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Appellate Rule 16(b) and *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*: New Requirements for Appeals of Right

On November 3, 1983, the North Carolina Supreme Court amended the provisions of the North Carolina Rules of Appellate Procedure governing appeals of right from the court of appeals to the supreme court.¹ The amendment, which became effective January 1, 1984,² added a new subparagraph (b) to Rule 16, restricting the scope of the supreme court's review in appeals of right that are based upon the existence of a dissent in the court of appeals.³ The new section provides that when the sole ground for an appeal of right is the existence of a dissent in the court of appeals, review by the supreme court is limited to consideration of the issues specifically set forth in the opinion as the basis for the dissent.⁴

The supreme court first applied Rule 16(b) in *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*⁵ The court stated that the purpose of Rule 16(b) is to ensure that review by the supreme court is limited to those questions on which there was a division in the intermediate appellate court.⁶ Thus, the court held that when the dissenting judge in the court of appeals fails

1. Amendment to the North Carolina Rules of Appellate Procedure, 309 N.C. 830 (1983).

2. The amendment became effective with notices of appeal filed in the supreme court on or after January 1, 1984. *Id.*

3. Under N.C. GEN. STAT. § 7A-30(2) (Supp. 1983), "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." In addition, parties may appeal to the supreme court as of right any decision of the court of appeals rendered in a case "[w]hich directly involves a substantial question arising under the Constitution of the United States or of [North Carolina] . . ." *Id.* § 7A-30(1). The only types of decisions of the court of appeals that may not be appealed as a matter of right under the statute are rulings upon motions for post-trial relief made more than ten days after the entry of judgment and motions for valuation of property that is exempt from the enforcement of judgments. *See id.* §§ 7A-28, -30 (Supp. 1983).

Decisions of the court of appeals also may be reviewed by the supreme court pursuant to § 7A-31. Section 7A-31 provides that, except in cases involving appeals from certain administrative bodies to the court of appeals, "the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals." *Id.* § 7A-31 (1981 & Supp. 1983); *see also* N.C.R. APP. P. 15 (procedure for certifying a claim under § 7A-31).

When the right to prosecute an appeal of right under § 7A-30 or to petition for discretionary review under § 7A-31 has been lost by failure to take timely action, or when no right of appeal exists, the supreme court may review decisions of the court of appeals by issuance of a writ of certiorari. N.C.R. APP. P. 21(a)(2); *see also* N.C. GEN. STAT. § 7A-32(b) (1981) (statutory authorization for issuance of prerogative writs, including writ of certiorari).

4. N.C.R. APP. P. 16(b) states:

Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues which are specifically set out in the dissenting opinion as the basis for that dissent and are properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

5. 311 N.C. 170, 316 S.E.2d 298 (1984).

6. *Id.* at 175, 316 S.E.2d at 301.

to set forth the issues on which the dissent is based, no issue is properly presented for review, and Rule 16(b) requires dismissal of the appeal of right.⁷

C.C. Walker involved a suit to collect money allegedly due plaintiff for work performed for defendant.⁸ The trial court granted summary judgment for defendant,⁹ and the court of appeals affirmed,¹⁰ with the chief judge noting a dissent but not writing a dissenting opinion.¹¹ Based on the existence of this dissent in the court of appeals, plaintiff appealed to the supreme court as a matter of right.¹² Applying Rule 16(b), the supreme court dismissed the appeal on the ground that the dissenting judge had not set forth the issues on which he based his dissent.¹³ On its own motion, however, the court certified certain issues in the case for discretionary review¹⁴ and reversed the judgment of the court of appeals.¹⁵

In its application of Rule 16(b), the decision in *C.C. Walker* marks a departure from the supreme court's previous practice with respect to appeals of right. Under section 7A-30(2) of the North Carolina General Statutes, parties are entitled, as a matter of right, to appeal any decision of the court of appeals in which there is a dissent.¹⁶ Prior to the amendment of Rule 16, the supreme court adhered to the literal language of section 7A-30(2), recognizing a right of appeal from any decision to which a judge in the court of appeals had dissented.¹⁷ In such cases, the scope of the supreme court's review was not limited to consideration of the issues raised in the dissenting opinion,¹⁸ but included all questions properly presented by the parties in the briefs filed in the supreme court.¹⁹

7. *Id.* at 176, 316 S.E.2d at 301.

