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APPELLATE RULE 16(b): THE SCOPE OF REVIEW IN AN APPEAL BASED SOLELY UPON A DISSENT IN THE COURT OF APPEALS

THOMAS L. FOWLER†

Appellate courts perform two important functions: (a) correcting errors that occurred at the trial level, and (b) clarifying, standardizing, and developing the rules and principles of law that apply in the jurisdiction.¹ The error correction function is of primary benefit to the aggrieved litigant because it addresses the adequacy or fairness of the legal proceedings that determined the litigant's rights, even if the legal issues involved are of little interest or significance to the greater community.² The law development function is of primary benefit to the community at large because it resolves the legal issues that have significance beyond the case in which the issue arose.³

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1. *Standards Relating to Court Organization* Section 1.13 (American Bar Association, 1990) (defining the two basic functions of appellate courts as (a) error correction: reviewing trial court proceedings to determine whether they have been conducted according to law and applicable procedure, and (b) law development: developing the rules of law that are within the competence of the judicial branch to announce and interpret).

2. The importance of the error correction function has been explained as follows: "[A]ppellate courts serve as the instrument of accountability for those who make the basic decisions in trial courts and administrative agencies. . . . The availability of the appellate process assures the decision-makers at the first level that their correct judgments will not be, or appear to be, the unconnected actions of isolated individuals, but will have the concerted support of the legal system; and it assures litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system. Thus, the review for correctness serves to reinforce the dignity, authority, and acceptability of the trial, and to control the adverse effects of any personal shortcomings of the basic decisionmakers." PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2 (1976).

3. The importance of the law development function has been explained as follows: "Without appellate review, such great divergences in practices and variation in results would arise between trial courts in the same system that they would jeopardize the belief that legal principles are a vital force in their decisions or provide a basis for predicting the application of official power. Accordingly, appellate courts are needed to announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve." *Id.* at 2-3.

Our legal system generally grants litigants the right to one appellate review of their case⁴ in recognition of the importance of the error correction function. If an aggrieved litigant chooses to exercise this appeal of right, the appellate court must hear the case even if no significant legal issues are involved. Yet an appellate court has a finite capacity to hear, consider, and resolve cases. The more cases an appellate court must hear pursuant to an appeal of right that involve issues of significance only to the litigants themselves, the less time that court will spend on its law development function, to the detriment of the greater community. As litigation, and the corresponding exercise of appeals of right, dramatically increased during the twentieth century,⁵ concern grew over how to protect the law development function of each jurisdiction's appellate court.⁶ Of the various proposed responses, the one ultimately adopted by most jurisdictions⁷ was the creation of an intermediate appellate court that would hear most of the appeals of right and would thus be charged with the responsibility of fulfilling the error correction function. Creating an intermediate appellate court to provide the one opportunity for appellate review

4. See *State v. Colson*, 274 N.C. 295, 304, 163 S.E.2d 376, 382 (1968) (noting the basic principle that there should be one trial on the merits and one appeal on the law, as of right, in every case—and that double appeals of right should be avoided except in the most unusual cases, the importance of which may be said to justify a second review). See also CARRINGTON ET AL., *supra* note 3, at 136 (“[W]e . . . are prone to accept the view that successive appeals of right should be very sparingly authorized. Not only are they a burden to the smooth functioning of the highest courts, but they are also a burden to the unwilling successful litigants who should be spared the cost of continued litigation in the absence of some fairly substantial public interest in the case.”).

5. Former North Carolina Governor and North Carolina Supreme Court Justice Daniel K. Moore stated in an interview:

[I]n the late 1950s the [North Carolina] Supreme Court was issuing more than 300 formal opinions per year By the 1964-65 term, that number had grown to more than 450 per year for the seven-person court. In 1968, the first year of the Court of Appeals, that six-person court filed almost 400 opinions; in 1970 the number of opinions filed by the supreme court had fallen to just over 100. By the early 1990s, the twelve-person court of appeals was disposing of roughly 1,500 cases per year, over ninety percent by opinion. At the same time, the supreme court issued opinions in roughly 200 cases per year.

Pat Devine, *Reflections from Daniel K. Moore*, 3 JURIDICUS 9, 12 n.6 (June 1998).

6. In the early 1930s several commentators (noting the increasing case load of the North Carolina Supreme Court) suggested possible sources of relief. See, e.g., H.B. Parker & C.T. McCormick, *Does Our Supreme Court Need Relief?*, 8 N.C. L. REV. 487, 488-89 (1930) (mentioning (1) increasing the number of justices from five to seven, (2) creating an intermediate appellate court, (3) providing for assignment of trial judges to sit, from time to time, as temporary members of the supreme court, and (4) providing for the appointment of “skilled young lawyers as law assistants, law clerks, or ‘referenders,’ for each of the members of the supreme court, to save the time of the justice by performing a part of the preliminary legal research preparatory to writing opinions.”); Susie M. Sharp, *Supreme Court Sitting In Divisions*, 10 N.C. L. REV. 351 (1932) (discussing the possibility of allowing the supreme court to sit in divisions).

7. See generally MARLIN O. OSTHUS, *STATE INTERMEDIATE APPELLATE COURTS* 2 (1980); JOY A. CHAPPER & ROGER A. HANSON, *INTERMEDIATE APPELLATE COURTS: IMPROVING CASE PROCESSING* v. (1990) (chronicling the development of state intermediate courts of appeal).

deemed sufficient to fulfill the error correction function⁸ freed the highest appellate court from the necessity of hearing appeals of right. Instead, the highest appellate court could focus on its law development function by choosing which cases it would review, selecting only those cases which involved legal issues having significance beyond the case in which the issue arose. This was the system adopted by the federal courts in 1925⁹ and by many of the states.¹⁰

I. NORTH CAROLINA'S TWO-TIER APPELLATE COURT SYSTEM

North Carolina created its intermediate appellate court, the North Carolina Court of Appeals,¹¹ in 1967 to join its court of last resort, the North Carolina Supreme Court.¹² Under this two-tier appellate court system, trial court decisions are generally appealable as a matter of right to the court of appeals.¹³ Further appeal to the supreme court is generally not a matter of right. Instead, the appellant must ask the supreme court to review the court of appeals' decision by filing a petition for discretionary review.¹⁴ The court grants or denies the motion, in its discretion, based on factors set out by statute: (a) the significant

8. See *State v. Colson*, 274 N.C. 295, 304, 163 S.E.2d 376, 382 (1968). The court stated: [I]n establishing the North Carolina Court of Appeals, defining its jurisdiction, and providing a system of appeals, the Courts Commission was guided, *inter alia*, by the basic principle that there should be one trial on the merits and one appeal on the law, as of right, in every case. The Commission sought to avoid double appeals as of right, except in the most unusual cases, the importance of which may be said to justify a second review (citation omitted).

Id.

9. See Federal Judiciary Act, ch. 229, § 1, 43 Stat. 938 (1925) (codified as amended at 28 U.S.C., 1940 ed., §§ 346, 347) (current version at 28 U.S.C. § 1254); see also PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 3-4 (1976). The author stated:

[T]he Federal Judiciary Act of 1925 conferred on the Supreme Court of the United States the power to refuse to hear many of the appeals which it had formerly been required to hear. It was the premise of that reform that the highest Court would continue to hear the cases which are of institutional importance, but would decline to hear cases which are of importance only to the individuals affected, thus leaving the function of review of district court decisions for correctness to the intermediate courts.

Id.

10. See Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 27 (1993) ("[W]hen appellate workload outruns the ability of the supreme court to handle it, the most common solution has been to create an intermediate appellate court. . . . By 1957, thirteen states had intermediate appellate courts By 1980, the number had grown to thirty-two, and at present there are thirty-nine.").

