

SUPREME COURT OF NORTH CAROLINA

Viar v. North Carolina Department of Transportation, 359 N.C. 400

610 S.E.2d 360 (2005) · No. No. 109A04 · Decided April 7, 2005

SUMMARY

The Supreme Court of North Carolina held that the plaintiff failed to comply with the North Carolina Rules of Appellate Procedure governing assignments of error and appellate briefs. It vacated the Court of Appeals' decision and dismissed the plaintiff's appeal, rejecting the Court of Appeals' use of Rule 2 to suspend the appellate rules.

CASE DETAILS

COURT	Supreme Court of North Carolina
JURISDICTION	North Carolina
DECIDED	April 7, 2005
DOCKET	No. 109A04
DISPOSITION	vacated
PROCEDURAL POSTURE	The North Carolina Department of Transportation appealed to the Supreme Court of North Carolina from the Court of Appeals' decision, which had applied Rule 2 to suspend appellate-rule requirements and reached the merits of the underlying appeal.
PRECEDENTIAL VALUE	Published precedential opinion
PARTIES	North Carolina Department of Transportation v. Claude M. Viar, Jr., Co-administrator of the Estate of Megan Rae Viar, Deceased, and Co-administrator of the Estate of Macey Lauren Viar, Deceased

TOPICS

- appellate procedure
- preservation of error
- civil procedure

PRACTICE AREAS

- appellate procedure
- civil procedure

QUESTIONS PRESENTED

1. Whether the appellee's failure to comply with North Carolina Rules of Appellate Procedure 10(c)(1) and 28(b)(6) required dismissal of the appeal.

2. Whether the Court of Appeals properly used Rule 2 to suspend the appellate rules and reach an issue that was not properly raised or argued.

HOLDINGS

1. The appeal was subject to dismissal because the appellant failed to comply with mandatory appellate rules governing assignments of error and briefing. The assignments were not properly numbered or supported by specific record references, one assignment was abandoned because it was not argued, and the other did not address the issue underlying the Industrial Commission's conclusion.
2. The Court of Appeals should not have used Rule 2 to create an appeal for the appellant and address an issue that the appellant had not properly raised or argued. The Court of Appeals' decision was therefore vacated and the appeal dismissed.

KEY QUOTATIONS

"It is not the role of the appellate courts, however, to create an appeal for an appellant." (359 N.C. 401)

"The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.'" (359 N.C. 401)

FACTUAL BACKGROUND

The underlying dispute concerned the reasonableness of the North Carolina Department of Transportation's decision to delay installation of median barriers. The opinion primarily addressed defects in the appellant's assignments of error and brief rather than the merits of the median-barrier issue.

PROCEDURAL HISTORY

The Court of Appeals majority recognized deficiencies in the appellee's assignments of error and brief but suspended the appellate rules under Rule 2 and addressed the merits of the Industrial Commission's decision. The Supreme Court held that the appeal violated the Rules of Appellate Procedure and vacated the Court of Appeals' decision, dismissing the appeal.

DISPOSITION

vacated

CASES CITED

- Steingress v. Steingress, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)
- Viar v. N.C. Dep't of Transp., 162 N.C. App. 362, 375, 590 S.E.2d 909, 919 (2004)
- Bradshaw v. Stansberry, 164 N.C. 356, 79 S.E. 302 (1913)

OPINION

PER CURIAM.

610 S.E.2d 360 (2005) 359 N.C. 400 Claude M. VIAR, Jr., Co-administrator of the Estate of Megan Rae Viar, Deceased, and Co-administrator of the Estate of Macey Lauren Viar, Deceased v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION. No. 109A04. Supreme Court of North Carolina. April 7, 2005. DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, Charlotte, for plaintiffs-appellees.

Roy Cooper, Attorney General, by William H. Borden, Special Deputy Attorney General, Robert T. Hargett, Special Deputy Attorney General, and Ann Reed, Senior Deputy Attorney General, for the defendant-appellant. PER CURIAM.

On appeal to this Court, defendant contends that plaintiff's appeal should be dismissed in accordance with Judge Tyson's dissenting opinion in the Court of Appeals for violation of the Rules of Appellate Procedure. We agree.

The North Carolina Rules of Appellate Procedure are mandatory and "failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999). In the instant case, plaintiff has failed to comply with Rule 10 and Rule 28(b). With respect *361 to assignments of error, Rule 10(c) provides the following: (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.

N.C. R.App. P. 10(c)(1). In this case, plaintiff presented two assignments of error, neither of which was numbered or made specific record references. Moreover, the second stated assignment of error did not "state plainly, concisely and without argumentation the legal basis upon which error [was] assigned." With respect to an appellant's brief, Rule 28(b) requires the following: (6) 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.

N.C. R.App. P. 28(b)(6). Plaintiff made no argument as to the first stated assignment of error in his brief to the Court of Appeals. Thus, this assignment of error is deemed abandoned under Rule 28(b)(6). Nevertheless, plaintiff's brief in the Court of Appeals refers to assignment of error one and then to the pages of the record containing the dissenting opinion in the Industrial Commission.

Moreover, plaintiff's second stated assignment of error purports to challenge the Industrial Commission's conclusion of law, but the arguments in plaintiff's brief in the Court of Appeals do not address the issue upon which the Industrial Commission's conclusion of law was based.

The majority opinion in the Court of Appeals, recognizing the flawed content of plaintiff's appeal, applied Rule 2 of the Rules of Appellate Procedure to suspend the Rules. The majority opinion then 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.

The Court of Appeals majority asserted that plaintiff's Rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process. *Viar v. N.C. Dep't of Transp.*, 162 N.C.App. 362, 375, 590 S.E.2d 909, 919 (2004). It is not the role of the appellate courts, however, to create an appeal for an appellant.

As this case illustrates, the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule. See *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913).

For the reasons stated herein and in that portion of the dissenting opinion in the Court of Appeals addressing plaintiff's violation of the Rules of Appellate Procedure, plaintiff's appeal should have been dismissed by the Court of Appeals.

The decision of the Court of Appeals is vacated and plaintiff's appeal is dismissed. **DISMISSED.**