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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Ninth Circuit Court Judge

Case No. 2021-CP-10-5478
App. Case No. 2022-1146

J. K. Holmes,

Respondent,

v.

C.E. Holmes,

Appellant.

PETITION FOR REHEARING EN BANC ON MOTION TO RECONSTRUCT THE RECORD IN THE LOWER COURT ON REMAND WHERE, WITHOUT EXPLANATION, NO RECORDING FOR THE HEARING CAN BE LOCATED AND MOTION FOR RECONSIDERATION

The appellant respectfully submits petition for rehearing en banc and motion for reconsideration. The April 11, 2023, decision is reversible based on prejudicial error of material fact and law and is internally inconsistent. In addition, without adequate record, i.e., without reconstructing the lower court record, there can be no factual determination, and therefore, no factual support for decision. Without factual support or Record on Appeal jointly filed by the parties, the April 11, 2023, decision is reversible abuse of discretion. The record reflects there is no lawful notice of the hearing below. Under these facts, there is no authorization/jurisdiction for impermissible ex parte hearings, and without any record, there is inadequate record for meaningful review requiring reconstruction of the record in the lower court. This Honorable Court as well as adversely affected litigants have a right to an adequate record of the impermissible ex parte proceedings below. The intended beneficiaries of the requirement for a record of the proceedings below are adversely affected litigants including the appellant. But for wrongful lack of a recording of the impermissible ex parte hearing for transcription by the court reporter, the outcome should and would be in appellant's favor. To the extent there is ambiguity, the rule of lenity supports appellant's position. Accordingly, appellant requests reconstruction of the lower court record on remand for adequate record for determination herein as well as adequate record for meaningful appellate review. *See Clements v. Young*, 310 S.C. 73, 425 S.E.2d 63 (Ct. App. 1992) (appellant moved for reconstruction of the record on remand to the lower court where the hearing was unrecorded); Toal *et al., Appellate Practice in South Carolina*, 3rd Ed. (2016), p. 378. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects againsts "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4)

the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

INTRODUCTION

The Great Statesman, Rep. Elijah Cummings, may he rest in peace, observed, "When we're dancing with the angels, the question will be asked, in *2023*, what did we do to make sure we kept our democracy intact?" Emphasis supplied. Along with Rep. John Lewis, may God rest his soul, it is fitting to remember these lifetimes of steadfast bravery and unremitting courage. It is fitting, as well, to remember the beginnings of that democracy. The framers of our State and Federal Constitutions risked life, limb, and liberty to escape abuses by the British government.

Both State and Federal Constitutions were deliberately crafted to foreclose those abuses here. The framers did not need computers, smart phones, or tablets to discern the basic tenets of fundamental fairness and due process. An impartial decision-maker was seen as a non-negotiable requirement for preventing such abuses. The letter and spirit of our cherished Constitution categorically prohibit deprivation of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws. The right of trial by jury shall be preserved inviolate. As a corollary, another requirement, deemed mandatory and prohibitory, is that no single individual, whether British monarch or government official shall have absolute authority over a citizen's life, liberty, or property without being subject to the right of appeal with meaningful judicial review.

In the instant case, appellant timely reserves, preserves, does not waive, and expressly requests fundamental fairness and substantial rights including but not limited to, meaningful opportunity to be

heard at a meaningful time and full and fair trial by jury. There are examples of unrepresented parties and/or traditional filers subjected to a separate second-class system of so-called justice, where the South Carolina Rules of Court are gleefully and cavalierly used as a trap for the unwary. Significantly and materially, there is an abundant body of law decisively declaring separate is never equal. Systemic institutional biases are acknowledged, including but not limited to, prejudice against minorities along with favoritism under Alex Murdaugh's "rules of law." Unequal treatment and the like threaten our democracy and feed the appearance of the proverbial "rigged" system. This issue is of exceptional importance as it is capable of repetition, capable of evading judicial review, and incapable of adequate remedy on appeal. The following inscription is found at the Four Corners of Law in Charleston, SC: Where the rule of law ends, tyranny begins. The Judge J. Waties Waring Judicial Center is named for the renowned crafter of divine dissents lying in repose in Charleston, who must be turning over in his grave at the historically persistent lawlessness at the Four Corners of Law. As set forth more fully below, it is respectfully submitted our democracy depends on the basic tenets of fundamental fairness and due process just as much, if not more so, in this age of smart phones, tablets, computers, and extraordinary and unprecedented public health and affiliated economic emergencies ongoing and still unfolding.