11. N.C. CONST., art. IV, § 7; N.C. GEN. STAT. § 7A-16 (1967).

12. N.C. CONST., art. IV, § 6; N.C. GEN. STAT. § 7A-10 (1967).

13. N.C. GEN. STAT. § 7A-27 (providing that defendants convicted of first degree murder and sentenced to death may appeal of right directly to the supreme court. Other final judgments and certain interlocutory orders of the trial courts are appealable by right to the court of appeals). See also N.C. GEN. STAT. § 7A-29 (regarding appeals of right to the court of appeals from final orders or decisions of various administrative agencies).

14. N.C. GEN. STAT. § 7A-31 (providing that if there is no appeal of right and the party fails to timely file a petition for discretionary review, the party can still seek appellate review by petitioning for a writ of certiorari). See also N.C. GEN. STAT. § 7A-32(b); N.C. R. APP. P. 21(a).

public interest in the subject matter of the appeal; (b) the significance to the jurisprudence of the state of the legal principles involved; and (c) consideration of whether the decision of the court of appeals conflicts with a decision of the supreme court.¹⁵ The supreme court denies the majority of petitions for discretionary review.¹⁶

As noted above, the principle behind North Carolina's system is twofold. First, individual litigants should have the right to appellate review of their case in order to correct trial errors. Second, the North Carolina Supreme Court's finite capacity to hear cases must be rationed and is properly utilized in cases where the subject matter or legal issues in the case have an importance beyond that of the individual litigant's interest in correcting trial error.¹⁷ Litigants are thus provided with the right to one appellate review of any issue properly preserved¹⁸ and appealed, which review will be performed, in most cases, by the court of appeals. Subsequent review by the supreme court, however, is reserved for those few cases that significantly impact or develop the law. For these cases, any benefit of the supreme court's review to the particular litigants is only incidental, at least insofar as the court's discretionary decision to review is concerned.

Allowing the highest court in the system to choose which cases it will review on the basis of broader significance has benefited the workloads of the supreme courts in each jurisdiction, even allowing for the parties' ability to file a petition for discretionary review. As one commentator has noted:

First, there is a significant attrition in cases after the court of appeals renders a decision. For many reasons, in numerous cases the parties do not seek further review in the supreme court. Second, petitions for

15. N.C. GEN. STAT. § 7A-31(c). See also N.C. R. APP. P. 15 (a) (stating that "[e]ither prior to or following determination by the court of appeals of an appeal docketed in that court, any party to the appeal may in writing petition the supreme court upon any grounds specified in G.S. 7A-31 to certify the cause for discretionary review by the supreme court.") The grounds for allowing discretionary review prior to court of appeal's decisions are set out in N.C. GEN. STAT. § 7A-31(b).

16. This can be confirmed by consulting the list of cases noted under the "Petitions for Discretionary Review" heading in the front of each volume of the North Carolina Reports.

17. The American Bar Association's *Standards Relating to Court Organization* found that the two basic functions of appellate courts, error correction (i.e., reviewing trial court proceedings to determine whether they have been conducted according to law and applicable procedure) and law development (developing the rules of law that are within the competence of the judicial branch to announce and interpret), were advanced by placing the primary responsibility for error correction with the intermediate appellate court (through granting the litigants an appeal of right to the intermediate appellate court) and placing the primary responsibility for law development with the supreme court (by allowing the supreme court to selectively review cases based on their special significance). See ABA Standards Relating to Court Organization § 1.13 (1990).

18. "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection, or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." N.C. R. APP. P. 10(b)(1). See also *State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 709 (1998).

discretionary review can be read and decided quickly, in a fraction of the time necessary for consideration of a plenary appeal on the merits. Such review focuses initially on the question of whether jurisdiction should be accepted, and in the great majority of cases results in an order denying review. The task of determining whether to exercise discretionary review is an important element of the supreme court's workload, but the time expended per individual case is very small. Third, in practice supreme courts actually grant discretionary review in only a small percentage of the cases where it is requested. The net effect of the two-tier system is to shift the time-consuming review-for-correctness function to the court of appeals and to streamline the supreme court's workload.¹⁹

Jurisdictions with the two-tier appellate court system often provide in rules, statutes, or in their constitution, criteria to guide the supreme court in its exercise of its discretionary decision to review intermediate appellate court decisions.²⁰ Some states' discretionary review criteria include consideration of whether or not there was a dissent in the intermediate court.²¹ Although generally consistent with other jurisdictions' two-tier systems, North Carolina treats dissents differently. In North Carolina, a dissent in the court of appeals triggers an unqualified right to appeal to the supreme court.²²

II. NORTH CAROLINA GENERAL STATUTES SECTION 7A-30(2): APPEAL OF RIGHT BASED SOLELY UPON DISSENT IN THE COURT OF APPEALS

North Carolina General Statutes Section 7A-30(2) provides that the parties to a case decided by the North Carolina Court of Appeals have a right to subsequent review by the North Carolina Supreme Court if "there is a dissent."²³ This language could be interpreted to allow appeal of right to the supreme court of all properly preserved issues in the case as there is no express limitation on the issues that can be appealed. Nevertheless, such a broad reading of this language would appear inconsistent with the purposes of the two-tier appellate court system. In context, the more logical interpretation is that the

19. See Cope, *supra* note 11, at 30.

20. For a general discussion of these criteria, see the article by Judge Cope, *supra* note 11.

21. See Cope, *supra* note 11, at 59.

22. N.C. GEN. STAT. § 7A-30(2). Judge Cope notes that Missouri, New Jersey, Texas and New York also appear to provide for an appeal of right when there is a dissent in the intermediate appellate court. See Cope, *supra* note 11, at 104 n.234.

23. § 7A-30(2). This language has not changed since the adoption of section 7A-30 in 1967. This statute also provides for an appeal of right from a decision of the court of appeals even when the three court of appeals judges agree on the disposition of a case if the decision "[d]irectly involves a substantial question arising under" either the United States or the North Carolina constitutions. N.C. GEN. STAT. § 7A-30(1).

appeal of right should be limited to the issue or issues on which the court of appeals panel disagreed.

The first purpose of the two-tier system is to provide the litigant with one opportunity for appellate review to correct trial error—that is, the appeal of right to the court of appeals. The adequacy of this one opportunity for appellate review might well be questioned if the three judges on the court of appeals panel which decided the case disagree as to whether or not there was trial error. It is not unreasonable to extend to those litigants the right to a second appellate review to resolve the issue upon which the three court of appeals judges disagreed. In such cases, the lack of unanimity undermines the authority of the first appellate review and the individual litigant's interest in correcting trial error may justify a small encroachment on the workload of the supreme court. This reasoning, however, would apply only to the specific areas of disagreement by the court of appeals judges. To the extent the judges were unanimous, the appellant would have received his one opportunity for review, subject of course, to the possibility of filing a petition for discretionary review with the supreme court.

The second purpose of the system, avoiding burdening the supreme court with cases that involve matters of importance only to the individual litigants, is also addressed by the more narrow interpretation of section 7A-30(2). If the three court of appeals judges disagree on a specific issue, that issue may be deserving of final resolution by the supreme court because that disagreement is likely to serve as the basis for future litigation by other parties concerned with the same legal issue. Resolution of the matter, much like the U.S. Supreme Court's resolution of disagreements between the federal circuits, might well be expected to develop the law and resolve issues of significance beyond the individual interests of the litigants. Again, this would not be so if the issues subject to the appeal of right included issues upon which the court of appeals' panel was in agreement. The court of appeals' unanimity on an issue would not generally portend or cause future litigation on the issue by others. Finally, it is clear that entitling a party to appeal as of right all issues in a case, rather than the limited issue or issues on which the court of appeals panel disagreed, would significantly increase the supreme court's workload by forcing it to review issues upon which the court of appeals reached a unanimous decision. Such issues may have been important only to the individual litigants involved in the case, precisely the situation that the two-tier system sought to address and avoid.

