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Civil Procedure -- Bowen v. Hodge Motor Co.: Abandonment of Appeal in North Carolina

Suzanne Morgan Leary

NOTES

Civil Procedure—*Bowen v. Hodge Motor Co.*: Abandonment of Appeal in North Carolina

It is a well settled rule in North Carolina that appealing a case[1] removes it from the jurisdiction of the trial court. Thereafter, while the appeal is pending, the trial judge is without further authority over the case.[2] The general rule, however, is subject to the exception or qualification that "the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned" and thereby regain jurisdiction of the cause.[3] In the recent case of *Bowen v. Hodge Motor Co.*,[4] the North Carolina Supreme Court

1. N.C.R. APP. P. 3(a), (b), enacted in June 1975, continues the traditional code practice that permitted an appeal to be taken from judgment either orally at trial or by written notice. *See* Code of Civil Procedure of N.C. § 300 (1868) (presently codified as amended at N.C. GEN. STAT. § 1-279 (Cum. Supp. 1977)).

2. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 735-36, 133 S.E.2d 659, 662 (1963); Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 375, 42 S.E.2d 407, 408 (1947); Bledsoe v. Nixon, 69 N.C. 81 (1873); N.C. GEN. STAT. § 1-294 (1969); 2 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1799, at 236-37 (1956).

The result of this rule is that oral notice of appeal given in open court forecloses post-verdict motions for relief from judgment at the trial court level that would otherwise have been available prior to the appeal. N.C.R. APP. P. 3 points out the timetable advantage of giving written notice of appeal rather than oral notice. Written notice of appeal must be given within 10 days after the entry of judgment. N.C.R. APP. P. 3(c), however, contains an important innovation derived from FED. R. APP. P. 4(a) which "causes the running of appeal time to be tolled by the filing of a post-verdict motion under either Rule 50, 52, or 59 of the Rules of Civil Procedure, with the period recommencing upon the entry of an order upon the motion." N.C. APP. P. 3, Drafting Comm. Note. Prior to the enactment of rule 3(c), this effect was given only to N.C.R. CIV. P. 59 (new trial) motions. N.C.R. APP. P. 3, Drafting Comm. Note. Thus, giving written notice of appeal allows time to consider alternate post-verdict motions whereas immediate oral notice of appeal removes jurisdiction from the trial court and forecloses post-verdict motions at the trial court level. Such motions may nevertheless be entertained if the appellant abandons his appeal or falls within the term rule exception to the general rule. *See* note 3 and accompanying text *infra*. *See also* N.C. GEN. STAT. § 15A-1448 & Official Commentary (Cum. Supp. 1977) (trial court retains jurisdiction after a criminal defendant has given oral or written notice of appeal for any time remaining in the 10 day appeal period). The problem, inherent in oral notice of appeal, does not arise in the federal courts, which permit only written notice of appeal. *See* FED. R. APP. P. 3(a).

3. American Floor Mach. Co. v. Dixon, 260 N.C. 732, 735-36, 133 S.E.2d 659, 662 (1963). In addition, there are two other exceptions to the general rule. "[T]he trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered [the term rule exception] and (2) for the purpose of settling the case on appeal." Bowen v. Hodge Motor Co., 292 N.C. 633, 635-36, 234 S.E.2d 748, 749 (1977); *see* Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 375-76, 42 S.E.2d 407, 408 (1947); N.C. GEN. STAT. § 1-283 (Cum. Supp. 1977) (second exception); N.C.R. APP. P. 11(c).

4. 292 N.C. 633, 234 S.E.2d 748 (1977).

clarified whether an appearance of the parties before the trial court on a post-verdict motion constitutes an abandonment of appeal. The *Bowen* court held that plaintiffs' motion for a voluntary dismissal and the appearance of the parties at a hearing on the motion pending an appeal did not constitute an abandonment of the appeal and consequently did not revest jurisdiction of the cause in the trial judge.[5]

Plaintiffs in *Bowen* brought an action for property damage to their automobile allegedly resulting from defendant's negligent repair.[6] The trial court denied defendant's motion for a directed verdict at the close of plaintiffs' case and again at the close of all the evidence. On the following day, the judge reconsidered and granted defendant's motion for a directed verdict. Plaintiffs subsequently gave notice of appeal in open court.[7] Thereafter, plaintiffs filed a rule 41(a)(2)[8] motion for voluntary dismissal without prejudice.[9] After the trial court granted plaintiffs' motion for voluntary dismissal,[10] defendant filed a motion to vacate the order allowing the dismissal on the ground that plaintiffs' notice of appeal from the directed verdict divested the trial court of jurisdiction.[11] Defendant appealed the

5. *Id.* at 638, 234 S.E.2d at 751.