DISCUSSION

Without being disagreeable, there is disagreement. Pursuant to Rule 219, another action is pending in the Family Court between the same parties for the same claim which should be considered en banc and which implicates jurisdiction and lack thereof. The family court has exclusive original jurisdiction over domestic matters pursuant to S.C. Code § § 63-3-510 to 530, including but not limited

to, marital property and retirement issues. Jurisdiction can be raised at any time and jurisdiction cannot be waived. The Family Court is the proper forum which has exclusive original jurisdiction over domestic matters herein. The Family Court attorney defendant herein filed this duplicitous and duplicative action in another court to make an end run around the jurisdiction of the Family Court. Defendant has unclean hands. The Family Court matter is subject to Family Court confidentiality and privacy which is hereby requested. This matter involves the attached copy of the Decree of Divorce, after almost 30 years and three children of the marriage, to which attorney defendant, with decades of experience, agreed on the record, into which that agreement was incorporated, from which defendant never appealed, and which is now the law of the case. See Rule 16, SCRFC ('The family court has jurisdiction of the parties and control of all subsequent proceedings from the time of service of the summons and complaint.'..." Wazney v. Wazney (S.C. App. 2019). The appellant respectfully requests reconsideration and petition for rehearing en banc for the April 11, 2023, decision which is based on error of material fact and law as well as internal inconsistencies. The appellant also requests reconstruction of the record on remand where, without explanation, the SCCA's recording for transcripts has a critical gap in the recording for this hearing despite finding recordings for essentially all other hearings on that day, one of many unexplained irregularities in this matter. Assuming the SCCA's statement regarding the missing gap in the recording is true, why was there unexplained delay with SCCA's explanation being sent only after dismissal despite petitioner's more than three timely transcript requests? Why did SCCA's unreasonable delay lead to wrongful sua sponte dismissal by a single government employee at the same SCCA address? The record reflects untrustworthy insider attorney defendant gaming the system. That lower court hearing was wrongfully held ex parte without the required notice to the adversely affected party, who on appeal is told that the South Carolina judicial system has a critical gap in the recording of that hearing which cannot be located and which cannot be transcribed. Remand is respectfully requested to reconstruct the record. Without the reconstructed record, there is no authorized determination of the facts, no lawful decision without the

reconstructed record, and any purported ruling is based on arbitrary and capricious speculation with inadequate basis or explanation for meaningful appellate review. Accordingly, the April 11, 2023, order is reversible based on error of material fact and law. *See, e.g., Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 146 (4th Cir. 2020) (remanded for lack of adequate explanation for meaningful review: "(T)he court disposed of the substance of the issue in a single sentence. See J.A. 252. We need more explanation to conduct meaningful appellate review of the court's disposition of the motion.").

Pursuant to Rule 219, SCACR, this matter should be heard en banc because the inapplicable less burdensome legal standard was wrongfully applied. Pursuant to S.C. Code § 14-8-220, *de novo* review is the standard of review at Rule 240(j), SCACR, appeal herein, which is different than the less burdensome standard of review for Rule 221, SCACR, rehearing. The proper more burdensome de novo standard of review was not applied and the April 11, 2023, order is reversible as a matter of law because a less burdensome legal standard was wrongfully applied. Ambiguity regarding the proper legal standard pursuant to Rule 240(j), SCACR, appeal is a denial of substantial rights, including but not limited to, due process. Rule 240(j), SCACR, appeal is a S.C. Code § 14-8-220 appeal of an order by an individual judge and the proper legal standard is *de novo*. S.C. Code § 14-8-220. To the extent there is ambiguity, the rule of lenity supports appellant's position. It is well established that the Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to provide for review of decisions by a single judge. See Rule 27(c), FRAP. Pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR, the case stands before the appellate court as if it had never been decided. See *Griffin v. State*, 763 N.E.2d 450 (Ind.2002) (citing 5 Arch N. Bobbitt & Frederic C. Sipe, *Bobbitt's Revision, Works' Indiana Practice* § 111.3 (5th ed.1979)). See *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142, 144, 50 S.Ct. 70, 74 L.Ed. 233; *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15, 51 S.Ct. 8, 75 L.Ed. 135 (The District Judge recognized the rule that if the court was warranted in taking jurisdiction and the case fell within section 266 of the Judicial Code (28 USCA § 380), a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the

merits might be). "The prior denial of the transfer motion was the order of a single judge. Federal Rule of Appellate Procedure 27(c) provides that 'an action of a single judge may be reviewed by the court.' That order is thus not binding on us as law of the case." *Thompson v. Merit Sys. Protection Bd.*, 772 F.2d 879, 882 (Fed. Cir. 1985). Accordingly, the April 11, 2023, opinion is reversible as a matter of law because the more burdensome legal standard of review under these circumstances for Rule 240(j), SCACR, appeal was not applied.