III. CASES INTERPRETING SECTION 7A-30(2): WILL UNANIMITY BLOCK REVIEW BY APPEAL OF RIGHT?

In a 1971 case, *Hendrix v. Alsop*,²⁴ the North Carolina Supreme Court considered whether an appeal of right based on a dissent allowed review by the supreme court of all matters or issues in the case, as might be argued based on the language of the statute. In *Hendrix*, the trial court dismissed the plaintiff's actions against each of the three defendants. The North Carolina Court of Appeals unanimously affirmed the trial court's dismissal of the action as to two defendants but divided as to the dismissal of a third defendant, with two judges finding that dismissal improper. The third defendant appealed as a matter of right based on the dissent. The plaintiff also appealed the dismissals as to the first two defendants as a matter of right based on the fact that there was a dissent in the case. The supreme court rejected the argument that plaintiff could appeal these dismissals as a matter of right and interpreted section 7A-30(2) to require a review only "of questions on which there was a division in the intermediate appellate court."²⁵ Limiting *Hendrix v. Alsop* to its facts, the narrow holding was that the appeal of right based on a dissent as to one "claim" does not extend to other "claims" upon which there was no dissent. The *Hendrix* analysis, however, indicated this principle might also extend to questions or issues in the case that were not the basis of any disagreement on the part of the court of appeals' panel.²⁶

In a 1980 case, *Williams v. Williams*,²⁷ however, the supreme court squarely stated that when considering an appeal of right pursuant to section 7A-30(2), it was "not limited, in reviewing a decision of the Court of Appeals, to a consideration of only such matters as may be mentioned by the dissenting judge in the Court of Appeals' opinion."²⁸ In *Williams*, the trial court ordered defendant to pay alimony, child support, attorneys fees and expenses. The court of appeals reversed the award of alimony, counsel fees, and expenses, and vacated and remanded the award of child support. In a brief dissent, Judge Erwin stated that he agreed "with all portions of the majority's opinion EXCEPT that portion which reverses the award of alimony to the plaintiff. I vote to affirm the award of alimony on the grounds that

24. 278 N.C. 549, 180 S.E.2d 802 (1971).

25. *Id.* at 554, 180 S.E.2d at 806.

26. The *Hendrix* language extending the principle to "questions" rather than just to "claims" was picked up in a 1972 case, *State v. Campbell*, 282 N.C. 125, 128, 191 S.E.2d 752, 755 (1972) ("By this enactment the General Assembly of North Carolina intended to insure a review by the Supreme Court of questions on which there was a division in the intermediate appellate court.").

27. 299 N.C. 174, 261 S.E.2d 849 (1980).

28. *Id.* at 190, 261 S.E.2d at 860.

the finding of fact by the trial judge was supported by competent evidence and that the defendant is the supporting spouse.”²⁹

On appeal, the supreme court explicitly agreed with Judge Erwin’s dissent and reversed the court of appeals on that issue. But defendant apparently also argued the propriety of the court of appeals’ ruling as to child support. Plaintiff responded in her brief by stating that the child support provisions of the trial court’s order were not involved in the appeal “since the dissent in the court of appeals was only with regards to the decision on alimony.”³⁰ As noted above, the supreme court expressly rejected this argument. The court nevertheless declined to consider the child support issue because the parties did not address the issue in their briefs and such issue was therefore deemed abandoned pursuant to appellate rule.³¹

Williams thus adopted the expansive reading of section 7A-30(2)—that the existence of a dissent is simply a condition precedent that establishes the right to appeal all issues in the case that have been otherwise properly preserved and presented for review. Despite the logical appeal of the narrower reading, *Williams* established that the court of appeals’ unanimity on an issue did not block review of such issue pursuant to an appeal of right based on a dissent. Superficially, *Williams* was consistent with a supreme court case that considered the scope of appeal under section 7A-30(1), which allowed an appeal of right when the court of appeals’ decision directly involved a substantial question arising under the state or federal constitution. In *State v. Colson*,³² the court stated the initial question before it as: If the case presents a substantial constitutional question, “does the [North Carolina] Supreme Court consider only the constitutional questions and nothing else, or may it pass upon all assignments of error allegedly committed by the [North Carolina] Court of Appeals and properly brought forward for review?”³³ After a survey of cases from other jurisdictions, *Colson* held that once involvement of a substantial constitutional question is established, the supreme court could, “in its discretion, pass upon any or all assignments of error, constitutional or otherwise, allegedly committed by the court of appeals and properly presented . . . for review.”³⁴ But *Colson* should be distinguished from *Williams* on two grounds. First, *Colson* was clear that review of non-constitutional questions was permitted in the court’s discretion, and

29. *Williams v. Williams*, 42 N.C. App. 163, 168, 256 S.E.2d 401, 404 (1979) (Erwin, J., dissenting).

30. *Williams*, 299 N.C. at 190, 261 S.E.2d at 860.

31. *Id.* (looking at N.C. R. App. P. 28(a)).

32. 274 N.C. 295, 163 S.E.2d 376 (1968).

33. *Id.* at 301, 163 S.E.2d at 380.

34. *Id.* at 305, 163 S.E.2d at 383.

not as a matter of right. *Williams* is less clear as to whether the appellant has the right to raise other issues or whether the court may, but need not, consider such other issues. Second, the expansive interpretation of the scope of appeal makes sense as applied to section 7A-30(1) because it furthers the basic principle that the appellate courts should avoid addressing constitutional questions if the matter is properly resolved on non-constitutional grounds.³⁵ The expansive interpretation makes less sense when the basis for the appeal is not significant constitutional questions, but simply a court of appeals' dissent.

The *Williams* approach also was consistent with a practice of the court of appeals' judges throughout the 1970s and early 1980s. During this time, it was not uncommon for dissenting court of appeals' judges to simply note their dissent to an opinion without giving any explanation or specifying any basis for their disagreement with the majority.³⁶ Clearly, in such cases, it is not possible for the supreme court to limit its review of the case to the express point of disagreement between the dissenter and the majority when the dissenting judge simply states: "I dissent." It may be that the supreme court, frustrated with this practice of court of appeals' dissenters, considered approaches that might encourage the dissenting court of appeals' judge to articulate the basis for his or her dissent, thereby assisting the supreme court in focusing its review on the specific area of disagreement, rather than holding a *de novo* review of all possible disagreements the dissenter might have had with the majority.

35. See *Jackson v. A Woman's Choice, Inc.*, 130 N.C. App. 590, 595, 503 S.E.2d 422, 425-26 (1998) (where a statute is subject to two constructions, one of which would raise a serious constitutional question, the court should adopt the construction which avoids the constitutional problem); *State v. T.D.R.*, 347 N.C. 489, 498, 495 S.E.2d 700, 705 (1998); see also *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985) (supreme court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court).

36. There are many examples in the North Carolina Court of Appeals Reports. The following is a random selection of cases where a judge simply noted a dissent without any stated basis: *Pergerson v. Williams*, 9 N.C. App. 512, 518, 176 S.E.2d 885, 889 (1970) (Vaughn, J., dissenting); *Ross v. Perry*, 12 N.C. App. 47, 54, 182 S.E.2d 655, 659 (1971) (Brock, J., dissenting); *Braswell v. Purser*, 16 N.C. App. 14, 28, 190 S.E.2d 857, 866 (1972) (Mallard, C.J., dissenting); *Lane v. Scarborough*, 19 N.C. App. 32, 35, 198 S.E.2d 45, 47 (1973) (Brock, J., dissenting); *Yount v. Lowe*, 24 N.C. App. 48, 51, 209 S.E.2d 867, 869 (1974) (Morris, J., dissenting); *Utilities Comm. v. Merchandising Corp.*, 26 N.C. App. 617, 619, 216 S.E.2d 868, 869 (1975) (Britt, J., dissenting); *Electric Co. v. Pennell*, 31 N.C. App. 510, 513, 229 S.E.2d 713, 715 (1976) (Brock, C.J., dissenting); *Student Bar Association v. Byrd*, 32 N.C. App. 530, 536, 232 S.E.2d 855, 859 (1977) (Hedrick, J., dissenting); *Coble v. Coble*, 44 N.C. App. 327, 331, 261 S.E.2d 34, 36 (1979) (Martin, J. dissenting); *Carrington v. Townes*, 53 N.C. App. 649, 663, 281 S.E.2d 765, 774 (1981) (Martin, J., dissenting).

