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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Ninth Judicial Circuit Court Judge

App Case No. 2025-000486
COA Case No. 24-1450 and 22-1146
Circuit Court Case No. 21-CP-10-05498

J. K. Holmes,

Respondent,

v.

C. E. Holmes,

Petitioner.

**Expedited S.C. Code § 14-3-350 and Rule 240(j), SCACR, Appeal and Motion for Abeyance of Time Limits Pending Resolution, and if Denied, Expedited Petition for Rehearing and Motion for Abeyance of Time Limits Pending Resolution**

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The undersigned respectfully submits expedited S.C. Code § 14-3-350 and Rule 240(j), SCACR, *de novo* appeal of a single individual's opinion with abeyance pending resolution and, if denied, expedited petition for rehearing of that S.C. Code § 14-3-350 and Rule 240(j), SCACR, *de novo* appeal hearing with abeyance pending resolution. Significantly and materially, S.C. Code § 14-3-350 and Rule 240(j), SCACR, provide for *de novo* appeal hearing of a single individual's March 17, 2025, opinion regarding error of material fact and timeliness. Malfunction of the dedicated Supreme Court Fax Number 803.734.1499 may have caused or contributed to inadvertent error. Recently, that Fax Number was completely out of service for weeks and after service was restored, service remains intermittent and spotty, including but not limited to, erroneous fax transmission status showing Busy, Error, Failed, and other. Thereafter, thank heaven, the kind staff provided alternate fax numbers. Other folks may be relying on Fax Number 803.734.1499 as listed on the official letterhead and in the Rules. Moreover, it is noted that "initial requests for extensions *to file petition for a writ of certiorari* may be obtained by letter to the clerk, without a formal motion." Toal *et al., Appellate Practice in South Carolina,* Third Ed. (2016), p. 375 (emphasis supplied).

Specifically, the attached copy of our extension request was timely served and filed after the January 27, 2025, COA opinion:

1. In the Supreme Court on February 23, 2025, pursuant to Rule 263, SCACR,

2. The Court of Appeals (COA) received that notice with COA date-stamp of February 24, 2025 (see attached),

3. Timely notice to the COA on February 24, 2025, is corroborated on the COA public index (copy attached),

4. Per request, the attached copy of amended request is timely served and filed on March 1, 2025,

5. Pursuant to Rule 263, SCACR, and the SCACR generally, timely service with timely filing of

extension request vests jurisdiction in the superior appellate court on February 23, 2025, and pursuant to Rule 221, SCACR, the record reflects the COA sent remittitur on March 5, 2025, in inadvertent error,

6. The record reflects the superior appellate court has jurisdiction on March 5, 2025, and Rule 221(b), SCACR, provides the COA has no authority/jurisdiction to send remittitur on March 5, 2025, herein,

7. A very strong showing for recall of remittitur is made as the remittitur in COA App. Case No. 2024-1450 is sent in inadvertent error, and

8. The certiorari petition herein is timely served and filed on March 16, 2025.

Accordingly, malfunction of the dedicated Supreme Court Fax Number 803.734.1499 led to inadvertent error because the motion for extension is timely served and filed on February 23, 2025, pursuant to Rule 263, SCACR. The record reflects that appellate jurisdiction vests in the Supreme Court on February 23, 2025, and notice of the petitioner's motion for extension is timely received and filed in COA App. No. 2024-001450 on February 24, 2025. Per Rule 221, SCACR, there is no lower appellate court jurisdiction or authority to send remittitur in COA App. No. 2024-001450 which was sent in inadvertent error. Rule 221(b), SCACR. Accordingly, recall is respectfully requested.

The law of the prior appeal, copy attached, provides that the appeal of the June 9, 2022, trial court opinion in COA Case No. 2022-001146 is reinstated after disposition on Rule 59(e), SCRCP, motion and that timely appeal is given COA App. No. 2024-001450. The extension request also provides the Circuit Court case number and the COA timely entered that request for extension in COA App. No. 2024-001450 on February 24, 2025. The record reflects timely filing, service, and notice of that extension request to the Court of Appeals. The attached copy of supporting affidavit is previously filed herein in Supreme Court App. Case No. 2025-000486. To the extent there is ambiguity and/or COA conflict, the rule of lenity supports our position. Accordingly, under the facts, inadvertent error in sending remittitur does not deprive the superior appellate court of jurisdiction and provides a very

strong showing with just cause for recall of remittitur which is respectfully requested. *State v. Barnes*, 413 S.C. 1, 774 S.E.2d 454 (2015); *Wise v. S.C. Dep't. Corrs.*, 372 S.C. 173, 642 S.E.2d 551 (2007); *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893). "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 against "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).

