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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
The Honorable ALJ Durden

ALC Case No. 22-ALJ-17-0398-CC

J.K. Holmes and C.C. Holmes,

Appellants,

v.

Chas. Cty. Assessor,

Respondent.

MOTION FOR RECONSIDERATION AND MOTION FOR ABEYANCE OF TIME LIMITS PENDING RESOLUTION AND, IF DENIED, RULES 221 AND 240, SCACR, PETITION FOR REHEARING EN BANC AND MOTION FOR ABEYANCE OF TIME LIMITS PENDING RESOLUTION

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The taxpayers timely motion for reconsideration of the May 30, 2024, ex parte dismissal of the party's appeal without due process and without notice and opportunity to be heard at a meaningful time before ex parte dismissal and motion for abeyance of time limits pending resolution. If denied, Rules 221 and 240, SCACR, petition for rehearing en banc is submitted with motion for abeyance of time limits pending resolution. Accordingly, the taxpayers respectfully request the motions and petition be granted.

DISCUSSION

Without being disagreeable, there is disagreement with the ex parte May 30, 2024, dismissal of the taxpayer's appeal. The caption is the same as it appears below, the caption reflects the taxpayers who protested below, and the taxpayers are proper parties to appeal herein. The State Constitution provides that no person "shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard … and he shall have in all such instances the right to judicial review." S.C. Const. Art. I, § 22. Significantly and materially, the Legislature intended to provide and the letter and spirit of the applicable statutes including S.C. Code § 12-60-2530, provide for taxpayer protections and fundamental fairness. The Legislature mandated statutory protections knowing that lack of fundamental fairness breeds unrest. In fact, that is what led to the birth of this great nation. There is lack of statutory compliance, lack of fundamental fairness, and denial of substantial rights. The taxpayers are prejudiced thereby. But for lack of statutory compliance, lack of fundamental fairness, and/or denial of substantial rights, the outcome should and would be in the taxpayers favor. In the interests of the public, overreaching attempts to ex parte dismiss meritorious taxpayer protests with inadequate factual basis for meaningful review and without a determination on the merits cannot pass

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constitutional muster. See *Pillay v. INS*, 45 F.3d 14 (2nd Cir. 1995). Accordingly, the motions and petition should be granted. "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).

As a threshold matter, the record reflects no motion to dismiss has been filed in this appeal and objection, if any, was waived below. See Rule 12, SCRCP. The record reflects the taxpayers are denied substantial rights including required notice, lack of meaningful opportunity to be heard at a meaningful time, lack of Record on Appeal (ROA), and lack of affidavit or any factual support for ex parte dismissal. The ex parte May 30, 2024, dismissal undercuts appearance of a disinterested court and violates State and federal statutory and Constitutional mandates for transparency, even-handedness, and fundamental fairness regarding taxpayer protests in the public interest. Accordingly, reversal of the May 30, 2024, ex parte dismissal is respectfully requested.

The taxpayers reserve, preserve, and do not waive any rights, privileges, or protections. Pursuant to S.C. Code § 1-23-380, the taxpayers are owners who are aggrieved and recognized as proper parties below without objection. S.C. Code § 1-23-310(5). To the extent there is ambiguity, the rule of lenity supports the taxpayers' position. Accordingly, reversal of the May 30, 2024, ex parte dismissal is respectfully requested.

By analogy, Rule 241, SCACR, provides:

An *ex parte* order shall issue **only if**:
(A) it clearly appears from specific facts shown by affidavits or included in the verified petition that immediate and irreparable injury, loss or damage will result before the opposing party can respond; and
(B) the moving party's attorney certifies in writing, as an officer of the court, the efforts which have been made to give notice, or the reasons supporting the claim that notice should not be required. Rule 241(d)(6), SCACR (emphasis supplied).

The record reflects there is inadequate factual support for the ex parte May 30, 2024, dismissal and no affidavits or verified petition claiming immediate and irreparable injury, loss or damage will result before the opposing party can respond. Moreover, the record reflects there is no required notice and no meaningful opportunity for the adversely affected taxpayers to respond at a meaningful time before dismissal. Significantly and materially, the record reflects there is no moving party, no motion, and there is no assertion of exigent or other circumstances to support a claim that notice should not be required. Accordingly, reversal of the ex parte May 30, 2024, dismissal is respectfully requested.