Pursuant to Rules 219 and 203, SCACR, the opinion is internally inconsistent because it relies on the pending lower court Rule 59(e), SCRCP, motion but overlooks or misapprehends the fact that the pending Rule 59(e), SCRCP, motion voids jurisdiction for the July 14, 2022, entry of judgment herein. Jurisdiction can be raised at any time and jurisdiction cannot be waived. *See* Rule 59(e), SCRCP ("the trial judge shall retain jurisdiction"). Unlawfully entering a judgment after a timely filed post-trial motion as in this case is appealable because there is no jurisdiction for such unauthorized entry and because appellant is denied substantial rights including but not limited to, mode of trial as well as substantial rights akin to mode of trial which must be appealed immediately. Appealability of wrongful July 14, 2022, entry of judgment by a clerk is at issue where a single government employee in the lower court wrongfully acted pursuant to direct or indirect impermissible ex parte contacts. Instead, the record reflects Rule 38, SCRCP, notice requiring the clerk's office to transfer the matter to the jury trial roster which is hereby requested. Rule 39, SCRCP. Accordingly, the wrongful July 14, 2022, entry is void for lack of jurisdiction and should be vacated and/or reversed.

Moreover, pursuant to SCACR, including Rule 219, SCACR, this matter should be heard en banc because dismissal of this appeal is not properly before the court. Moreover, jurisdiction can be raised at any time and jurisdiction cannot be waived. Due process requires including but not limited to, notice and meaningful opportunity to be heard at a meaningful time. These are matters of great public importance. Sua sponte dismissal of appeal at the behest of untrustworthy Family Court attorney defendant, so called "officer of the court," who is currently respondent in the pending Family Court

matter, cannot pass constitutional muster. Sua sponte dismissal herein cannot pass constitutional muster at the behest of untrustworthy Family Court attorney defendant, so called "officer of the court," and current Family Court respondent, without filing a motion to dismiss and paying the filing fee which denies the other side meaningful opportunity to be heard at a meaningful time and provides inadequate explanation and provides no factual support or jointly filed ROA for meaningful appellate review. Further, the State and Federal Constitutions provide, including but not limited to, Constitutional guarantees, protections, and substantial rights under the circumstances. Appellant is prejudiced thereby. But for untrustworthy Family Court attorney defendant failing to file and pay the filing fee for a motion to dismiss which every other litigant must pay, the outcome should and would be in appellant's favor. Accordingly, the April 11, 2023, opinion should be reversed. See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988). See also Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 251 n.16 (2002).

Further, pursuant to Rule 219, SCACR, en banc consideration is indicated where a single government employee researched outside a jointly filed ROA, which was not yet due, and failed to provide the adversely affected party with the information/documentation he relied upon. There are multiple apparent inaccuracies/irregularities below. Reliance on a public index with inaccuracies/errors without notice and opportunity to respond is challenged and the appellant, as a traditional filer, respectfully requests a printed copy of the purported "record" and information researched outside the record, cited, and relied upon due to apparent multiple inaccuracies/irregularities below. Furthermore, the propriety of failing to copy traditional filers with hard copy of electronic research outside the record

which the court relied on herein is challenged as well as failing to provide hard copy of, for example, emails to and from litigants who are not traditional filers because neither can pass constitutional muster. As just one example of the misrepresentations and/or irregularities in the lower court herein, there was no required notice to the adversely affected party, the undersigned, of that hearing and no recording of that hearing for transcription can be located. Pursuant to Rule 207, SCACR, appellant timely requested the transcript from SCCA multiple times, however, there was no timely response from SCCA. On or about October 17, 2022, appellant timely made another request for transcript, again without response from SCCA. Only after filing a motion for a response herein and paying $50.00 filing fees did the SCCA respond stating SCCA was unable to locate a recording of any hearing in the case below. In contrast, the SCCA's ex parte email response to the ex-husband attorney defendant shows SCCA'a immediate response when untrustworthy Family Court attorney defendant requested the transcript without timely copying the other side. Despite locating recordings for essentially all other hearings in other cases that day, there is a critical gap in the recording for this matter without explanation. The appellant respectfully submits substantial rights including mode of trial and those akin to mode of trial are timely raised and requested and require reconstruction of the record in the lower court of that impermissible ex parte hearing. The record reflects unequal treatment and irregularities in this matter supporting review. Appellant is prejudiced thereby. But for SCCA's unexplained gap in the recording for the transcript of hearing, the outcome would and should be in appellant's favor. Decades-long insider Family Court attorney defendant, so-called officer of the court, has unclean hands. See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