6. *Id.* at 634, 234 S.E.2d at 748.

7. *Id.* at 634, 234 S.E.2d at 749.

8. N.C.R. Civ. P. 41(a)(1) provides that plaintiffs have a right to a voluntary dismissal without order of the court "(i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action." Rule 41(a)(2) provides that, except as provided in 41(a)(1), "an action or any claim . . . shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires." *Id.* 41(a)(2).

9. The N.C.R. Civ. P. 41(a)(2) motion was grounded upon additional evidence that had not been presented at trial and that was in part not known to plaintiffs' attorney at that time. 292 N.C. at 635, 234 S.E.2d at 749.

10. On appeal in *Bowen*, the question whether a rule 41(a)(2) motion could be granted after the entry of a directed verdict was raised. Although the supreme court did not reach the issue, the court of appeals concluded that a voluntary dismissal could be granted after the entry of a directed verdict, noting that "[t]he rule prescribes no time limit on the right of the plaintiff to move for a voluntary dismissal with the court's permission" and that there was no showing that the trial judge had abused his discretion when he granted the motion. 29 N.C. App. 463, 466-67, 224 S.E.2d 699, 702 (1976). In support of its conclusion, the court of appeals cited Kelly v. International Harvester Co., 278 N.C. 153, 158, 179 S.E.2d 396, 398 (1971) (stating in dicta that "[w]hen a motion for a directed verdict . . . is granted, the defendant is entitled to judgment unless the court permits a voluntary dismissal of the action under Rule 41(a)(2)"), and King v. Lee, 279 N.C. 100, 107, 181 S.E.2d 400, 404-05 (1971) (after sustaining the trial court's grant of a motion for a directed verdict, the supreme court remanded the case to the trial court for the purpose of permitting plaintiff to consider making a motion for a voluntary dismissal). 29 N.C. App. at 466-67, 224 S.E.2d at 702. *See generally* W. Shuford, North Carolina Civil Practice and Procedure §§ 41-3 to -5 (1975).

11. 292 N.C. at 635, 234 S.E.2d at 749. After plaintiffs' notice of appeal and the court's direction to defendant to present judgment, the notation "Court expires" appears in the court's minutes. *Id.* The supreme court upheld the court of appeals' decision that the session of court had adjourned. Since the session of court at which the appeal was entered had ended, the trial court did not have jurisdiction to consider the motion under the term rule exception. *Id.* at 638-39, 234 S.E.2d at 751; *see* note 3 *supra*.

order allowing plaintiffs' voluntary dismissal and the denial of his motion to dismiss the order for lack of jurisdiction.

The court of appeals affirmed, holding on the basis of the North Carolina Supreme Court's decision in *Sink v. Easter*,[12] that plaintiffs' rule 41(a)(2) motion and the subsequent appearance of the parties at the hearing on the motion constituted an abandonment of plaintiffs' appeal from the directed verdict.[13] The North Carolina Supreme Court reversed the court of appeals, pointing to *Wiggins v. Bunch*[14] as the controlling case.[15] The supreme court also explained that the court of appeals' reliance on *Sink* was misplaced and that *Sink* "should not be interpreted as holding that the mere filing of a motion . . . and the appearance at a hearing thereon constitutes an abandonment of the prior appeal, nothing else appearing."[16]

Historically, the qualification that a trial judge can, upon proper showing, judge an appeal abandoned applied principally to situations in which an appellant failed to prosecute his appeal.[17] When an appellant had not timely docketed the appeal, the appellee could either move in the supreme court to docket and dismiss the appeal according to rule II, section 7 of the Rules of Practice in the Supreme Court of North Carolina[18] or have the superior court, upon proper notice, determine that the appellant had abandoned his appeal and proceed in the case as if no appeal had been taken.[19] The alternative of having the appeal adjudged abandoned at the trial court level was a product of case law;[20] the essential procedures constituting an abandonment were not delineated as they were for the docket and dismiss rule.

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12. 288 N.C. 183, 217 S.E.2d 532 (1975).