Further, Article 1, section 9 of the South Carolina Constitution provides "[A]ll courts shall be public." S.C. Const. art. I, sec. 9. By analogy, new governing precedent, in the *Price* case, *infra*, provides that if there is no factual record for the ex parte order it is axiomatic there can be no meaningful judicial review. As such, there is no statutory authority which renders the ex parte order void/voidable. "Section 14-5-10 of the South Carolina Code (2017) provides, 'The circuit courts herein established shall be courts of record . . . .' The circuit court's hearing ... must be recorded." *State v. Jeroid J. Price*, S.C. Sup Ct. App. Case No. 2023-000629 filed Sept. 6, 2023. *See Orpiano v. Johnson*, 687 F.2d 44 (4th Cir. 1982) ("(F)ailure even to have a transcript filed ... was reversible error."). Accordingly, reversal of the ex parte May 30, 2024, dismissal is respectfully requested.

The unauthorized ex parte dismissal wrongfully ends the appeal for the taxpayer who is a proper party below without objection and who is holder of an undivided interest in the family home as marital property. By analogy, the Fourth Circuit has rejected the argument that a former spouse's undivided interest in the family home is "cut off." See In re Roberge, 188 B.R. 366 (E.D.Va.1995) (unpublished), aff'd, 95 F.3d 42 (4th Cir. 1996). The owners of an undivided interest are proper parties.

Ex parte dismissal wrongfully ends the appeal for proper parties who are holders of an undivided interest in the marital property. Accordingly, reversal of the ex parte May 30, 2024, dismissal is respectfully requested.

In addition, the taxpayers are owners who are proper parties. The ex parte dismissal wrongfully ends appeal for proper parties. The term "party" is defined as each person named or admitted as a party below, as in this case. S.C. Code § 1-23-310(5). The Legislature created the Administrative Law Court (ALC) to provide an objective body to hear contested cases arising out of state agency decisions. The purpose of the ALC is to provide due process of law when a right to a hearing is specifically granted as in this case by statute or regulation and by the South Carolina and United States Constitutions. S.C. Code § 1-23-600. S.C. Code § 1-23-610 provides for judicial review. Toal *et al., Appellate Practice in South Carolina* (2016), Third Ed., p. 41. Accordingly, reversal of the ex parte May 30, 2024, dismissal is respectfully requested.

Moreover, the ex parte dismissal appears to violate the SCACR. Pursuant to Rule 260(c), SCACR, the taxpayer has not motioned for dismissal and has not been provided notice and opportunity to respond at a meaningful time. As such, the dismissal is void/voidable. Further, Rule 265(c), SCACR, provides that the appellate court may not on its own order substitution of parties except for death or incompetency: "(F)or any reason other than death or incompetency, substitution SHALL be by motion." Rule 265(c), SCACR (emphasis supplied). "Substitution for any other reason must be by motion to the appellate court. Rule 265(c), SCACR." Toal *et al., Appellate Practice in South Carolina* (2016), Third Ed., p. 377. The record reflects there is no death or incompetency and no "motion to the appellate court." Rule 265(c), SCACR. The ex parte dismissal is in violation of this Honorable Court's own SCACR Rules. Accordingly, reversal of the ex parte May 30, 2024, dismissal is respectfully requested.

"Subject to the statutory law, the Supreme Court shall make rules governing the practice and

procedure" in all courts of the state. S.C Const. art. V § 4. The statute, S.C. Code § 14-8-220, provides for de novo review of the order by a single individual dismissing meritorious taxpayers appeals. That statute provides as follows:

S.C. Code § 14-8-220

SECTION 14-8-220. Power of Court and judges to administer oaths and writs; **appeal.**

The Court and each of the judges thereof shall have the same power at chambers or in open court to administer oaths, and to issue such remedial writs as are necessary to give effect to its jurisdiction. **An appeal shall be allowed from decision of any one judge to a panel of the Court.** S.C. Code § 14-8-220 (emphasis supplied).

S.C. Code § 14-8-220 provides protections for individual judges as well as protections for the integrity of the courts. Significantly and materially, there is no record on appeal (ROA), no affidavit, no factual basis, or adequate record supporting ex parte dismissal herein. The taxpayers respectfully request consideration of dismissal be deferred to provide, including but not limited to, full, fair, and adequate record for meaningful review. Moreover and by analogy, the Federal Rules of Court, on which the State Rules of Court are based, are loud and clear on this issue in Rule 27(c), FRAP:

(c) Power of a Single Judge to Entertain a Motion.

A *court of appeals* judge may act alone on any motion, but **may not dismiss** or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. **The court may review the action of a single judge.** Rule 27(c), FRAP (emphasis supplied).

