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High Court's *Walsh* Decision Tops List

The North Carolina Supreme Court issued two decisions on May 4 that could end two years of automatic dismissals and divided panels in the Court of Appeals — not to mention a great deal of angst among the state's appellate attorneys.

In the criminal case of *State v. Hart* and in *Walsh v. Town of Wrightsville Beach*, a civil case decided under *Hart*'s reasoning, the high court held that "every violation of the rules [of appellate procedure] does not require dismissal of the appeal or issue."

That means the Court of Appeals in the future is likely to be more flexible in dealing with appellate rule violations, selecting from a range of sanctions instead of dismissing cases outright.

Justice Robin E. Hudson, who wrote the unanimous decision in *Hart*, said the Court of Appeals "misinterpreted and improperly extended" *Viar v. N.C. Department of Transportation*, the 2005 case in which the Supreme Court dismissed an appeal because of the appellant's violation of Rule 10 of the N.C. Rules of Appellate Procedure.

Dismissal is merely one possible sanction for a rule violation, Hudson wrote, and in "rare" and "extraordinary" cases, the Court of Appeals could invoke its Rule 2 power to suspend other appellate rules and decide a case on its merits despite the rule violations. Rule 2 gives the court discretion to suspend the other appellate rules to "prevent manifest injustice" or "expedite a decision in the public interest."

Both *Hart* and *Walsh* had been dismissed in the Court of Appeals for mistakes made in assignments of error under Rule 10.

The high court reversed and remanded the cases to the Court of Appeals to determine whether the appellants should receive lesser sanctions than dismissal and whether, if warranted, the lower court should invoke Rule 2 to decide the cases on their merits.

"I think they were telling the Court of Appeals that their interpretation of *Viar* had been producing draconian results," said Barbara Blackman of the Office of the Appellate Defender, who argued *Hart* to the Supreme Court.

"I hope this puts the brakes on the problem."

The *Viar* decision

Viar roiled controversy in the Court of Appeals and among the state's appellate bar from the moment it came out in April 2005.

The appeals panel had reversed an Industrial Commission decision to deny a tort claim filed by the estate of two passengers who were killed when their vehicle crossed a highway median strip and crashed into a tractor-trailer.

The Supreme Court, in turn, vacated the decision, holding that the Court of Appeals had improperly called on its Rule 2 power to decide the appeal on the basis of issues the appellant did not present — namely, the reasonableness of the transportation department's failure to erect median barriers because of budget constraints.

In its per curiam opinion, the high court said the Court of Appeals had found the plaintiff's Rule 10 violations "did not impede comprehension of the issues on appeal or frustrate the appellate process." But it was not the role of the appellate courts "to create an appeal for the appellant," the high court said.

The holding was interpreted by the Court of Appeals as a severe restriction on its Rule 2 power to consider cases on the merits despite technical violations.

The *Viar* aftermath

In the 20 months that followed, the Court of Appeals cited *Viar* in 124 separate cases: 50 of those were dismissed outright, and 29 were partially dismissed. The court justified the dismissals on the basis of rule violations that ranged from assignments of error to defects in certificates of service to a failure to double-space between lines.

"When you have an appeal, you hate to see justice denied for minor reasons," said Allen W. Boyer, a Charlotte attorney whose dismissed appeal, *State v. Buchanan*, was cited in *Hart* as an example of the appellate court's misinterpretation of *Viar*.

"*Viar* seemed overbroad, denying appeals to defendants who otherwise had reason to appeal. They were being denied access to the courts for insufficient reasons."

The Court of Appeals' interpretation of *Viar* also fueled "a very active motions practice," said Wilmington attorney J. Wesley Casteen, the appellant's counsel in *Walsh*.

An appellee might file a motion to dismiss for a technical rule violation. The appellant would fire back with a motion for sanctions.

"Historically, the appellate courts had been above such fray," he said.

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"The appellate courts were more concerned with correctly applying the law and deciding cases on their own merit if the errors did not relate to the substance of the appeal."

Every time they clicked the "send" button when electronically filing, Blackman said, attorneys were seized with thoughts of malpractice suits.

"I think it created a state of panic within the appellate bar," she said. "You were giving it your best shot, and you thought you were complying with the rules. But depending on what panel you got, you could have your case dismissed."

The high court's correction

The Court of Appeals summed up its interpretation of *Viar* in *Buchanan*:

(1) The Supreme Court had "admonished" the lower court to avoid applying Rule 2, even where the party's technical rule violations did not impede a grasp of the substance of the appeal or frustrate the appeals process; and

(2) The violation of any rule mandated dismissal.