13. 29 N.C. App. 463, 466, 224 S.E.2d 699, 702 (1976). The court of appeals also relied on Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975), which followed *Sink* in holding that, pending appeal from summary judgment, the hearing on plaintiff's subsequent motion to set aside summary judgment constituted an adjudication by the trial court that plaintiff's prior appeal had been abandoned.

14. 280 N.C. 106, 184 S.E.2d 879 (1971); *see* text accompanying notes 49-56 *infra*.

15. 292 N.C. at 636, 234 S.E.2d at 750; *see* text accompanying note 57 *infra*.

16. 292 N.C. at 636, 234 S.E.2d at 750.

17. *See* Avery v. Pritchard, 93 N.C. 266, 267 (1885).

18. N.C. Sup. Ct. R. II, § 7, 89 N.C. 598 (1884), stated that:

> If the appellant in a civil action shall fail to bring up and file a transcript of the record before the call of causes from the district from which it comes is concluded during the week appropriated to the district, at a term of this court in which such transcript is required to be filed, the appellee, on exhibiting the certificate of the clerk of the court from which the appeal comes, or a certified transcript of the record . . . may move to have the appeal docketed and dismissed at appellant's cost, with leave to the appellant during the term and after notice to the appellee, to apply for the re-docketing of the cause.

Avery v. Pritchard incorrectly cited *id.* II, § 8 as the docket and dismiss procedure. 93 N.C. 266, 267 (1885). Rule II, § 8 provided that an appeal should not be reinstated until appellant paid or offered to pay appellee's costs of having the appeal dismissed under § 7.

19. Avery v. Pritchard, 93 N.C. 266, 267 (1885).

20. *Avery v. Pritchard* was one of the first cases to state the abandonment rule. *See id.*

The trial courts, however, consistent with rule II, section 7,[21] have required that an appellee seeking an adjudication of abandonment prove that the record and transcript were not docketed on time.[22] The rationale behind both procedures was that an appellee should have the fruit of his judgment promptly and thus is entitled to have an appeal that was taken but not prosecuted dismissed.[23]

The modern counterpart to the procedures allowing an appellee to dismiss an appeal for failure of the appellant to comply with the rules for prosecuting an appeal is rule 25 of the North Carolina Rules of Appellate Procedure,[24] which has its origin in part in rule II, section 7 of the Rules of Practice in the Supreme Court of North Carolina.[25] Rule 25 dispenses with the docket and dismiss procedure but continues the traditional authority of the trial court to dismiss appeals prior to docketing upon an appropriate showing. The rule makes explicit what was implicit in the abandonment procedure: first, that the method for having an appeal adjudged abandoned is a motion to dismiss by the appellee; and second, that the "proper showing" to support the motion consists of affidavits or copies of the record showing appellant's failure to take timely action or otherwise prosecute the appeal.[26]

There are no provisions governing dismissal of an appeal by an appellant in either the old Rules of Practice in the Supreme Court of North

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21. *See* note 18 *supra*.

22. *See* Pentuff v. Park, 195 N.C. 609, 611, 143 S.E. 139, 140 (1928).

23. Jordan v. Simmons, 175 N.C. 537, 540, 95 S.E. 919, 921 (1918) (concurring opinion) (attacking failure to perfect appeals as a cause of delay in the courts and endorsing adjudications of abandonment as the speedier of the two methods); Avery v. Pritchard, 93 N.C. 266, 267 (1885).

24. The North Carolina Rules of Appellate Procedure supersede the Rules of Practice in the Supreme Court of North Carolina and the Rules of Practice in the Appellate Court of North Carolina. *See* 4A N.C. GEN. STAT. app. I (Cum. Supp. 1977). N.C.R. APP. P. 25 states:

> If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the docketing of an appeal in the appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court.

The Drafting Committee comments that the "rule states a blanket authority in the appropriate courts to dismiss cases on appeal for failure to take any timely action in the appellate process, from serving proposed case on appeal to filing the record on appeal" except that failure to file timely briefs is dealt with separately. *Id.*, Drafting Comm. Note. The rule also allows the court to excuse untimely action for good cause. This replaces the reinstatement procedure of N.C. Sup. Ct. R. II, §§ 7, 8, 89 N.C. 598 (1884); *see* note 18 *supra*.

25. N.C.R. APP. P. 25, Drafting Comm. Note. N.C. Sup. Ct. R. II, §§ 7, 8 was renumbered as rules 17 and 18 in 1889. *See* 104 N.C. 633 (1889). Rules 17 and 18 continued basically unchanged and were incorporated as N.C. Ct. App. R. 17, 18, 1 N.C. App. 632, 639 (1968).