The following statutory and South Carolina Constitutional protections, privileges, and immunities are pertinent:

Art. 1, § 23. Provisions of Constitution mandatory.
The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its own terms. (1970 (56) 2684; 1971 (57) 315.)

Art. 1, § 2. Religious freedom; freedom of speech; right of assembly and petition.
The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department, including the judicial branch for a redress of grievances. (1970 (56) 2684; 1971 (57) 315.) (Emphasis supplied.)

Art. 1, § 3. Privileges and immunities; due process; equal protection of laws.
The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws. (1970 (56) 2684; 1971 (57) 315.)

Art. 1, § 4. Attainder; ex post facto laws; impairment of contracts; titles; effect of conviction.
No bill of attainder, ex post facto law, or law granting any title of nobility or hereditary

emolument, shall be passed, and no conviction shall work corruption of blood or forfeiture of estate. (1970 (56) 2684; 1971 (57) 315.) (Emphasis supplied.)

Art. 1, § 14. Trial by jury; witnesses; defense.
The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both. (1970 (56) 2684; 1971 (57) 315.)

Art. V, § 9. Jurisdiction of Court of Appeals; **binding effect of Supreme Court decisions.**
The Court of Appeals shall have such jurisdiction as the General Assembly shall prescribe by general law. The decisions of the Supreme Court shall bind the Court of Appeals as precedents. (1985 Act No. 9.)

Art. V, § 16. Compensation of Justices and judges; practice of law and dual office holding.
The Justices of the Supreme Court and the judges of the Court of Appeals and Circuit Court shall each receive compensation for their services to be fixed by law, which shall not be diminished during the term. They shall not, while in office, engage in the practice of law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions except in the militia, nor shall they be allowed any fees or perquisites of office. Any such Justice or judge who shall become a candidate for a popularly elected office shall thereby forfeit his judicial office. (1972 (57) 3176; 1973 (58) 161; 1985 Act No. 9.)

**S.C. Code § 14-3-350**

SECTION 14-3-350. Power of individual justices at chambers; appeal.

Each of the justices of the Supreme Court shall have the same power at chambers to administer oaths, issue writs of habeas corpus, mandamus, quo warranto, certiorari and prohibition and interlocutory writs or orders of injunction as when in open court. **But an appeal shall be allowed from the decision of any such justice to the Supreme Court.**

HISTORY: 1962 Code Section 15-125; 1952 Code Section 15-125; 1942 Code Section 26; 1932 Code Section 26; Civ. P. '22 Section 26; Civ. P. '12 Section 11; Civ. P. '02 Section 11; 1896 (22) Section 1; 1901 (23) 623.

The underlying statutory authority, S.C. Code § 14-3-350, and Rule 240(j), SCACR, expressly provide for appeal of an order by a single justice as follows:

**S.C. Code § 14-3-350**

SECTION 14-3-350. Power of individual justices at chambers; appeal.

Each of the justices of the Supreme Court shall have the same power at chambers to administer oaths, issue writs of habeas corpus, mandamus, quo warranto, certiorari and prohibition and interlocutory writs or orders of injunction as when in open court. **But an appeal shall be allowed from the decision of any such justice to the Supreme Court.**

With that statute, the Legislature enacted protections for the Court, for individual justices, and for the citizens of this great State. The petitioner is one of the Legislature's intended beneficiaries of S.C. Code § 14-3-350. That statute underlies Rule 240(j), SCACR, which was renumbered in 2009 from Rule 224(j), SCACR. The previous Rule 224(j), SCACR, included the provision that, "Any party aggrieved by an order of an individual judge or justice may seek review of that order by the appellate court or a panel thereof." That Rule 224(j), SCACR, provision was preserved (in 2007) but reworded then re-numbered Rule 240(j), SCACR, to provide that, "Any review of an order issued by an individual judge or justice shall be by petition for rehearing." It is respectfully submitted that the rewording of Rule 240(j), SCACR, is internally inconsistent since an order by an individual is by definition not a hearing and there can be no rehearing without the condition precedent of a hearing. A hearing is required under the State Constitution and the Fourth Circuit has determined in the *Navistar case* that a hearing after-the-fact is no substitute for a pre-decision hearing. *Hathcock v. Navistar Intern. Transp. Corp.*, 53 F.3d 36 (4th Cir. 1995). Accordingly, the Legislative intent and underlying statutory authority remain the same in S.C. Code § 14-3-350 and the standard of review is *de novo*. See *Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 432–33, 716 S.E.2d 443, 445 (2011) (holding that a