8. *Id.* at 171, 316 S.E.2d at 299.

9. *Id.* at 174, 316 S.E.2d at 301.

10. *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*, 66 N.C. App. 170, 310 S.E.2d 615, *rev'd*, 311 N.C. 170, 316 S.E.2d 298 (1984).

11. *Id.* at 173, 310 S.E.2d at 616 (Vaughn, C.J., dissenting).

12. *C.C. Walker*, 311 N.C. at 171, 175, 316 S.E.2d at 299, 301.

13. The court stated:

Where an appeal of right is taken to this Court based solely on a dissent in the Court of Appeals and the dissenter does not set out the issues upon which he bases his disagreement with the majority, the appellant has no issue properly before this Court. Such appeals are subject to dismissal. Application of this procedural amendment [Rule 16(b)] to the case at bar precludes further review by appeal of right.

Id. at 176, 316 S.E.2d at 301-02.

14. *Id.* at 176, 316 S.E.2d at 302.

15. *Id.* at 183, 316 S.E.2d at 305.

16. *See supra* note 3.

17. *See, e.g., State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972) (aggrieved parties may appeal to the supreme court as of right from any decision of the court of appeals in which there is a dissent).

18. In *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980), the supreme court specifically addressed the question whether the scope of its review in appeals of right under § 7A-30(2) was limited to consideration of the issues discussed by the dissenting judge in the court of appeals. In *Williams*, which involved questions concerning both alimony and child support, plaintiff argued that the child support provisions of the trial court's order were not subject to review by the supreme court because the dissent in the court of appeals concerned only the alimony issue. The supreme court rejected this argument, holding that it was "not limited, in reviewing a decision of the Court of Appeals, to consideration of only such matters as [might] be mentioned by the dissenting judge in the Court of Appeals' opinion." *Id.* at 190, 261 S.E.2d at 860.

19. Prior to its amendment, Rule 16(a) provided:

Rule 16(b) now restricts the scope of the supreme court's review in appeals under section 7A-30(2) to consideration of the issues set forth in the dissenting opinion in the court of appeals.²⁰ This limitation led the *C.C. Walker* court to conclude that there can be no appeal of right under the statute from decisions of the court of appeals in which the dissenting judge merely notes his dissent but does not write an opinion discussing the grounds for his disagreement with the majority.²¹ On its face this result appears to conflict with the language of section 7A-30(2), which provides for an appeal of right from any decision of the court of appeals in which there is a dissent. The court avoided this potential conflict, however, by stating that Rule 16(b) was intended to advance the existing policy limiting the scope of review in appeals of right under section 7A-30(2) to questions on which there was a division in the court of appeals.²² Relying on previous decisions construing the statute,²³ the court observed that review by the supreme court had never been intended for questions on which there was no disagreement in the intermediate appellate court.²⁴

If there is conflict between section 7A-30(2) and Rule 16(b) as construed in *C.C. Walker*, the result reached by the supreme court is controlling. Under the North Carolina Constitution, the supreme court has exclusive authority to pro-

Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

N.C.R. App. P. 16(a), 287 N.C. 720 (1975). The amendment of November 3, 1983 retained this statement of the scope of the supreme court's review but created an exception for appeals of right based solely on the existence of a dissent in the court of appeals. See Amendment to the North Carolina Rules of Appellate Procedure, 309 N.C. 830 (1983). The scope of review in such appeals is now governed by Rule 16(b). See *id.*

20. See *supra* note 4 and accompanying text.

21. See *C.C. Walker*, 311 N.C. at 176, 316 S.E.2d at 301.

22. See *id.* at 175, 316 S.E.2d at 301. The fact that a dissenting judge does not write an opinion does not indicate the absence of disagreement in the court of appeals; it merely means that the grounds for such disagreement are not apparent.