26. N.C.R. APP. P. 25.

Carolina,[27] the Rules of Practice in the Appellate Court of North Carolina[28] or the North Carolina Rules of Appellate Procedure.[29] Furthermore, there is little early case law developing the procedure by which an appellant could abandon an appeal. Appellants can, nevertheless, abandon their appeals. Since 1947, the original limitation of the abandonment rule to appellees has apparently been discarded.[30] Both appellants and appellees can prove abandonment and thereby revest jurisdiction in the trial court. Moreover, the "proper showing" requirement of the abandonment rule has been extended to appellants.[31] Thus, an appellant could, in the discretion of the trial court, withdraw his appeal by making application for leave to dismiss and by showing that the appellee would not be prejudiced by the withdrawal.

The first indication by the North Carolina Supreme Court that a motion in the trial court by an appellant while his appeal was pending could constitute an abandonment of that appeal came in *Leggett v. Smith-Douglass Co.*[32] Plaintiffs in *Leggett* appealed an order of the trial court sustaining defendants' demurrer and dismissing the action. Plaintiff-appellants gave notice of appeal to the supreme court but subsequently failed to draft and serve a copy of the case on defendants; the appeal was never perfected.[33] Thereafter, appellants took a voluntary nonsuit[34] in superior court and instituted another action against defendants. The state supreme court held that under those circumstances "the taking of a voluntary nonsuit

27. 254 N.C. 783 (1961) (superseded 1975).

28. 1 N.C. App. 632 (1968) (superseded 1975).

29. *But cf.* N.C. GEN. STAT. § 15A-1450 (Cum. Supp. 1977) (express statutory authority for withdrawal of appeal by a criminal defendant).

30. In Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 376, 42 S.E.2d 407, 408 (1947), where the general rule and its exceptions were first consolidated, the abandonment rule was cited as a qualification to the general rule that jurisdiction is removed from the trial court pending appeal without reference to who may invoke the rule or under what conditions it may be invoked. Prior to this time the abandonment rule as set forth in Avery v. Pritchard, 93 N.C. 266 (1885); *see* text accompanying note 17 *supra*, had been cited only in cases in which the appellee was dismissing an appeal not prosecuted by the appellant. *Avery* was cited only once after *Hoke. See* Jones v. Brinson, 238 N.C. 506, 511, 78 S.E.2d 334, 339 (1953). Thereafter, *Hoke* was cited for the proposition that an appellant could abandon his appeal at the trial court prior to docketing. *See, e.g.*, McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960); State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959); Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947). The recent litigation raising the abandonment issue has resulted from appellants' attempts to abandon appeal in order to seek other affirmative relief at the trial court level. *See* text accompanying notes 6-11 & 48-53 *infra*.

31. McDowell v. Town of Kure Beach, 251 N.C. 818, 821, 824-25, 112 S.E.2d 390, 393, 395 (1960); *accord*, Town of Davidson v. Stough, 258 N.C. 23, 24, 127 S.E.2d 762, 763 (1962).

32. 257 N.C. 646, 127 S.E.2d 222 (1962).

33. *Id.* at 648, 127 S.E.2d at 223.

34. The nonsuit was pursuant to former § 1-224, 2 Hen. IV c. 7 (1400), *as adopted* by Rev. Code of N.C. ch. 31, § 110 (1855) (formerly codified as N.C. GEN. STAT. § 1-224 (1954)) (repealed 1967). Prior to the adoption of the North Carolina Rules of Civil Procedure, a plaintiff was allowed to take a voluntary nonsuit at any time before the verdict as long as the defendant had not asserted a counterclaim or a demand for affirmative relief. *Id.*

before the clerk of the superior court is tantamount to an abandonment or withdrawal of the appeal."[35] The notion that an appeal could be abandoned without a formal motion for abandonment was later endorsed in *Sink v. Easter*[36] and relied upon by the court of appeals in *Bowen*.[37]

Sink v. Easter involved a complex procedural tangle[38] that the *Bowen* court likened to a "Gordian knot."[39] On March 21, 1974 the trial judge entered a judgment granting defendant's rule 60(b)(6)[40] motion and dismissing plaintiff's case for lack of jurisdiction. In response, plaintiff filed a rule 60(b)(1) and (2) motion for relief from judgment on grounds of mistake, inadvertance and newly discovered evidence.[41] On the same day, the trial judge filed a Correction of Judgment and an order denying plaintiff's rule 60(b) motion.[42] Plaintiff gave notice of appeal from both of these actions by the trial court.[43] Thereafter, the trial judge, acting on his own motion,[44] set

35. 257 N.C. at 648, 127 S.E.2d at 224; *accord*, Williams v. Asheville Contracting Co., 257 N.C. 769, 770, 127 S.E.2d 554, 555 (1962) (per curiam).