The record reflects further unequal treatment for the proverbial decades-long insider Family Court attorney defendant who engaged in direct or indirect impermissible ex parte contacts with the court and the SCCA while breaching professional responsibilities to, including but not limited to, copy the appellant. Respondent is hereby requested to timely copy the undersigned on all contacts herein whether electronic, written, email, text, oral, or other and to provide those copies from the date the case was filed, up to and including the present, and going forward. It is respectfully requested that this Honorable Court issue its order for compliance with the SCACR and the professional responsibility to copy the other side.

In addition, the record reflects unequal treatment regarding request for transcript. Despite three or more timely requests for transcript by the appellant, there was no response UNTIL AFTER DISMISSAL. At the same time, with lack of transparency and while being hidden from the undersigned, the decades-long insider untrustworthy attorneys failed to copy the undersigned on their transcript request which received immediate response BEFORE DISMISSAL.

Moreover, appellant had to file a motion and pay a filing fee just to get a delayed response to three or more timely transcript requests while SCCA's unexplained delays led to wrongful dismissal. The record reflects direct or indirect impermissible ex parte contacts with the court by untrustworthy attorneys without filing the required motion to dismiss and without paying the filing fees required of other attorneys thereby denying the appellant, including but not limited to, notice and meaningful opportunity to be heard at a meaningful time.

Further, pursuant to Rule 219, SCACR, and in violation of the SCACR Rules, dismissal is not properly before the court: The SCACR Rules do not allow dismissal based on issues that have not been raised by the parties which should be heard en banc. The SCACR do not allow judges to act as counsel of record for the ex-husband Family Court attorney defendant in the pending Family Court matter and for sua sponte dismissal based on pure speculation regarding questions that have yet to be presented. There is no jointly filed ROA, affidavit, or factual basis in support of the opinion herein which requires

reconstruction of the record. Without factual support, the order is reversible abuse of discretion. Accordingly, the April 11, 2023, order is reversible as a matter of law, judicial overreach, and/or abuse of discretion.

The April 11, 2023, opinion overlooks or misconstrues the prior sua sponte order by a single government employee which apparently relies word-for-word on Chief Justice Toal's Second Edition of *Appellate Practice in South Carolina* which is now updated in the 3rd Edition with new precedent. Toal *et al., Appellate Practice in South Carolina*, 2d Ed. (2002), p. 94. The first case cited in the opinion is inapposite because it applies to mortgage foreclosures. *No. Carolina Fed. S. & L. Ass'n. v. Twin States Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986). Mortgages include agreement to mortgage foreclosure and there is no mortgage foreclosure in the instant case. Referral can also be entered on consent. There is no consent in this case and in fact, there is timely Rule 38, SCRCP, notice requiring the clerk to transfer the matter to the jury docket. Rule 39, SCRCP. The second case cited supports appellant's position because appellant appeals deprivation of a party's right to trial by jury which must be immediately appealed. *Williford v. Downs*, 265 S.C. 319, 218 S.E.2d 242 (1975). Deprivation of the party's right to trial by jury must be immediately appealed. *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985).

Former Chief Justice Toal's Third Edition provides updated controlling precedent. Toal *et al., Appellate Practice in South Carolina*, 3rd Ed. (2016), p. 155-157. At issue is denial of the appellant's right to trial by jury in a law case. *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E. 2d 81 (2008). "[S]ome minimal inquiry will always be necessary on the part of the appellate court considering the appealability of an order which is alleged to have deprived a party of a mode of trial." *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). "**These cases not only permit, but indeed require, immediate appeal.**" *Id.*(emphasis supplied). This updated precedent mandates "some minimal inquiry" is necessary and must e immediately appealed. *Id.* It is respectfully submitted governing case law requires reconstruction of the record below to satisfy the mandate for

"some minimal inquiry." *Id.* The matter herein includes counterclaims with jury demand. It is respectfully submitted that reconstruction of the lower court record is required in order to comply with new precedent and governing case law. Accordingly, the April 11, 2023, and December 9, 2022, opinions should be reversed pending reconstruction of the lower court record which is hereby requested.