IV. AMENDMENT TO APPELLATE RULE 16

The North Carolina Supreme Court is authorized to prescribe rules of practice and procedure for all litigation in the appellate division.³⁷ If there is a conflict with the statutes, the rules of appellate procedure promulgated by the supreme court will prevail.³⁸ Thus, even without the legislature amending the language of section 7A-30(2) or the supreme court reversing or modifying *Williams*, the case that interpreted section 7A-30(2) to not limit the scope of review, the supreme court possessed the power to alter section 7A-30(2) by appellate rule. In 1983 the supreme court did so by amending Rule 16 of the Rules of Appellate Procedure, entitled "Scope of Review of Decisions of Court of Appeals." The amendment provided that in cases where the only ground for the appeal of right is a dissent in the court of appeals, review by the supreme court is limited to the questions "specifically set out in the dissenting opinion as the basis for that dissent."³⁹ Although other questions may be presented to and considered by the supreme court through a petition for discretionary review,⁴⁰ the language of this amendment to Rule 16 appeared to clearly limit the review to the expressed grounds upon which the dissenter disagreed with the majority's holding.⁴¹ Matters upon which the court of ap-

37. N.C. CONST. art. IV, § 13(2), ("The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division."); N.C. GEN. STAT. § 7A-33.

38. *Duke Power Co. v. Winebarger*, 300 N.C. 57, 69, 265 S.E.2d 227, 234 (1980); *State v. Furnage*, 250 N.C. 616, 624, 109 S.E.2d 563, 569 (1959) ("It has been held that the exclusive power to establish its own rules of practice and procedure is vested in the Supreme Court by Article I, Section 8, and Article IV, Section 12, and that the General Assembly has no power to modify the rules so established."); see discussion in Jane Wylie Saunders, *Appellate Rule 16(b) and C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.: New Requirements for Appeals of Right*, 63 N.C. L. REV. 1074 (1985).

39. N.C. R. APP. P. 16(b).

40. *Id.*

41. See *Jones v. All American Life Ins. Co.*, 312 N.C. 725, 325 S.E.2d 237 (1985) (A majority of the panel of the Court of Appeals affirmed the judgment with one judge dissenting on the grounds (1) that the evidence was insufficient to establish that plaintiff either killed or procured the killing of the decedent Hilliard and (2) that the submission of an issue phrased in the disjunctive deprived plaintiff of her right to a unanimous verdict. Pursuant to Rule 16(b) of the Rules of Appellate Procedure, only these two issues were before the court for review.); see also *Blumenthal v. Lynch, Sec. of Revenue*, 315 N.C. 571, 577-78, 340 S.E.2d 358, 361 (1986). The court held:

Although plaintiff is clearly entitled to bring an appeal by the terms of N.C.G.S. 7A-30(2), only the issue raised in the dissent is properly before this Court for review. . . . This Court's appellate review is properly limited to the single issue addressed in the dissent, and we strongly disapprove of and discourage attempts by appellate counsel to bring additional issues before this Court without its appropriate order allowing counsel's motion to allow review of additional issues. Nevertheless, on rare occasions, when, as here, issues of importance . . . require a decision in the public interest, this Court will exercise its inherent residual power or its authority under Rule 2 of the North Carolina Rules of Appellate Procedure and address those issues though they are not properly raised on appeal.

Id.

peals' panel were in agreement would thus not be before the supreme court in appeals of right based solely upon a dissent.

This conclusion was affirmed by the supreme court in the first case that applied Rule 16(b) in 1984. In *Walker Grading & Hauling v. S.R.F. Management Corp.*,⁴² the trial court's order granting summary judgment for defendant was upheld by a two judge majority of the court of appeals. The third judge on the panel noted his dissent but wrote no dissenting opinion. Based on the dissent the plaintiff appealed as a matter of right. The supreme court dismissed the appeal holding that Rule 16(b) required that the dissent specify the basis for the dissent.⁴³ The court stated that review by the supreme court in such cases was never intended for claims on which the court of appeals had rendered "unanimous decisions,"⁴⁴ and further, "[w]here an appeal of right is taken to this Court based solely on a dissent in the [North Carolina] 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 [North Carolina Supreme] Court."⁴⁵ Such appeals are subject to dismissal because application of this procedural amendment to Rule 16 "precludes further review by appeal of right."⁴⁶

In another 1984 case, the court appeared to confirm its intention to narrowly limit the appeals of right available for cases in which there was a dissent. In *Harris v. Maready*,⁴⁷ the plaintiff appealed, pursuant to section 7A-30(2), because the court of appeals' decision included two opinions which were labeled concurrences in part and dissents in part.⁴⁸ The defendants argued that the two concurring opinions were mislabeled as dissents. The supreme court agreed, noting that all

42. 311 N.C. 170, 316 S.E.2d 298 (1984).

43. Despite this holding, the supreme court heard the matter (and reversed the court of appeals) by certifying certain issues for discretionary review on its own motion. *Id.* at 176, 316 S.E.2d at 301.

44. *Id.* at 175, 316 S.E.2d 301 (1984). See also *State v. Kimbrell*, 320 N.C. 762, 767, 360 S.E.2d 691, 693 (1987) where the court held:

The Court of Appeals was unanimous in finding that admission of this evidence was error. [citations omitted]. The panel divided, however, in its assessment of the evidence's prejudicial effect. The question of the prejudicial effect of the evidence was the only issue addressed in the dissent, and under Rule 16(b) of the North Carolina Rules of Appellate Procedure, that issue is the only one before us.

Id.

45. *C.C. Walker Grading & Hauling*, 311 N.C. at 176, 316 S.E.2d at 301.

46. *Id.* This was also the result in *State v. Bowen*, 312 N.C. 79, 320 S.E.2d 405 (1984), where Chief Judge Vaughn (later Justice Vaughn) had dissented without an opinion in *State v. Bowen*, 67 N.C. App. 512, 313 S.E.2d 196, 197 (1984). The supreme court held: "There being no issue before this Court for review as required by Rule 16(b) of the North Carolina Rules of Appellate Procedure, the appeal is dismissed." *Id.*

47. 311 N.C. 536, 319 S.E.2d 912 (1984).

48. *Harris v. Maready*, 64 N.C. App. 1, 16-17, 306 S.E.2d 799, 808-09 (1983) (Webb, J., concurring in part, dissenting in part) (Arnold, J., concurring in part, dissenting in part).

three court of appeals' judges agreed that the plaintiff's actions against both defendants should have been dismissed but differed only as to why the dismissal was proper. Because all three judges agreed that the case should have been dismissed, the decision was not one in which there was a dissent, and there was no right of appeal pursuant to section 7A-30 (2).⁴⁹

From 1984 until 1996 the case law consistently interpreted Rule 16(b) to restrict the supreme court's review under section 7A-30(2) to the *issue* or *issues* expressly raised by the dissent as the basis for its disagreement with the majority.⁵⁰

49. *Maready*, 311 N.C. at 537, 319 S.E.2d at 914 (1984); *see also* *State v. Monroe*, 330 N.C. 433, 435, 410 S.E.2d 913, 914 (1991). The court stated:

The defendant contends here that since the dissenting opinion in the Court of Appeals reaches the same result as that reached by the majority, it does not constitute a 'dissent' entitling the State to appeal to this Court as a matter of right under N.C.G.S. 7A-30(2). We assume *arguendo* that the defendant is correct.

Id.