23. Before the adoption of Rule 16(b), the supreme court had held consistently that in enacting § 7A-30, the general assembly intended to ensure review by the supreme court of questions on which there was a division in the court of appeals. See, e.g., *State v. Hageman*, 307 N.C. 1, 6-7, 296 S.E.2d 433, 437 (1982); *State v. Campbell*, 282 N.C. 125, 127-28, 191 S.E.2d 752, 754-55 (1972); *Hendrix v. Alsop*, 278 N.C. 549, 554, 180 S.E.2d 802, 806 (1971).

24. *C.C. Walker*, 311 N.C. at 175-76, 316 S.E.2d at 301. Based on this reasoning, the supreme court has held that appeals of right under § 7A-30(2) must be dismissed in cases in which there is no real disagreement in the court of appeals, even if there is an opinion labelled as a dissent. See, e.g., *Harris v. Maready*, 311 N.C. 536, 538, 319 S.E.2d 912, 914 (1984) (when all three judges in court of appeals agreed as to result but disagreed as to reasoning, and two judges filed dissenting opinions that were in effect concurrences, no dissent existed, and plaintiff had no right of appeal under § 7A-30(2)); *State v. Hageman*, 307 N.C. 1, 6-7, 296 S.E.2d 433, 437 (1982) (when two criminal cases were consolidated and court of appeals ruled unanimously in one case, dissent from court's decision in other case gave defendant no right under § 7A-30(2) to appeal unanimous decision); *Nantz v. Employment Sec. Comm'n*, 290 N.C. 473, 484, 226 S.E.2d 340, 347 (1976) (when one judge in court of appeals filed an opinion designated a dissent but in effect a concurrence, such opinion did not constitute ground for appeal under § 7A-30(2)); *Hendrix v. Alsop*, 278 N.C. 549, 554, 180 S.E.2d 802, 806 (1971) (when court of appeals ruled unanimously as to two defendants, dissent from court's decision with respect to third defendant gave plaintiff no right to appeal unanimous decision as to first two defendants under § 7A-30(2)).

mulgate rules of practice and procedure in the appellate courts.²⁵ The general assembly may not prescribe rules of appellate procedure or abridge rules adopted by the supreme court.²⁶ In the event that a statute enacted by the general assembly conflicts with the appellate procedure adopted by the supreme court, the rules and case law of the court are controlling, and the statute must yield.²⁷ Thus, the apparent inconsistency between section 7A-30(2) and the supreme court's new approach to appeals of right must be resolved in favor of the court; Rule 16(b) as interpreted in *C.C. Walker* controls the scope of the supreme court's review in such appeals and overrides section 7A-30(2) to the extent it is inconsistent.

Although Rule 16(b) limits the scope of the supreme court's review in appeals of right under section 7A-30(2), it does not prevent the court from considering issues that do not fall within its scope. Rule 16(b) does narrow the class of questions that must be considered by the supreme court as a matter of right, but the rule also specifically provides²⁸ that parties may obtain review of other issues in the case by means of a petition for discretionary review²⁹ or certiorari.³⁰ In

25. N.C. CONST. art. IV, § 13(2) provides that "[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division." The legislature specifically recognized the power of the supreme court to adopt rules of appellate procedure in N.C. GEN. STAT. § 7A-33 (1981), which states that "[t]he Supreme Court shall prescribe rules of practice and procedure designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division." Although statutory recognition of the supreme court's rule-making authority with respect to discretionary review and certiorari is included in the statutes specifically concerning these procedures, see N.C. GEN. STAT. §§ 7A-31(d), -32(b) (1981), no similar provision appears in § 7A-30.