"We expressly disavow this interpretation," the Supreme Court said in *Hart*.

The appellate rules are "mandatory" and not "directory," the high court said, and an appeal could be "subject to" dismissal for a rule violation. But that did not mean an appeal "shall" be dismissed for any violation,

"Rather, 'subject to' means that dismissal is one possible sanction," Hudson wrote. "We did not intend thereby to imply that all rules violations mandate automatic dismissal."

Casteen said he took a similar tack in arguing *Walsh*, in which the plaintiff's only assignment of error in the record on appeal lacked references to the record or transcript and the brief contained no reference to the lone assignment of error.

"I never argued that there wasn't a technical violation in *Walsh*, but there was never a question in *Walsh* that the parties knew what the issue was on appeal," he said. "The [Rule 10(b) violation] never clouded the issue. It never concealed the issue.

"The issue was identified on appeal, and it was the one that all parties addressed."

In contrast, the appellant in *Hart* contested a Rule 10(c)(1) violation.

The controversy in *Hart* stemmed from a police officer's testimony that certain evidence "constituted a crack pipe." In an assignment of error, the appellant said the testimony "otherwise violated the N.C. Rules of Evidence." In his brief, the appellant argued that the testimony specifically violated Rule 701 of the evidence rules.

The Supreme Court affirmed the Court of Appeals' finding of a Rule 10(c)(1) violation. By omitting Rule 701 from the assignment of error, Hudson wrote, the appellant had been "broad, vague and unspecific" and failed to state a legal basis upon which the error was assigned.

However, because the majority opinion cited *Viar* to hold that it could not apply Rule 2 to decide the case on its merits, the Supreme Court reversed the decision.

Viar, the high court said, "does not mean that the Court of Appeals can no longer apply Rule 2 at all."

"I am slightly disappointed the Supreme Court ruled that the assignment was too broad and hope that it doesn't get to the point that we have to cite actual case names in assignments of error," said Whiteville attorney Michelle FormyDuval Lynch, who argued *Hart* to the Court of Appeals. "But, overall, I am very satisfied with the decision regarding Rule 2."

Restoring Rule 2's power

With *Hart* and *Walsh*, the Supreme Court put the punch back into Rule 2, but the guideposts it gave the Court of Appeals lacked precision, Casteen said.

"If the Court of Appeals were to read *Hart* as emphasizing that Rule 2 is to be a rare remedy, used only in extraordinary circumstances, you could get the same application as in *Viar*," Casteen said. "The effect would be chilling."

In *Hart*, the high court said Rule 2 should be "applied cautiously" and only in limited, rare occasions in which "a fundamental purpose of the rules is at stake."

Before exercising the rule to "prevent manifest injustice," the appeals panel would need to recognize whether circumstances were appropriate to take the "extraordinary step" of suspending the rules.

"Fundamental fairness and predictable operation of the courts depend upon the consistent exercise of this authority," Hudson wrote.

Ideally, Casteen said, this means the Court of Appeals will not resort to Rule 2 but instead consider appropriate sanctions short of dismissal, such as Rules 25 and 34.

Only when the court finds lesser sanctions inappropriate and considers dismissal should it then consider whether to invoke its Rule 2 power.

"At that point, the court considers whether the case is 'exceptional' or 'rare,'" Casteen said. "What I hope the court doesn't seize upon is 'exceptional and rare' and say that if there's a violation, it can only hear the merits in these 'exceptional and rare' cases."

Blackman, too, said the Supreme Court could have provided more guidance.

"Everyone is still going to wonder when Rule 2 will be applied," she said. "It's always going to depend on the precise factual situation that the case presents."

The *Viar* legacy

In coming months, the Court of Appeals will either issue decisions or request supplemental briefs to be filed in *Hart* and *Walsh* before it makes any determinations.

The cases decided under the Court of Appeals' past interpretation of *Viar* are final and can't be revived, Blackman said.

The future, she hopes, will be different.

"I think more cases are going to be decided on their merits," she said, "and I hope that it's going to work a reexamination of requiring assignments of error."

Regardless of *Hart*, *Viar*'s legacy will linger, Lynch said. "I do not think *Hart* will make appellate attorneys take less notice of the Rules of Appellate Procedure," she said. "Given the case law of the past couple of years, we are all too afraid for that."

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