50. *See* *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984) ("When an appeal is taken pursuant to N.C. Gen. Stat. 7A-30 (2), the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent."); *Penley v. Penley*, 314 N.C. 1, 10, 332 S.E.2d 51, 57 (1985) ("Because plaintiff's appeal is based solely on the existence of a dissent in the Court of Appeals, the scope of our review on plaintiff's appeal is limited to the issues raised in that dissent."); *State v. Hooper*, 318 N.C. 680, 681-82, 351 S.E.2d 286, 287 (1987). The court stated:

Defendant contends that Officer Reed's remark that defendant had 'stopped . . . and asserted his Constitutional rights' was a violation of those rights. The Court of Appeals agreed and awarded defendant a new trial. Judge (now Justice) Webb dissented on the grounds that he did not believe the admission of Officer Reed's statement was prejudicial error. When an appeal is taken pursuant to N.C.G.S. 7A-30(2), the scope of this Court's review is properly limited to the issue upon which the dissent in the Court of Appeals diverges from the opinion of the majority [citation omitted]. Because the Court of Appeals panel agreed that Officer Reed's testimony violated defendant's constitutional rights, we do not address this question. We examine only whether any error in admitting this testimony was prejudicial.

Id.; *Smith v. N.C. Farm Bureau Mutual Ins. Co.*, 321 N.C. 60, 63, 361 S.E.2d 571, 573 (1987). The court stated:

Rule 16 (b) of the North Carolina Rules of Appellate Procedure limits the scope of review in appeals based solely on a dissent to those issues that are specifically given as the basis for the dissenting opinion. Therefore, the only issue properly before this Court is whether the Court of Appeals correctly applied Great American I, even though the defendant raises other issues in its brief.

Id.; *Murrow v. Daniels*, 321 N.C. 494, 496, 364 S.E.2d 392, 394 (1988) (scope of review under G.S. 7A-30(2) limited to issue addressed in dissent); *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 228, 393 S.E.2d 854, 857 (1990) ("Because the sole question raised in Judge Cozart's dissent concerns the reasonableness of the contract as to time and territory, the plaintiff's likelihood of meeting its burden of proof on the remaining criteria for determining the enforceability of this contract is not before this Court."); *Brooks v. Hackney*, 329 N.C. 166, 174, 404 S.E.2d 854, 859 (1991). The court stated:

Having held that plaintiff is estopped to deny that a valid agreement for the purchase and sale of the land existed, we need not address plaintiff's claim of unjust enrichment. Also, since it was not set out in the dissenting opinion as the basis for the dissent pursuant to Rule 16 (b) of the North Carolina Rules of Appellate Procedure, we do not address plaintiff's claim of breach of contract.

Id.; *Shadhoo v. Shilo East Farms, Inc.*, 328 N.C. 47, 48, 399 S.E.2d 319, 320 (1991). The court stated:

V. *STATE v. KALEY* (1996)

In 1996, in *State v. Kaley*,⁵¹ the supreme court decided that Rule 16(b) should not be so narrowly interpreted. In *Kaley*, the trial court charged the jury on acting in concert in a second-degree murder trial which resulted in an involuntary manslaughter conviction. The evidence was that the defendant was the passenger in a car driven by a man who went to buy crack cocaine. When the automobile pulled to the curb, the victim leaned in on the passenger side. Either the defendant held the victim or the victim held the defendant while the driver began to drive away. As the automobile picked up speed, the victim fell. The automobile ran over her and killed her. The court of appeals ruled that it was error to charge the jury on acting in concert, according to the majority opinion. The court held that there was no evidence the two men were acting together pursuant to a common plan or purpose to harm or kill the victim when they drove away causing the victim's death.⁵²

In his dissent, Judge Cozort did not disagree with this conclusion. Rather, Judge Cozort reasoned that the defendant and the driver were acting in concert in attempting the "drive-up" purchase of illegal drugs, that death was a natural and sometimes probable consequence of such an attempt, and that it was proper for the trial court to instruct the jury that it could find the defendant guilty of involuntary manslaughter through acting in concert.⁵³ The *Kaley* majority explained why it disagreed with the dissent:

We note that . . . a defendant is guilty of not only the planned crime, but of any crime committed by the other person in pursuance of the common plan or purpose, or as a natural or probable consequence thereof. The dissent argues that there was a common plan or purpose

In the trial court, the Court of Appeals, and this Court, plaintiff argued that the case was for the jury under the theory of *res ipsa loquitur*. The dissenting opinion in the Court of Appeals relates solely to the 'exclusive control' aspect of the *res ipsa* doctrine. Because this appeal is before us pursuant to N.C.G.S. 7A-30 (2), our review is limited to the issue raised in the dissent: whether plaintiff presented sufficient evidence to establish the requisite of the doctrine of *res ipsa loquitur* that the speaker, the instrumentality that caused her injury, was under defendant's exclusive control and management.

Id.; *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398, 474 S.E.2d 783, 785 (1996) ("[B]ecause the Court of Appeals majority and dissent agreed that plaintiff raised issues of fact concerning the propriety of the procedures followed leading up to the merger, our review is limited to the issue dissented on: whether plaintiff's claim was rendered moot by the merger."). *But see Jackson v. Housing Authority of High Point*, 316 N.C. 259, 262, 341 S.E.2d 523, 525 (1986) ("Thus, to the extent that there is technical merit to the plaintiff's contention, we have chosen to exercise our authority under Appellate Rule 2 to consider the question, since it was fully argued by both parties.").

51. 343 N.C. 107, 468 S.E.2d 44 (1996).

52. *State v. Kaley*, 117 N.C. App. 420, 422, 451 S.E.2d 6, 8 (1994), *rev'd*, 343 N.C. 107, 468 S.E.2d 44 (1996).

53. *Id.* at 423, 451 S.E.2d at 8.

to commit the crime of purchasing crack cocaine and that the involuntary manslaughter was a natural or probable consequence of that crime. However, the trial court did not instruct the jury based on that theory. The instructions made no reference whatsoever to any crimes other than murder, voluntary manslaughter, and involuntary manslaughter. Further, defendant was not even charged with a drug-related crime. As stated above, there was insufficient evidence to support the instruction given.⁵⁴

The panel of judges in the court of appeals who heard *Kaley*, thus appeared not to disagree that the evidence did not show that the occupants of the car acted in concert when the driver drove the car away while the victim was in close contact with the defendant. Under the language of Rule 16(b) and the case law interpreting Rule 16(b), this issue was consequently not before the supreme court on the section 7A-30(2) appeal. Yet, the supreme court held that the court of appeals erred in this conclusion stating that “[w]hen the two men drove away without paying for the cocaine, it can be concluded that they planned to drive away without paying for the drugs [and] [t]o drive away when a person is standing next to the automobile in such close proximity that the automobile may hit or catch and drag her can be found to be culpable negligence. This evidence supported the court’s charge on involuntary manslaughter.”⁵⁵

The defendant in *Kaley* expressly argued that Rule 16(b) limited the State’s right of appeal to the matters which are the basis of the court of appeals’ dissenting opinion so that the State was limited on appeal to arguing that the attempted purchase of the cocaine was the concerted action which would support the charge. Justice Webb for the court disagreed.

“The dissent was based on the premise that there was evidence to support a charge of acting in concert. The State can argue in this court any evidence that supports this premise. It is not limited to arguing the reasons in the dissent as to why there was evidence to support the charge.”⁵⁶

Kaley thus contradicted the long-held understanding of Rule 16(b) that it was the *issue* explicitly discussed by the dissenting judge of the court of appeals, rather than a broadly defined legal question or premise, that was before the supreme court on review.⁵⁷ *Kaley* thus dispensed with the only logical justification for Rule 16(b) — that appeals of right should not lie from issues upon which the court of appeals’ panel unanimously agreed. Review of such unanimous mat-

54. *Id.*

55. *Kaley*, 343 N.C. at 110, 468 S.E.2d at 46.

56. *Id.*

57. See discussion *supra* footnotes 42 and 51 and accompanying text.

ters was of course available to *Kaley* through petition for discretionary review or by Rule 2's suspension of the appellate rules. Thus, it is not clear why *Kaley* chose to reinterpret Rule 16(b) instead of suspending the rules or allowing discretionary review on its own motion in order to consider the issue.⁵⁸ In any event, although *Kaley* confused the clarity of the Rule 16(b) limitation, the court did justify its approach by noting that it was reversing the court of appeals on the precise issue upon which the trial court and the court of appeals had decided the case.⁵⁹ *Kaley* did not claim that Rule 16(b) allowed the court to consider and resolve a case on issues never considered or addressed in the trial court or court of appeals. However, in a 1998 opinion the supreme court, citing *Kaley* as its precedent, made this claim.