26. The supreme court has long held that the promulgation of rules of appellate procedure is within its exclusive province, into which the general assembly cannot intrude. See, e.g., *Duke Power Co. v. Winebarger*, 300 N.C. 57, 69, 265 S.E.2d 227, 234 (1980); *State v. Furrmage*, 250 N.C. 616, 624, 109 S.E.2d 563, 569 (1959); *Lacy v. State*, 195 N.C. 284, 287-88, 141 S.E. 886, 889 (1928); *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927); *State v. Ward*, 184 N.C. 618, 618-19, 113 S.E. 775, 775 (1922) (per curiam); *State v. Johnson*, 183 N.C. 730, 731, 110 S.E. 782, 782 (1922); *Herndon v. Imperial Fire Ins. Co.*, 111 N.C. 384, 385-86, 16 S.E. 465, 465-66 (1892). The general assembly does have authority to prescribe rules of practice and procedure for the superior and district courts, but it has delegated this authority to the supreme court pursuant to N.C. CONST. art. IV, § 13(2). See N.C. GEN. STAT. § 7A-34 (1981) (authorizing supreme court to prescribe rules of practice and procedure for superior and district courts).

27. See, e.g., *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983) (when statute conflicts with rule of appellate procedure, statute must yield to the extent it is inconsistent with rule); *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981) (general assembly lacks constitutional authority to enact statutes conflicting with rules of appellate procedure, and supreme court's rules and decisions are authoritative with respect to appellate procedure); *Duke Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E.2d 227 (1980) (under constitution, supreme court, not general assembly, has final authority over questions of appellate procedure).

28. See *supra* note 4.

29. The decision whether to grant such petitions is within the discretion of the supreme court. See N.C. GEN. STAT. § 7A-31(a) (1981 & Supp. 1983). Section 7A-31(c) sets forth the grounds for allowing discretionary review by the supreme court in cases that have been decided by the court of appeals. Under the statute, the supreme court may grant discretionary review when, in its opinion, "(1) [t]he subject matter of the appeal has significant public interest, or (2) [t]he cause involves legal principles of major significance to the jurisprudence of the State, or (3) [t]he decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court." *Id.* § 7A-31(c). Petitions for discretionary review of cases decided by the court of appeals must be based upon one or more of these grounds. N.C.R. APP. P. 15(a).

Grounds for allowing discretionary review before determination of a case by the court of appeals are set forth in N.C. GEN. STAT. § 7A-31(b) (1981 & Supp. 1983). Consideration of this provision is unnecessary here, however, since this discussion concerns cases in which an appeal of

cases in which a party wishes to obtain review of issues in addition to those that may be appealed as a matter of right, or in which a party is unsure whether issues are appealable by right, a petition for discretionary review of those issues should be filed along with the notice of appeal that is required for appeals of right.³¹ If Rule 16(b) requires dismissal of the appeal of right and no petition for discretionary review or certiorari has been filed, however, the supreme court may, in its discretion and on its own motion, certify the case for review.³²

As stated by the supreme court, the purpose of Rule 16(b) is to "ensure that in appeals of right based solely upon dissent, review by [the supreme court] shall be limited to those questions on which there was division in the intermediate appellate court."³³ In cases in which the dissenting judge in the court of appeals writes an opinion, the rule fulfills this purpose by denying parties the right to appeal issues as to which the dissenter expressed no disagreement with the majority. In cases in which the dissenter merely notes his dissent without opinion, however, Rule 16(b) as construed in *C.C. Walker* precludes any appeal of right, notwithstanding the obvious division among the judges of the court of

right exists under § 7A-30(2). Such cases necessarily must have been determined by the court of appeals before being appealed to the supreme court. The decision whether to grant discretionary review is based solely on the appellant's petition and any response filed by an adverse party, without oral argument. N.C.R. APP. P. 15(e)(1).

N.C. GEN. STAT. § 7A-31(a) (1981 & Supp. 1983) provides that in most cases, the supreme court may, in its discretion, certify a cause for review either before or after it has been determined by the court of appeals. See *supra* note 3. When discretionary review is granted, the scope of the supreme court's review includes all questions properly presented by the parties in the briefs filed in the supreme court. N.C.R. APP. P. 16(a).