36. 288 N.C. at 198, 217 S.E.2d at 542.

37. 29 N.C. App. 463, 465-66, 224 S.E.2d 699, 701 (1976). The supreme court in *Bowen*, however, summarily distinguished *Leggett*. *Leggett* "dealt with [North Carolina's] old voluntary nonsuit practice under which plaintiff had an absolute right voluntarily to nonsuit his action without prejudice up to the time a verdict was rendered against him." 292 N.C. at 638, 234 S.E.2d at 751. N.C.R. Civ. P. 41(a)(2), which was at issue in *Bowen*, does not convey an absolute right to dismiss the action without prejudice. The court further distinguished *Leggett* on the basis that plaintiff had failed to perfect his appeal prior to taking the nonsuit. Although in Williams v. Asheville Contracting Co., 257 N.C. 769, 127 S.E.2d 554 (1962) (per curiam), a case following *Leggett*, the time for perfecting the appeal had not expired at the time plaintiff filed a nonsuit, the *Bowen* court pointed out that plaintiff thereafter failed to perfect the appeal and it was subsequently dismissed by the supreme court. 292 N.C. at 638, 234 S.E.2d at 751.

38. *Sink* involved two actions commenced on September 3, 1971, for personal injuries and medical expenses resulting from an automobile accident. One action was instituted by Sherry Sink for injuries and expenses incurred subsequent to her majority; the other was instituted by Sherry Sink's father, James Sink, for Sherry's medical expenses prior to her majority. James Sink's action was litigated and ultimately remanded by the North Carolina Supreme Court with instructions to dismiss for lack of jurisdiction due to insufficiency of service of process. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

Sherry Sink's action remained in limbo until after James Sink's action was dismissed. Defendant then filed a N.C.R. Civ. P. 60(b)(6) (relief from judgment) motion to dismiss Sherry Sink's action on the ground that the court's prior denial of defendant's rule 12(b) motion to dismiss filed in March 1972 was "irregular and void" by reason of the decision in James Sink's action. Sink v. Easter, 288 N.C. at 188, 217 S.E.2d at 535. The *Sink* court pointed out that defendant's rule 60(b)(6) motion was mislabeled since it was made in response to the denial of defendant's rule 12(b)(5) (insufficiency of service) motion, an interlocutory order, while rule 60(b) applies only to final judgments. The *Sink* court elected, therefore, to treat defendant's rule 60(b)(6) motion as a motion for summary judgment based on collateral estoppel and to treat the trial court's granting of the rule 60(b)(6) motion as a granting of a rule 56 motion for summary judgment. *Id.* at 196-97, 217 S.E.2d at 540-41.

39. 292 N.C. at 636-37, 234 S.E.2d at 750.

40. N.C.R. Civ. P. 60(b)(6); *see* note 38 *supra*.

41. 288 N.C. at 190, 217 S.E.2d at 536.

42. *Id.* at 190, 217 S.E.2d at 536-37.

43. *Id.* at 190, 217 S.E.2d at 537 (appeal from corrected judgment granting defendant's N.C.R. Civ. P. 60(b)(6) motion); *id.* at 191, 217 S.E.2d at 537 (appeal from denial of plaintiff's N.C.R. Civ. P. 60(b)(1), (2) motion).

44. Since this action took place at a new session of court, the trial judge no longer had

aside his order denying plaintiff's rule 60(b) motion because he had erred in determining that he was without discretion to consider the motion.[45] The trial judge proceeded, over defendant's objection, to conduct a hearing on plaintiff's motion.