VI. *STATE v. FLY* (1998)⁶⁰

One early morning in 1995, Mark Fly "moonied" Barbara Glover. For exposing his buttocks to Mrs. Glover, Mark Fly was charged with violating North Carolina's indecent exposure statute, section 14-190.9, which provides that "[a]ny person who shall willfully expose the private parts of his or her person in any public place, and in the presence of any other person or persons, of the opposite sex . . . shall be guilty of a Class 2 misdemeanor."⁶¹ The State's evidence was clear that Mr. Fly willfully exposed his buttocks in a public place, in the presence of Barbara Glover, a person of the opposite sex. Mr. Fly did not dispute this evidence, but he did move to dismiss the charge on the grounds that buttocks were not private parts as defined in section 14-190.9. The trial court denied defendant's motion and convicted him of indecent exposure.⁶²

58. For instance, in both *Jackson v. Housing Authority of High Point*, 316 N.C. 259, 262, 341 S.E.2d 523, 525 (1986), and *Blumenthal v. Lynch, Sec. of Revenue*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986), the court exercised its authority under Rule 2 to hear issues that were not otherwise before the court under Rule 16(b).

59. *State v. Kaley*, 343 N.C. 107, 110, 468 S.E.2d 44, 46 (1996) ("We reverse the Court of Appeals on the issue upon which it decided the case.").

60. *State v. Fly*, 127 N.C. App. 286, 488 S.E.2d 614 (1997), *cert. denied*, 348 N.C. 556, 501 S.E.2d 656, *rev'd*, 348 N.C. 556, 501 S.E.2d 656 (1998).

61. See N.C. Gen. Stat. § 14-190.9 (amending N.C. Gen. Stat. § 14-190.9 (1971)). In 1971 the statute provided for a fine not to exceed \$500 and imprisonment for up to six months, or both. In 1993 the statute was amended to provide for punishment as a Class 2 misdemeanor.

62. The judge instructed the jury in essential conformity with the *N.C. Pattern Jury Instructions*, Section 238.17: "[To find the defendant guilty of indecent exposure] the State must prove four things to you beyond a reasonable doubt. First, that the Defendant willfully exposed a private part of his body; second, that the exposure occurred in a public place-that is a place to which the public has access and is visited by many persons; third, that the exposure was in the presence of at least one person of the opposite sex; and, fourth, that the Defendant acted willfully." After the jury retired, the judge asked if the attorneys had any corrections or additions to the charge. Defendant's counsel, Ms. Eady, responded: "I might ask the Court to give the Jury

Fly appealed the trial court's denial of his motion to dismiss. The court of appeals reversed the conviction holding that buttocks are not private parts as that term is used in the indecent exposure statute. The court acknowledged that Mark Fly's actions were indecent and offensive, but that "indecent" and "offensive" were not elements of the crime of indecent exposure. The court also acknowledged that courts are not free to expand what constitutes a crime beyond the definition clearly provided in the statute.⁶³ Judge Walker dissented from the majority's opinion, disagreeing with the majority in only one regard — that section 14-190.9 should be reasonably interpreted to include buttocks within the meaning of "private parts."⁶⁴

The State appealed the court of appeals' decision pursuant to section 7A-30(2). Rule 16(b) appeared to limit the State to arguing, as the dissent had, that buttocks were private parts. The State sought, however, to expand the issues it could argue before the supreme court, by repeating one argument apparently rejected by all three judges on the court of appeals, and by raising an argument that had not been considered by the trial court or the court of appeals. In its new brief before the supreme court, the State argued: (a) that buttocks were private parts within the meaning of the statute; (b) that the excretory organ, the anus, is a private part within the meaning of the statute, and that defendant had either actually exposed his anus or that the buttocks are actually a part of this excretory organ (i.e., "the flesh covering the anus");⁶⁵ and (c) that the genital organs, e.g., the penis and scrotum, are private parts within the meaning of the statute and that the evidence supported an inference that defendant had "exposed" his genitals in Mrs. Glover's presence even if she had not seen, and could not have seen, defendant's front.⁶⁶ To properly present arguments (b) and (c) to the supreme court, the State petitioned the supreme court for writ of certiorari, as is expressly authorized by Rule

the definition of private parts." The judge, however, declined, stating: "I'm going to wait and see if they come back for any further instruction on that." Record at 16.

63. *Fly*, 127 N.C. App. at 289, 488 S.E.2d at 616 (citing *State v. Hill*, 272 N.C. 439, 443, 158 S.E.2d 329, 332 (1968)) ("It is the legislature that is to define crimes and ordain punishment and the courts are not permitted to extend the application of the statute 'by implication or equitable construction' to include acts not clearly within the prohibition.").

64. *Fly*, 127 N.C. App. at 291, 488 S.E.2d at 617.

65. This argument was made by the State in its brief to the Court of Appeals—but it was apparently rejected sub silentio by the Court of Appeals panel as the argument is not mentioned by either majority opinion or dissent. Appellee's Brief at 5.

66. The State did argue in its brief that Mrs. Glover could have seen defendant's genitals if she had looked but the evidence was clear that Mrs. Glover did look—she made no effort to avert her gaze, indeed she chased after Mr. Fly—and never saw his genital organs. Appellee's Brief at 2, 5. In its majority opinion, the court of appeals stated: "In this case there is no evidence that the defendant exposed his genital organs" *Fly*, 127 N.C. App. at 289, 488 S.E.2d at 616 (1997). The dissent nowhere disagreed with this statement.

16(b),⁶⁷ to consider these additional issues that were not specifically set out as the basis for the dissent.

The supreme court denied the State's petition for writ of certiorari on the grounds that Rule 16(b) allowed the court to resolve the case based upon arguments and theories that were not the basis of the dissent, e.g., theories, (b) and (c) above, so that the writ of certiorari was unnecessary.⁶⁸ The court then proceeded to reverse the court of appeals' decision solely on its determination that under either theory (b) or (c), the evidence supported a finding that Fly had exposed his private parts in Mrs. Glover's presence, thus violating section 14-190.9, and stated that it was unnecessary to resolve the question raised by theory (a), i.e., whether or not buttocks were private parts.⁶⁹

Both the express language of Appellate Rule 16, and the supreme court's pre-*Kaley* interpretations of the reasons for Rule 16, indicate that the court should have limited its review in *Fly* to the single issue on which the court of appeals' panel did not agree and the issue on which the court of appeals resolved the case, i.e., whether or not buttocks were private parts.

Nevertheless, the supreme court explained that *Kaley* allowed its conclusion:

Initially, we address whether the State can present an argument before this Court that was not the basis of the dissent below. In *State v. Kaley*, 343 N.C. 107, 468 S.E.2d 44 (1996), we said the "State can argue in this Court any evidence that supports [the dissent's] premise. It is not limited to arguing the reasons in the dissent as to why there was evidence to support the charge." *Id.* at 110, 468 S.E.2d at 46. Thus, because the dissent in this case was based on the premise that there was sufficient evidence to support the charge of indecent exposure, the State should not be limited to arguing solely that buttocks are private parts. Accordingly, the State is free here to argue any reasoning it wishes in support of the proposition that the evidence was sufficient to support defendant's conviction, as that is the issue on appeal before this Court. Since no writ of certiorari is necessary to permit the State

67. N.C. R. APP. P. 16(b) provides: "Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review . . . or by a petition for writ of certiorari."

68. *Fly*, 348 N.C. at 559, 501 S.E.2d at 658.