Accordingly, the ex parte dismissal by an individual judge overlooks or misapprehends material facts and law, it is internally inconsistent, it fails to comply with the SCACR, it violates the letter and spirit of the underlying statutory authority in S.C. Code § 14-8-220 as well as Legislative intent, and it is unsupported without ROA and/or adequate record for meaningful review. Accordingly, reversal of the ex parte May 30, 2024, dismissal is respectfully requested.

The petition for rehearing en banc, if any, should be *de novo* review which does not include the individual who signed the ex parte taxpayer dismissal. Meaningful review requires that a judge not

participate when his or her own order is appealed. 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 that case. 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. *Ríce v. McKenzíe*, 581 F.2d 1114, 1116 (4th Cir. 1978) (emphasis supplied). Impartiality reasonably questioned herein. 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 *participation* 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. [*Ríce v. McKenzíe*, 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 the individual judge to participate. *Ríce v. McKenzíe*, 581 F.2d 1114, 1117 (4th Cir. 1978). Moreover, in

consideration of the overarching principles incorporated in the State and Federal Constitutions by the framers including but not limited to due process, *de novo* review is indicated. Ambiguity in and of itself regarding the requirement of non-participation and/or *de novo* review is a denial of due process. To the extent there is ambiguity, and the taxpayers respectfully assert there is, the rule of lenity supports the taxpayers position. Accordingly, reversal of the ex parte May 30, 2024, dismissal is respectfully requested.

Materially, *de novo* review is the standard of review pursuant to S.C. Code § 14-8-220, which is different than the standard of review for Rule 221, SCACR, rehearing. Pursuant to S.C. Code § 14-8-220, the proper legal standard is *de novo* for appeal of an order by an individual judge. S.C. Code § 14-8-220. 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 Local Rule 27(e), FRAP. Pursuant to S.C. Code § 14-8-220, 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). Significantly and materially in that case, the denial of a transfer motion does not end or finally determine a case. Pursuant to S.C. Code § 14-8-220, the necessary element triggering *de novo* review is that the order is signed by a single judge. Accordingly, the legal standard of review for appeal of the ex parte dismissal signed by a single judge under the facts is *de*

novo. Accordingly, reversal of the ex parte May 30, 2024, dismissal is respectfully requested.

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 *de novo* review and non-participation by the individual who signed the ex parte May 30, 2024, dismissal.

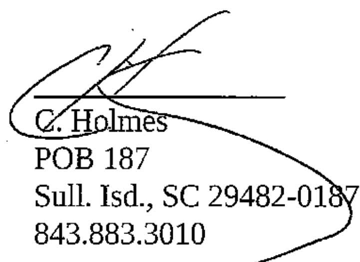
The record reflects the ex parte May 30, 2024, dismissal by an individual judge is unnoticed, it is out of nowhere, there is no motion, its source is undisclosed, and it denies substantial rights including due process, notice and meaningful opportunity to be heard at a meaningful time before *ex parte* dismissal. To the extent the individual judge is influenced by impermissible direct or indirect ex parte contact, that contact is unauthorized. Accordingly, reversal of the ex parte May 30, 2024, dismissal is respectfully requested. See *Burgess v. Stern*, 311 S.C. 326, 428 S.E.2d 880 (1993).

To the extent there is ambiguity, the rule of lenity supports the taxpayers position. The taxpayers are prejudiced thereby. But for wrongful denial of substantial rights including due process, the outcome should and would be different in the taxpayers favor. Accordingly, reversal of the ex parte May 30, 2024, dismissal is respectfully requested.

CONCLUSION

For substantial justice affecting substantial rights and for good cause, the taxpayers timely motion for reconsideration of the ex parte May 30, 2024, dismissal of the taxpayers appeal without due process and without notice and opportunity to be heard at a meaningful time before ex parte dismissal and the taxpayers motion for abeyance of time limits pending resolution. If denied, Rules 221 and 240, SCACR, petition for rehearing en banc and motion for abeyance of time limits pending resolution is submitted. Accordingly, the taxpayers respectfully request the motions and petition be granted. In the alternative, dismissal should be deferred until final briefing with ROA is complete.

Respectfully submitted,



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The Honorable Deborah Brooks Durden

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J.K. Holmes and C.C. Holmes,

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v.

Chas. Cty. Assessor,

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PROOF OF SERVICE

I certify that a true copy of the above document was served upon the respondents by regular first class mail postage pre-paid on this date at this address:

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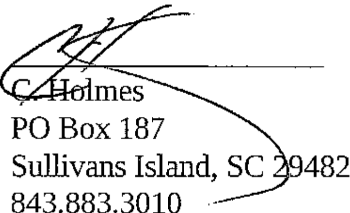
Dated 6/10/2024



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Thank You!