The question before the supreme court in *Sink* was whether plaintiff had properly abandoned her appeal from the denial of the rule 60(b) motion in order to revest jurisdiction in the trial court. In answering this question affirmatively, the supreme court construed the hearing on the rule 60(b) motion attended by both parties as constituting an adjudication by the trial court that plaintiff, by appearing at the hearing, gave proper notice of her intention to abandon her prior appeal from the denial of her motion.[46] The court concluded that the trial court had jurisdiction to reconsider plaintiff's 60(b) motion.[47]

The supreme court in *Bowen*, in rejecting *Sink's* holding that the proceedings alone constituted an abandonment of appeal,[48] gave controlling authority to an earlier decision, *Wiggins v. Bunch*.[49] The issue in *Wiggins* was whether motions filed pursuant to rules 59[50] and 60,[51] pending appeal, affected the general rule that an appeal removes the case from the jurisdiction of the trial court.[52] The trial court had granted defendants' motion to dismiss at the close of plaintiff's evidence; plaintiff gave notice of appeal in open court. Nearly two months after the judgment of dismissal, plaintiff moved to set aside the judgment and for a new trial pursuant to rules 59 and 60 on the grounds of newly discovered evidence. After a hearing on the motion, the trial court set aside the dismissal and granted plaintiff a new trial.[53]

The supreme court held that, because the time limit for a rule 59 motion is ten days after the entry of judgment,[54] rule 59 did not apply and that if

jurisdiction of the case under the term rule exception. *Id.* at 198, 217 S.E.2d at 542; *see* note 3 *supra*.

45. 288 N.C. at 190-91, 217 S.E.2d at 536. "As is recognized in many cases, a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Id.* at 198, 217 S.E.2d at 541.

46. *Id.* at 198, 217 S.E.2d at 542.

47. The events in *Sink* were further complicated because plaintiff gave notice of appeal on two issues. *See* text accompanying notes 62-71 *infra*.

48. 292 N.C. at 636, 234 S.E.2d at 749.

49. 280 N.C. 106, 184 S.E.2d 879 (1971); *see* text accompanying note 14 *supra*.

50. N.C.R. Civ. P. 59; *see* note 2 *supra*.

51. N.C.R. Civ. P. 60.

52. *See* text accompanying note 2 *supra*.

53. 280 N.C. at 107, 184 S.E.2d at 879.

54. N.C.R. Civ. P. 59(b) states: "A motion for a new trial shall be served not later than 10 days after entry of the judgment."

plaintiff were entitled to any relief it would have to be under rule 60.[55] *Wiggins* concluded that the general rule that an appeal divests the trial court of jurisdiction was not changed by the time limits for moving under rules 59 and 60 of the newly adopted North Carolina Rules of Civil Procedure.[56] Hence, even though plaintiff was within the time limit of rule 60 when he made his motion, the prior appeal had removed jurisdiction from the trial court, and the trial court was, therefore, without authority to vacate the judgment.

In giving controlling authority to *Wiggins, Bowen* emphasized that, although the court in *Wiggins* recognized the qualification to the general rule that an appeal divests the trial court of jurisdiction,[57] it found no occasion to apply the qualification in that case.[58] Instead, *Wiggins* held that motions filed pursuant to rules 59 or 60 could not properly be addressed to the trial court pending appeal.[59] Moreover, according to *Bowen*, "[t]here was no suggestion [in *Wiggins*] that the mere filing of the motions and the appearance of the parties for a hearing thereon constituted an abandonment of the appeal by the moving party."[60] If the filing of the motions and the appearance of the parties at a hearing did constitute an abandonment, the *Wiggins* court could have found an abandonment of appeal in that case. The *Bowen* court attempted to reconcile the apparent conflict between the implication in *Wiggins* that plaintiff's appearance at a hearing on his rule 59 and 60 motions did not constitute an abandonment of appeal and the express

55. 280 N.C. at 109, 184 S.E.2d at 880. N.C.R. CIV. P. 60(b) states: "The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation." Plaintiffs moved for a new trial on the grounds of newly discovered evidence under rule 60(b)(2). 280 N.C. at 107, 184 S.E.2d at 879.

56. 280 N.C. at 111, 184 S.E.2d at 882. The court was guided by interpretations of the nearly identical Federal Rules of Civil Procedure, FED. R. CIV. P. 59, 60. *See* Norman v. Young, 422 F.2d 470 (10th Cir. 1970) (when defendant filed an appeal before arguing his FED. R. CIV. P. 60(b) motion, the case was taken out of the trial court's jurisdiction); Switzer v. Marzall, 95 F. Supp. 721 (D.D.C. 1951) (when a motion for a new trial is filed and an appeal is taken thereafter, the case is removed from the trial court which no longer has jurisdiction over the rule 60(b) motion); Daniels v. Goldberg, 8 F.R.D. 580 (S.D.N.Y. 1948) (the district court has power to correct clerical errors in the record before the appeal is docketed in the appellate court and thereafter with leave of the appellate court under FED. R. CIV. P. 60(a), but this does not confer on the district court the power to vacate a judgment after an appeal has been filed); *cf.* Keyser v. Farr, 105 U.S. 265 (1881); Draper v. Davis, 102 U.S. 370 (1880) (in pre-Rules setting, after an appeal was allowed and security for appeal taken, the lower court was without jurisdiction).