69. Despite this conclusion, the supreme court stated in *Fly* that the court of appeals majority was correct that "buttocks are not private parts within the meaning of the statute." *Id.* at 561, 501 S.E.2d at 659. This statement is intended dictum which the court included in the opinion apparently for the sole purpose of justifying the court's conclusion that a person wearing a thong bikini is not guilty of indecent exposure, an issue which was not before this court in this case. See *id.* at 561, 501 S.E.2d at 659. For a more comprehensive analysis of *State v. Fly*, see Thomas L. Fowler, *Of Moons, Thongs, Holdings and Dicta: State v. Fly and the Rule of Law*, 22 CAMPBELL L. REV. 253 (2000).

to make such arguments, its petition for writ of certiorari is hereby denied.⁷⁰

VII. *STEINGRESS v. STEINGRESS* (1999)

*Steingress v. Steingress*⁷¹ also concerned the issue of the scope of the appeal of right when there is a dissent, but cited neither *Kaley* nor *Fly*. In *Steingress*, an equitable distribution case, the defendant appealed the district court's judgment to the court of appeals. The defendant's appellate brief was not, however, "in the form prescribed by Rule 26(g)" of the Rules of Appellate Procedure.⁷² Specifically, the text of defendant's brief was not double-spaced and it did not set out references to the assignments of error upon which her issues and arguments were based. In an unpublished opinion,⁷³ the court of appeals dismissed the defendant's appeal for her failure to file a brief in compliance with the Rules of Appellate Procedure. In a separate opinion labeled a dissent, Judge Walker agreed that the brief was not in compliance with the Rules, but that since he was able to determine which assignments of error were argued in the brief, he would vote to hear the appeal and tax the attorneys with the appropriate costs for violating the Rules.

Case law has established that adherence to the Rules of Appellate Procedure is mandatory and that failure to follow the Rules subjects an appeal to dismissal.⁷⁴ Consistent with this rule, the court of appeals' majority opinion in *Steingress* explicitly stated: "A violation of the requirements of Rule 26(g) is sufficient alone to subject the appeal to dismissal." Judge Walker's dissent did not disagree with this statement, nor did it claim that to dismiss the appeal for such a technical violation constituted an abuse of discretion. The "dissent" simply stated that Judge Walker would exercise his discretion differently from the other two judges that sat on the *Steingress* panel. Judge

70. *Fly*, 348 N.C. at 558-59, 501 S.E.2d at 657-58.

71. *Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999).

72. N.C. R. APP. P. 28(b).

73. N.C. R. APP. P. 30(e). Rule 30(e) allows the court of appeals to not publish an opinion if the opinion involved "no new legal principles" and would have "no value as precedent" if published.

74. See *Roberts v. First-Citizens Bank & Trust*, 124 N.C. App. 713, 715, 478 S.E.2d 809, 810 (1996) (typeface used in appellant's brief violated Rule 26 and was sufficient basis for dismissal of appeal); *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 148, 468 S.E.2d 269, 273 (1996) (stating that the specific limitations of Rule 26 will be "applied by this Court to briefs, petitions, notices of appeal, responses and motions filed after the date of this opinion."); *Atlantic Veneer Corp. v. Robbins*, 133 N.C. App. 594, 516 S.E.2d 169 (1999) (stating the Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal.); *Barnard v. Rowland*, 132 N.C. App. 416, 420, 512 S.E.2d 458, 462 (1999) ("It should be unnecessary to reiterate that our appellate rules are mandatory, . . . and that violation thereof subject an appeal to dismissal.").

Walker's separate opinion might, therefore, be viewed more accurately as a concurrence in the result because the judge appeared to agree that the majority acted within its discretion in dismissing for technical failure to comply with the Rules and that in such cases an appeal is properly dismissed when a majority of the court of appeals' panel vote to dismiss. Under this view, Judge Walker's declaration that he would have heard the appeal simply notes his disagreement with the majority on this issue, but does not specify any error in the majority's decision or the result in the case.

The defendant appealed, as a matter of right pursuant to section 7A-30(2), to the supreme court. The defendant admitted her brief failed to comply with the applicable rules, but argued that the application of the rules should be suspended in her case pursuant to Rule 2 of the Rules of Appellate Procedure to prevent manifest injustice. The supreme court, per Justice Lake, first found the case inappropriate for application of Rule 2 because the defendant failed to show the necessary exceptional circumstances of manifest injustice or significant issues of importance to the public interest.⁷⁵ The court then turned to the scope of review when the appeal is of right based on a dissent in the court of appeals. The court stated:

The dissenting opinion states in its entirety that although defendant's assignments of error do not comply with the rules, the dissenting judge is able to determine which assignments are argued in the brief and for that reason, "I vote to hear the appeal and tax each attorney with some appropriate costs for violating the Appellate Rules." Thus, it appears the dissenting opinion in this case presents no dividing issue and is merely a vote in favor of the exercise of discretion to suspend the rules. "When an appeal is taken pursuant to [N.C.G.S. § 7A-30(2)], the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent."⁷⁶

Nevertheless, Justice Lake looked for and found a possible issue of disagreement, not inconsistent with Judge Walker's dissent, stating

75. *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 300 (1999). See also *State v. Fennell*, 307 N.C. 258, 263, 297 S.E.2d 393, 396 (1982). The court stated:

[T]he rules of this Court, governing appeals, are mandatory and not directory. They may not be disregarded or set at naught (1) by act of the Legislature, (2) by order of the judge of the Superior Court, (3) by consent of litigants or counsel. The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. . . . The work of the Court is constantly increasing, and, if it is to keep up with its docket, which it is earnestly striving to do, an orderly procedure, marked by a due observance of the rules, must be maintained. When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties.

Id.

76. *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 300 (1999) (quoting *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984)).

that the court of appeals' majority abused its discretion in failing to apply Rule 2 to hear defendant's appeal despite the non-compliance with the rules. As stated above, this was not the express basis of Judge Walker's opinion in *Steingress*. Justice Lake then concluded that no such abuse of discretion had been shown, and affirmed the court of appeals' majority.

Justice Frye, joined by Justices Parker and Orr, dissented. The dissenters did not address the limited scope of review under section 7A-30(2), as discussed in the majority's opinion, Rule 16(b), or the one case cited by the majority, *Clifford v. River Bend Plantation, Inc.* Neither did the dissenters cite *Kaley* or *Fly*. However, the dissent did follow the *Kaley/Fly* analysis. Without focusing on the precise language of Judge Walker's dissent, the dissenters stated that "the question raised is whether dismissal of the appeal was proper."⁷⁷ As in *Kaley* and *Fly*, the *Steingress* dissenters ignored the precise basis specified in the court of appeals' dissent in order to broadly define the premise or question raised, and to allow consideration of any argument that supported the premise or question without regard as to whether that argument had been considered or addressed by the court of appeals' majority or dissenter. The *Steingress* dissent concluded that the matter should have been remanded to the court of appeals not because the majority abused its discretion in dismissing the case, but because before dismissing a case for substantial violation of the appellate rules, Rule 34(d) requires that the offending party be afforded the opportunity to show cause "why this most drastic sanction should not be imposed."⁷⁸

VIII. CONCLUSION

The 1983 amendment to Rule 16 provides that when the sole ground for the appeal of right is the existence of a dissent in the court of appeals, the supreme court's review is limited to "those questions which are . . . specifically set out in the dissenting opinion as the basis for that dissent." This language appears to clearly state a rule that the supreme court's scope of review is limited to the specific point of disagreement actually expressed by the dissenting court of appeals judge. Any doubt as to this meaning should have been resolved by the *Walker Grading & Hauling* case. *Walker* was a summary judgment case. The dissenting judge's unexplained dissent clearly implicated the broad premise or question as to whether summary judgment was proper. Nevertheless, *Walker* held that broad premise was not before the court under a section 7A-30(2) appeal of right. The only issue

77. *Steingress*, 350 N.C. at 67, 511 S.E.2d at 300 (Frye, J., dissenting).

78. *Id.* at 70, 511 S.E.2d at 302 (Frye, J., dissenting).

properly before the court on a section 7A-30(2) appeal of right was the specific point (or points) of disagreement actually expressed by the dissenting court of appeals' judge in his or her opinion.