Significantly and materially, pursuant to Rule 219, SCACR, the order entered December 9, 2022, is a violation of Legislative intent that a panel of judges, not a single individual, finally determine an appeal (see, e.g., Rule 240(j), SCACR) as well as a violation of the party presentation rule which should be considered en banc. S.C. Code § 14-8-220. The American judicial system is an adversary system, not based on inquisitors: **In order to ensure the integrity of the judicial system,** the norms of that adversarial system prohibit ex parte communications and outside factual research which undercut the appearance of a disinterested court. In both civil and criminal cases, in the first instance and on appeal, the principle of party presentation is followed: The parties frame the issues for decision and the courts have the role of **neutral arbiter** of matters the parties present. *Greenlaw v. United States,* 554 U.S. 237, 243 (2008) (emphasis supplied). In this case, the record reflects a single government employee authored a wrongful sua sponte opinion based on outside-the-record factual research while functioning as the ex-husband Family Court attorney defendant's counsel of record, not a neutral arbiter. As such, the record reflects the wrongful sua sponte order of a single individual is reversible abuse of discretion. The ex-husband Family Court attorney defendant's standard-operating-procedure (SOP) parallels Alex Murdaugh's "the rules don't apply to me" SOP which was used to entice the judiciary to rubber-stamp his wrongdoing. Similarly, untrustworthy officers of the court herein entice sua sponte wrongdoing thereby denying the other party an opportunity to be heard at a meaningful time. Sua sponte disposition requires, at a minimum, briefing prior to dispositional decision and the orders herein are reversible error for this reason alone. Accordingly, the April 11, 2023, and December 9, 2022, opinions should be reversed and reconstruction of the record below is

needed both as factual support for any decision herein and for adequate record for meaningful appellate review hereafter. *See Clements v. Young*, 310 S.C. 73, 425 S.E.2d 63 (Ct. App. 1992) (appellant moved for reconstruction of the record on remand to the lower court where the hearing was unrecorded).

In addition, pursuant to Rule 219, SCACR, and S.C. Code § 14-8-220, the appellant respectfully submits Rule 240(j), SCACR, petition for rehearing herein is *de novo* review which does not include the individual judge who signed the order that is the subject of the Rule 240(j), SCACR, review which should be considered en banc without the participation of the single individual who signed the wrongful, unsupported sua sponte dismissal without notice or briefing. Appellant filed the appeal pursuant to Rule 240(j), SCACR, for appeal of a single judge's order. S.C. Code § 14-8-220 provides statutory authority for Rule 240(j), SCACR, and provides for **appeal** of the order of a single judge. S.C. Code § 14-8-220. Meaningful review requires that a judge not directly or indirectly participate in appeal of his or her own order. Occasionally, a recently appointed Appellate Court Judge or recent Supreme Court Justice will find him or herself in the position of potentially reviewing an Order that he or she authored. In these cases, the Judge or Justice will recuse him or herself from the position of potentially reviewing an order that he or she authored. A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Rule 3(E)(1), CJC, Rule 501, SCACR.* Disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978) (emphasis supplied). Appellant reasonably questions impartiality. In the *Rice* case, then Chief Judge Haynsworth further ruled that, "For many years a federal judge has been prohibited from sitting to hear or determine an appeal in a case or issue tried by him. 28 U.S.C.A. § 47. To say the least, it would be unbecoming for a judge to sit in a United States Court of Appeals to participate in the determination of the correctness, propriety and appropriateness of what he did in the trial of the case. After rendering decisions, some judges remain open minded, and some are unreluctant to confess previous error, but **a reasonable person has a reasonable basis to question the impartiality** of a judge who sits in a United States Court of Appeals