30. Petitions for certiorari are filed when the right to prosecute an appeal of right does not exist or when the right to petition for discretionary review has been lost by failure to take timely action. See *supra* note 3.

In addition to the possibility of review by means of a petition for discretionary review or certiorari, an appeal of right will lie in cases directly involving a substantial question arising under the constitution of the United States or North Carolina. N.C. GEN. STAT. § 7A-30(1) (Supp. 1983).

31. Appeals of right from the court of appeals to the supreme court are taken by the filing and service of notices of appeal within 15 days after the mandate of the court of appeals is issued to the trial court or within 15 days after the court of appeals denies a petition for rehearing. N.C.R. APP. P. 14(a). When the appeal is based upon the existence of a dissent in the court of appeals, the notice of appeal must state the grounds for the appeal under § 7A-30 and the issues which were the basis of the dissenting opinion and which are to be presented to the supreme court for review. *Id.* 14(b)(1). In addition to a party's notice of appeal, a petition for discretionary review may be filed to request review of issues other than those set out in a dissenting opinion, or to request review of the entire case in the event the appeal is determined not to be of right. *Id.* 14(a), 15(b).

32. The supreme court did just this in *C.C. Walker*. See *supra* note 14 and accompanying text. N.C. GEN. STAT. § 7A-31 (1981 & Supp. 1983) provides that in most cases, the supreme court may, in its discretion and on its own motion, certify a cause for review either before or after it has been determined by the court of appeals. See *supra* note 3. The grounds for review and scope of review in cases certified by the supreme court on its own motion are the same as for cases certified on petition of a party. See N.C. GEN. STAT. § 7A-31 (1981 & Supp. 1983); N.C.R. APP. P. 16(a); see also *supra* note 29 (discussing grounds for discretionary review and scope of review). The supreme court makes the decision whether to certify a case for review on its own motion without prior notice to the parties and without oral argument. N.C.R. APP. P. 15(e)(2).

In view of the *C.C. Walker* decision, it is hazardous for parties merely to appeal as of right decisions of the court of appeals in which a dissenting judge notes his dissent but writes no opinion. Although the supreme court may certify such a case for review on its own motion, it is fully within the court's discretion not to do so. Thus, in this situation parties who wish to obtain supreme court review should file petitions for discretionary review or certiorari.

33. *C.C. Walker*, 311 N.C. at 175, 316 S.E.2d at 301.

appeals. Thus, under Rule 16(b) as interpreted by the supreme court, the right of appeal depends solely upon whether the dissenting judge in the court of appeals has chosen to write an opinion expressing and explaining his disagreement with the majority.³⁴

Although this result may operate inequitably in some cases by denying parties the right to appeal when there is no dissenting opinion in the court of appeals, its potential unfairness to aggrieved parties is mitigated by the availability of discretionary review. If Rule 16(b) deprives a party of the right to appeal an adverse decision of the court of appeals, the supreme court may still allow discretionary review of the case upon petition of the party or on its own motion. Thus, the rule preserves needed flexibility in the appellate review system while precluding automatic review of issues on which the court of appeals was in agreement.

The practical effect of Rule 16(b) and *C. C. Walker* will be to impel dissenting judges in the court of appeals to write opinions in cases which they believe merit review by the supreme court. The filing of dissenting opinions in such cases will likely encourage both majority and dissenting judges to evaluate and present the contested issues in each case in a thoughtful manner. If such cases are then appealed as a matter of right under Rule 16(b), the supreme court will have the benefit of well-reasoned opinions setting forth both points of view in the court below. These opinions will aid the supreme court in accomplishing the purposes of the rule by ensuring that the court is fully informed of the grounds of the disagreement in the court of appeals that it must resolve under Rule 16(b).

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34. The mere presence of an opinion labelled as a "dissent" will not guarantee the right of appeal if that opinion does not express clear disagreement with the majority. *See supra* note 24.