57. *See* 280 N.C. at 108, 184 S.E.2d at 880.

58. 292 N.C. at 636, 234 S.E.2d at 750.

59. 280 N.C. at 111, 184 S.E.2d at 882. Plaintiff in *Bowen*, by making a N.C.R. CIV. P. 41(a)(2) motion for a voluntary dismissal grounded on newly discovered evidence rather than a rule 59 motion, may have been trying to avoid the effect of *Wiggins*. *Sink*, discussed at text accompanying notes 38-47 *supra*, was not decided until several weeks after the 41(a)(2) motion was made in *Bowen*.

60. 292 N.C. at 636, 234 S.E.2d at 750.

statement in *Sink* that the appearance of plaintiff at a hearing on her 60(b) motion did constitute an abandonment by narrowing *Sink* in light of later procedural events in the latter case.[61]

In doing so, however, the supreme court has apparently oversimplified the analysis in *Sink*. The *Bowen* court treated the procedural events in *Sink* as if there were only one appeal and interpreted *Sink* as holding that plaintiff's abandonment of her rule 60(b) motion was effective *only* in relation to plaintiff's later express abandonment of the same appeal.[62] The *Sink* court, however, had expressly maintained that it was "important to remember"[63] that two appeals were pending: an appeal from the order of dismissal and an appeal from the order denying plaintiff's rule 60(b) motion.[64] Plaintiff in *Sink* did not expressly abandon her rule 60(b) appeal,[65] but rather expressly abandoned her appeal from the judgment of dismissal subsequent to the initial, implied abandonment.[66] Therefore, even if the appeal from the rule 60(b) motion was effectively abandoned by the appearance of the parties at the hearing, the trial court in *Sink* still did not have sufficient jurisdiction to grant the rule 60(b) motion because the first appeal from the judgment of dismissal was still pending.

When the *Sink* court held that the hearing on the rule 60(b) motion constituted an abandonment of the appeal from the denial of that motion, it did not claim that the hearing on the rule 60(b) motion *also* constituted an abandonment of the appeal from the judgment of dismissal. On the contrary, *Sink* recognized that after the trial court regained jurisdiction over the rule 60(b) motion by virtue of the abandonment, it then faced the only issue that was before the court in *Wiggins*—the effect of a pending appeal on the trial court's power to grant relief under the 60(b) motion.[67] Following the practice of the federal courts,[68] the *Sink* court suggested that it could have

61. *Id.* at 636-37, 234 S.E.2d at 750.

62. "Plaintiff's position relative to her appeal on 1 April 1974 [the proceedings at which the trial court reconsidered its prior denial of plaintiff's rule 60(b) motion] must be considered in the context of her later *express* abandonment of *that* appeal and the court's order allowing the abandonment." *Id.* at 637-38, 234 S.E.2d at 750 (second emphasis added).

63. 288 N.C. at 198, 217 S.E.2d at 542.

64. *See* text accompanying note 43 *supra*.

65. 288 N.C. at 191, 198, 217 S.E.2d at 535-36, 542; *see* text accompanying notes 45-47 *supra*.

66. 288 N.C. at 200, 217 S.E.2d at 543.

67. *Id.* at 199, 217 S.E.2d 542; *see* 280 N.C. at 110, 184 S.E.2d at 881.