to review his own decision as a trial judge." *Id.* At 1117 (emphasis supplied). The inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's impartiality, not whether the judge is in fact impartial. *Id.* at 1116. Granted, this is a Fourth Circuit case, but the principle from this oft-cited case is well-stated, sound, and universally accepted as logical and fair. "There is another way to look at the case, however: as one in which the losing litigant appeals from a ruling by Judge X to an appellate panel that includes Judge X; and it is considered improper—indeed it is an express ground for recusal, see 28 U.S.C. Sec. 47--**in modern American law** for a judge to sit on the appeal from his own case. On this ground the Fourth Circuit held in *Rice* that section 455(a) required the district judge to recuse himself. [*Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).] We agree with this result." *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989) (emphasis supplied). Similarly, in this case, "(t)o say the least, it would be unbecoming for a judge" to sit on the Rule 240(j), SCACR, appeal of his own decision. *Rice v. McKenzie*, 581 F.2d 1114, 1117 (4th Cir. 1978). Moreover, under these facts and in consideration of Legislative intent and the overarching principles incorporated in the State and Federal Constitutions by the framers, due process requires that the appellate court judge who individually signed the sua sponte dismissal order after outside-the-record factual research not participate, directly or indirectly, on appeal of the decision which is the subject of the Rule 240(j), SCACR, *de novo* appeal. Ambiguity regarding the requirement of non-participation on Rule 240(j), SCACR, appeal is a denial of due process. To the extent there is ambiguity, the rule of lenity supports appellant's position. Accordingly, Rule 240(j), SCACR, *de novo* appeal and due process require non-participation by the individual judge who signed the wrongful sua sponte dismissal based on outside-the-record factual research.

Former Justice Sandra Day O'Connor warned the public about the importance of judicial independence. She wrote "... many Americans today do not see the need for independent judges. Many prefer a judiciary that acts merely as a reflex of popular will." *Judicial Independence and 21st Century Challenges*, Sandra Day O'Connor, The Bencher, July/August 2012. As she explained, "The reason

why judicial independence is so important is because **there has to be a safe place** where being right is more important than being popular; where fairness triumphs strength. That place, in our country, is the courtroom. It can only survive so long as we keep out political influences." *Id.* (emphasis supplied). Public policy, legislative intent, statutory authority, governing case law, State and Federal Constitutional law, the Rules of Court, the SCACR, and fundamental fairness support Rule 219, SCACR, en banc consideration of Rule 240(j), SCACR, appeal and application of the *de novo* legal standard herein.

In sum, the order dated April 11, 2023, misapprehends, overlooks, and/or misconstues material fact and law. Appellant respectfully objects. This matter is of great public importance. This matter involves the attached copy of the Decree of Divorce to which the Family Court attorney defendant, with decades of experience, agreed on the record, into which that agreement was incorporated, from which defendant never appealed, and which is now the law of the case. See Rule 16, SCRFC ('The family court has jurisdiction of the parties and control of all subsequent proceedings from the time of service of the summons and complaint.'..." Wazney v. Wazney (S.C. App. 2019). The family court has exclusive original jurisdiction over the domestic matters herein including marital property and retirement pursuant to S.C. Code § § 63-3-510 to 530. This matter is currently pending in the Family Court subject to confidentiality and privacy which is hereby requested. It is undisputed that the family court can order child support to continue beyond eighteen years. *SCDSS Child Support v. Mangle*, 633 S.E.2d 903 (S.C. App. 2006). See S.C. Code § 20-7-420(A)(17). Defendant's tax returns confirm support payments made by him pursuant to written agreement and subject to S.C. Code § § 63-3-510 to 530. Legislative intent, exclusive original jurisdiction pursuant to S.C. Code § § 63-3-510 to 530, and the plain language of the Decree (copy attached) to which the ex-husband attorney defendant agreed and which is now the law of the case all provide exclusive jurisdiction over marital property and retirement issues without prejudice in the Family Court. To the extent there is ambiguity, the rule of lenity supports the undersigned's position. Accordingly, the April 11, 2023, order is reversible as a

matter of law based on error of material fact and law.

CONCLUSION

For the foregoing reasons and for substantial justice affecting substantial rights, the undersigned respectfully requests this Court grant this petition for rehearing en banc and motion for reconsideration with abeyance pending resolution. The appellant also makes motion with abeyance for reconstruction of the record on remand where, without explanation, the SCCA's recording for transcripts has a critical gap in the recording for the hearing below despite finding recordings for essentially all other hearings on that day, one of many unexplained irregularities in this matter. As the adversely affected party appealing the wrongful ex parte hearing, appellant respectfully requests reconstruction of the record in matters adversely affecting the appellant and respectfully submits dismissal is premature pending reconstruction of the record below. Accordingly, the April 11, 2023, order should be reversed.

