all required content under Appellate Rule 28.** Required content commonly omitted from briefs include statement of appellate jurisdiction, standard of appellate review for each argument, and cross-references to assignments of error. The appellate rules also require specific page citations to the record on appeal and case law supporting your argument. A good practice is to follow every sentence in your brief with either specific record page references or legal authority citations.

**Leave Plenty of Time for Formatting:** Once the substantive portion of the brief is written, a legal assistant *experienced with appellate work* will typically need one to two days to format the brief, table of authorities,

appendix, and index. The time involved to properly format a brief is particularly lengthy when the appeal involves a trial. The appellate attorney must review the final product to double check for compliance before filing. Common formatting missteps include spacing, margin, and font errors; page numbers at the bottom, rather than the top, of the brief; improper indexes to the brief and appendix; and not putting all required material in the appendix to the brief. If you think these types of non-substantive details do not matter, think again. See *Selwyn Village Home Owners Assoc. v. Cline & Co.*, -- N.C. App. --, 651 S.E.2d 909 (2007); *Capps v. NW Sign Industries of N.C.*, -- N.C. App. --, 652 S.E.2d 372 (2007).

**Do not forget to file your appeal information statement.**

**Two sets of eyes are always better than one, and sometimes new eyes see things differently than old ones.** The appellate rules are voluminous, and in some cases confusing and arguably contradictory. Consider consulting experienced appellate counsel to help you with your appeal early on. Appellate counsel can help you avoid rules violations, as well as assist you in pinpointing your best substantive arguments and formulating them in a clear, concise, and more persuasive manner.

**Respond to a motion to dismiss.** If a motion to dismiss is filed or if the Court directs your attention to a rules violation, take it very, very seriously. File a responsive brief that addresses whether the complained-of errors violate the appellate rules. If you have erred, explain what category your rules violation fits within, and why the more egregious sanctions—such as dismissal—should not be imposed under Dogwood. If your filing does not comply with the appellate rules, you should also move to correct the offending brief or record, no matter how trivial or arguable you may think the violation may be.

**Do not try to fix appellate rules violations on your own.** If a motion to dismiss is filed or if you are unsure whether you have complied with the rules, associate experienced appellate counsel and your malpractice claims counsel. There is no shame in admitting that you made a mistake. In many instances, appellate rules violations can be corrected without prejudice to you or your

client if they are recognized and dealt with early on. ■

## End Notes

1. The author wishes to extend a special thanks to Allison Van Laningham of Smith Moore Leatherwood for sharing her "Four Ws?" of Assignments of Error".

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