68. Earlier federal cases held that the district court had no power to consider a rule 60(b) motion pending appeal and required the party making the motion to first present his grounds to the appellate court which could remand the case or give permission to the district court to rule on the motion. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2873, at 263-65 (1973). The practice of making a 60(b) motion in the appellate court is referred to in *Wiggins*, where the court stated that plaintiffs had failed to make the 60(b) motion in the appellate court within the time limit of the rule. 280 N.C. at 111, 184 S.E.2d at 882; *accord*, Rhodes v.

treated the order granting plaintiff relief under rule 60(b) as a " 'clear indication' " of how the trial court would rule were the cause remanded to the trial court.[69] Remanding the cause became unnecessary, however, because plaintiff expressly abandoned her appeal from judgment of dismissal prior to the granting of the rule 60(b) motion.[70] The *Sink* court stated that only after plaintiff expressly abandoned her appeal from dismissal for lack of jurisdiction by successfully filing a motion to withdraw the appeal was the trial judge revested with jurisdiction over the "entire cause."[71] It was not until after this motion to withdraw the appeal from the judgment of dismissal was granted that the trial court ruled on plaintiff's rule 60(b) motion, set aside the judgment of dismissal and denied defendant's motion to dismiss for lack of jurisdiction.

Much of the problem in *Sink* arises from an overly broad interpretation that in all circumstances proceedings on a post-verdict motion made in the trial court pending a prior appeal constitute an abandonment of that appeal. *Bowen* was correct in holding that this is not a proper interpretation of *Sink* and that the implied abandonment in *Sink* must be viewed in light of its procedural context.[72] *Bowen*, however, by failing to distinguish between the two appeals in *Sink*, derived the rule that an express abandonment is required in all cases in order to revest jurisdiction in the trial court.[73] This holding does not adequately account for the relationship between the proceedings constituting an abandonment and the later procedural events in *Sink*. The *Sink* rule allowing the proceedings on the rule 60(b) motion to constitute an abandonment is limited to the situation where there is an appeal both from judgment and from a rule 60(b) motion properly made in the trial court prior to appeal and where the abandonment only vests jurisdiction in the trial court for the purpose of "reconsidering" the rule 60(b) motion pending either remand or express abandonment of the still pending appeal from judgment.[74]

To hold in that narrow context, as *Sink* does, that the proceedings

Henderson, 14 N.C. App. 404, 409, 188 S.E.2d 565, 568 (1972); A. MCINTOSH, *supra* note 2, § 1800(7), at 242 & § 1720, at 94 (1956 & Supp. 1970).

Other cases developed a procedure, recommended by Wright and Miller, C. WRIGHT & A. MILLER, *supra* § 2873, at 256-66, and suggested by Sink, 288 N.C. at 199-200, 217 S.E.2d at 543, whereby the district court could consider the rule 60(b) motion and, if it were inclined to grant it, application could be made to the appellate court for remand. The result is that while the district court could deny the motion, it could not grant it until there had been a remand. 7 MOORE'S FEDERAL PRACTICE ¶ 60:30(2), at 420-22 (2d ed. 1970).

69. 288 N.C. at 199-200, 217 S.E.2d at 543.

70. *Id.*

71. *Id.* at 200, 217 S.E.2d at 543.

72. *See* text accompanying note 61 *supra*.

73. *See* text accompanying note 62 *supra*.

74. *See* text accompanying notes 64-66 *supra*.

constituted an abandonment of the rule 60(b) appeal is not inconsistent with *Wiggins*, in which the rule 60(b) motion was not made in the trial court until after an appeal from judgment had been taken.[75] The trial court in *Wiggins* never had jurisdiction over the rule 60(b) motion that could be revested. Furthermore, the jurisdiction purportedly conveyed by the proceedings on the motion was not to reconsider the post-verdict motion but to rule on the pending appeal. Thus, the court's conclusion in *Bowen* that the filing of a rule 41(a)(2) motion and the appearance at a hearing did not constitute an abandonment of appeal absent express abandonment of the appeal and a judgment of the trial court to that effect elaborates the holding in *Wiggins* and clarifies the requirements for abandonment of appeal by appellants.

The need to abandon an appeal in order to seek post-verdict relief in the trial court could be reduced by more cautious use of oral notice of appeal.[76] When it is necessary to abandon an appeal, any remaining uncertainty surrounding the procedures for voluntary abandonment by an appellant could be eliminated by adopting a provision for voluntary dismissal by appellants similar to that governing dismissals by appellees.[77] The drafters of the Federal Rules of Appellate Procedure have recognized the need for such a provision[78] and perhaps *Wiggins, Bowen* and *Sink* reveal the need for such a provision in North Carolina.

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75. *See* text accompanying notes 49-56 *supra*.
76. *See* note 2 *supra*.
77. *See* note 24 and text accompanying notes 27-31 *supra*.
78. FED. R. APP. P. 42 provides:

(a) **Dismissal in the District Court.**
If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.
(b) **Dismissal in the Court of Appeals.**
If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

Id.