Respectfully submitted,

C. Holmes
POB 187
S.I., SC 29482-0187
843.883.3010

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT OF THE
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 03-DR-10-3935
CYNTHIA ELAINE HOLMES,	)	
Plaintiff,	)	
-vs-	)	DECREE OF DIVORCE
JAMES KEVIN HOLMES,	)	
Defendant.	)	

Trial Judge:	F.P. Segars- Andrews
Court Reporter:	Sharon D. Jones
Plaintiff Attorney:	Cynthia Elaine Holmes, pro se
Defendant's Attorney:	J. Kevin Holmes, pro se
Date of Hearing:	January 30, 2004

This matter came to be heard before me at Charleston, South Carolina on January 30, 2004. Both parties were present at the hearing. Neither party was represented by legal counsel. The purpose of the hearing was to obtain divorce and preserve all other issues pending mediation or subsequent hearings on the merits.

The Court inquired of both parties whether there was any chance of a reconciliation of the marriage. Both parties responded that no reconciliation was possible.

Based upon the testimony of the Plaintiff and Cassandra Alberesius and the documentary evidence admitted into evidence without objection, the Court makes the following findings of fact:

FIRST: The Plaintiff and Defendant are residents of the County of Charleston, State of South Carolina and have been for more than one (1) year prior to the commencement

of this action.

SECOND: The Plaintiff and Defendant last resided together as husband and wife in the County of Charleston, State of South Carolina.

THIRD: The Plaintiff and Defendant were lawfully married on September 4, 1978, in the State of Georgia and of this marriage three (3) children have been born:

FOURTH: The Defendant has committed adultery.

FIFTH: There is no fraud or collusion between the parties in the bringing of this action.

Based upon the foregoing findings of fact, the Court concludes:

FIRST: This Court has jurisdiction of the parties and subject matter of this action.

SECOND: More than 90 days have elapsed since the filing of the Complaint.

THIRD: The Plaintiff is entitled to a divorce on the statutory grounds of adultery.

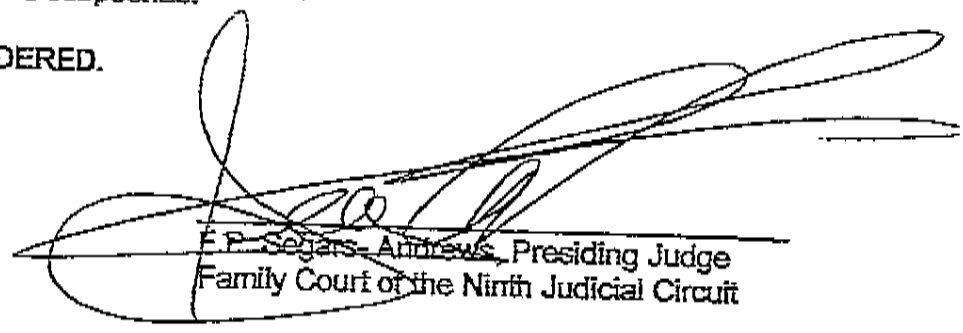
IT IS HEREBY ORDERED that the Plaintiff is hereby granted a divorce, *a vinculo matrimonii*, on the statutory grounds of adultery; and

IT IS HEREBY ORDERED that all other issues including, but not limited to, temporary and permanent custody, child support, alimony, and the equitable division of marital property and retirement accounts are reserved and preserved pending discovery, mediation, and further Court hearings, if necessary; and

IT IS HEREBY ORDERED that the parties may engage in discovery under the Rules of Civil Procedure including interrogatories, requests for production, requests for

admissions, depositions and subpoenas.

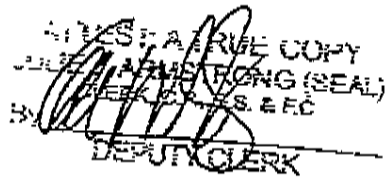
AND IT IS SO ORDERED.



E. P. Segars-Andrews, Presiding Judge
Family Court of the Ninth Judicial Circuit

Charleston, South Carolina

30 day of January, 2004.



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Apr 21 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Ninth Circuit Court Judge

App. Case No. 2022-1146

J. K. Holmes,

Respondent,

v.

C.E. Holmes,

Appellant.

PROOF OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for the respondent by regular first class mail postage pre-paid on this date at this address: POB 31265, Chas., SC 29417.

Dated April 21, 2023

C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

Hard copy
available
on request -

Thank You!

Fax Cover:

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