Rule 16(b) appears to have been a logical response to the expansive interpretation of section 7A-30(2) adopted by *Williams v. Williams*. As discussed previously, most jurisdictions that have created intermediate appellate courts have eliminated or minimized appeals of right to their court of last resort. Narrowly limiting the scope of review of cases involving appeals of right from cases with lower court dissents, accomplishes the goal of maximizing the highest court's discretionary jurisdiction without sacrificing the error correction goal. Litigants are granted the right to one appeal in the court of appeals, with no right to further appeal, except for issues on which the court of appeals' panel was in express disagreement. Rule 16(b), as interpreted by *Walker* and subsequent cases,⁷⁹ thus accommodated both the protection of the error correction function and the expansion of the supreme court's law development function.

In *Kaley*, *Fly*, and *Steingress*, however, the supreme court has ignored or devalued both the language of and the purpose behind Rule 16(b) and the case law that focused on this language and explained the purpose behind Rule 16(b). In light of these cases, it is no longer clear that the court will follow the ruling in *Harris v. Maready* that an opinion improperly labeled a dissent confers no right to appeal under section 7A-30(2),⁸⁰ or the ruling in *Walker* that an unexplained dissent confers no right to appeal under section 7A-30(2).⁸¹ It does appear clear that in the wake of these three cases, the supreme court is willing to resolve these kinds of cases on the basis of arguments and theories that were never addressed by the lower courts.

For litigants whose cases have been resolved by a divided panel of the court of appeals, the question remains as to whether they have the right to the expanded scope of review as applied in *Kaley*, *Fly*, and *Steingress*, or if they should always seek discretionary review of any issues that were not expressly discussed in the dissent, but that could be considered reviewable as a part of the section 7A-30(2) appeal of right under *Kaley*, *Fly*, and *Steingress*. The conservative attorney will

79. See *supra*, note 50.

80. Although this issue was raised by the *Steingress* majority, it apparently was not deemed dispositive, as it should have been under *Harris*. Additionally, the three dissenting justices ignored the issue entirely despite its mention by the majority.

81. *Kaley* and *Fly*, and to some extent *Steingress*, reveal a supreme court willing to look beyond the specifics of the court of appeals' dissent to what *might* have been the basis for the dissent. If the supreme court is not limited to reviewing the points of disagreement actually expressed in the dissent, then there is no basis for the *Walker* holding—that is, a dissent need not be explained if all possible arguments are available regardless of whether or not they appeared in the dissent.

seek such discretionary review. Questions remain about the long-term impact of the *Kaley* and *Fly* analysis. The only supreme court case that cites *Kaley* is *Fly*, and *Fly* has yet to be cited. *Steingress* cited only the pre-*Kaley* and *Fly* case of *Clifford v. River Bend*. It may be that the court will reconsider its approach to this issue for it has been noted that individual justices of the North Carolina Supreme Court “have voiced their opinions that they would like to see the automatic right of appeal based on dissent eliminated by the General Assembly.”⁸² In the meantime, however, if the supreme court denies the motion for discretionary review, the appellant’s attorney may still seek to make the additional arguments as a part of the appeal of right, citing *Kaley* and *Fly* as authority.⁸³

If the supreme court determines, consistent with *Kaley* and *Fly*, that the section 7A-30(2) appellant has the right to supreme court review of all issues and arguments that the appellant can muster that support the broad question or premise raised by the dissent, regardless of whether these issues or arguments were the expressed basis for the dissent, then the court will have expanded the mandatory appellate jurisdiction of the supreme court, contrary to its interest in maximizing its law development function. If, on the other hand, the supreme court determines that the appellant lacks the right to insist on its review of these new issues and arguments but that the court can do so or not in its discretion, then the court will have created a new category of discretionary review that is not subject to any of the guidelines estab-

82. “By forcing the supreme court to hear all cases in which there is a dissent, it is believed that the court is forced to expend its limited time and resources hearing cases that do not involve novel or important claims. Consequently, the court would prefer to hear these cases on a discretionary basis.” NORTH CAROLINA TRIAL AND APPEAL, *Appellate Jurisdiction*, 11-3 (1998) (emphasis added).

83. *Fly* clearly states that the appellant is “free . . . to argue any reasoning it wishes” to support the proposition that the court finds is the issue before it. This presumably means that no permission from the court is required. If the parties are free to fashion any argument that addresses the “premise” of the sufficiency of the evidence to support the charges, then [in *State v. Fly*] the supreme court would presumably have considered a contention raised for the first time in the defendant’s brief to the supreme court, that the State’s evidence failed to show that Mrs. Glover was a person of the opposite sex (which is an element of the crime of indecent exposure). One danger of considering arguments that were not addressed in the lower courts, of course, is that the factual and legal issues may not have been fully developed below leading to incomplete understanding by the supreme court. In *State v. Fly*, the supreme court based its holding on its belief that the evidence supported the conclusions that Mr. Fly actually exposed his anus and that Mrs. Glover was in a position to see Mr. Fly’s genital organs even if she did not actually view them. Yet Mrs. Glover’s uncontradicted testimony was that she made no effort to avoid looking at Mr. Fly, that she saw everything that she was in a position to see, and that she did not see Mr. Fly’s anus or genital organs. *State v. Fly*, 348 N.C. 556, 559, 501 S.E.2d 656, 658 (1998). It seems clear that the parties and the court of appeals had concluded that there was no evidence that Mr. Fly had exposed his anus or genital organs as required by the indecent exposure statute. *Fly*, 127 N.C. App. 286, 289, 488 S.E.2d 614, 616 (1997) (“In this case there is no evidence that the defendant exposed his genital organs . . .”).

lished by section 7A-31 or by case law. Such a new category of discretionary review is incompatible with either of the two important functions of appellate courts. The litigant's appeal of right is the absolute right of the litigant to have certain matters reviewed. This right of review should not depend on the supreme court's discretion. The supreme court is also empowered, under Appellate Rule 2, and North Carolina General Statutes sections 7A-31 and 7A-32, to determine, even on its own motion, whether to hear certain cases or issues. If the court felt that the issues in *Kaley*, *Fly* and *Steingress* were not properly reviewable pursuant to Rule 2, sections 7A-31 or 7A-32, for instance because the issue lacked significant public interest or involved no legal principles of major significance, then the supreme court was not authorized to review these issues in its discretion.

In a 1934 case, on appeal to the supreme court, the appellants made several arguments as to why they should prevail on one issue. The supreme court refused to consider one of the arguments stating that its review of the record disclosed "that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount in the [North Carolina] Supreme Court."⁸⁴ Since 1934 this principle has been consistently cited by our courts⁸⁵ and restated as: "[W]e cannot review the case as the parties might have tried it; rather, we must review the case as tried below, as reflected in the record on appeal."⁸⁶ In section 7A-30(2) cases, expanding the theories that can be argued beyond those that were the express basis for the dissent, might also be viewed as a prohibited horse swap.⁸⁷

84. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

85. *See, State v. Sharpe*, 344 N.C. 190, 194-95, 473 S.E.2d 3, 5 (1996). The court stated: This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)) (citations omitted). Here, defendant argued to the trial court - expressly, extensively, and with citations of authority - only that the proffered evidence should be admitted under the state of mind and dying declarations exceptions to the rule against hearsay. The State responded only to those arguments, and the trial court expressly ruled on admissibility only under those grounds Under these circumstances, it is well settled in this jurisdiction that defendant cannot argue for the first time on appeal this new ground for admissibility that he did not present to the trial court.

Id.

86. *Tallent v. Blake*, 57 N.C. App. 249, 252, 291 S.E.2d 336, 339 (1982) ("The theory upon which the case was tried must prevail in considering the appeal, interpreting the record, and determining the validity of exceptions. . . . A party may not acquiesce in the trial of his case upon one theory below and then argue on appeal that it should have been tried upon another.").

87. Clearly, the appellate courts' interchangeable use of the terms "theory," "question," "proposition," and "issue," which may refer to distinct levels of legal reasoning or may be used as synonyms, is the source of some confusion in the cases cited herein which interpret Rule 16(b).