specific statute governing a certain issue controls over the more general language of another statute addressing the issue); *Avant v. Willowglen Academy*, 367 S.C. 315, 319, 626 S.E.2d 797, 799 (2006) (noting "the principle that more specific rules prevail over general ones").

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re *Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992). "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." Norman J. Singer, Sutherland Statutory Construction § 47.23 at 227 (5th ed. 1992) (citations omitted). *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970).

This Court should not completely disregard the text of an unambiguous statute based on an alleged conflict. In the instant case, the ordinary meaning of S.C. Code § 14-3-350 will not lead to absurd results unintended by the Legislature, so the plain language of the statute should not be disregarded. *Hodges v. Rainey*, 533 S.E.2d 578, 341 S.C. 79 (S.C. 2000). "In that vein, we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." (citation omitted). *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). It is respectfully submitted S.C. Code § 14-3-

350 provides for *de novo* appeal hearing, not petition for rehearing. Under the facts, Rule 240(j), SCACR, petition for rehearing is internally inconsistent since there is no hearing as a condition precedent for rehearing and further, Rule 240(j), SCACR, petition for rehearing thereby renders S.C. Code § 14-3-350 unnecessary due to Rule 221, SCACR, petition for rehearing. Rule 240(j), SCACR, is rendered superfluous and "the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *Id.* Accordingly, the motion for S.C. Code § 14-3-350 *de novo* appeal hearing should be granted.

In addition, pursuant to S.C. Code § 14-3-350, the petitioner respectfully submits Rule 240(j), SCACR, appeal is *de novo* review by the court which does not include the individual justice who signed the order that is the subject of the Rule 240(j), SCACR, appeal. The undersigned filed the motion under Rule 240(j), SCACR, for appeal of a single justice's order, as opposed to a Rule 221, SCACR, petition for rehearing. S.C. Code § 14-3-350 provides statutory authority for Rule 240(j), SCACR, and provides for **appeal** of the order of a single justice. S.C. Code § 14-3-350. Meaningful review requires that a judge not 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 while in the court below. 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 while in the court below. In these cases, the Judge or *Chief Justice Beatty* will recuse him or herself from reviewing his or her own order. 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). In that 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. 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 a judge (*or justice*)" to sit on the appeal for his own decision. *Ríce v. McKenzíe*, 581 F.2d 1114, 1117 (4th Cir. 1978) (emphasis supplied). Moreover, in consideration of Legislative intent and the overarching principles incorporated in the State Constitution by its framers, due process requires the appellate court judge or justice who individually signed the order not participate, directly or indirectly, on appeal of the decision which is the subject of the Rule 240(j), SCACR, appeal. Ambiguity regarding the requirement of non-participation on Rule 240(j), SCACR, appeal is a denial of due process in the appellate courts. Accordingly, pursuant to Rule 240(j), SCACR, the appeal and due process provide for non-participation of the individual judge or justice who signed the order which is the subject of a Rule 240(j), SCACR, appeal.

Significantly and materially, *de novo* review is the standard of review at Rule 240(j), SCACR, appeal pursuant to S.C. Code § 14-3-350, which is different than the standard of review for Rule 221,

SCACR, rehearing. Ambiguity in the lower appellate court and/or court of last resort regarding the proper legal standard pursuant to Rule 240(j), SCACR, appeal is a denial of due process. The Rule 240(j), SCACR, motion is an appeal of an order by an individual justice and the proper legal standard is *de novo*. S.C. Code § 14-3-350. 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 Local Rule 27(e), FRAP. Pursuant to S.C. Code § 14-3-350 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). Importantly in that case, the denial of a transfer motion does not end or finally determine a case; the necessary element under Rule 240(j), SCACR, review is that the order is signed by a single judge or justice. Accordingly, the legal standard of review under these circumstances for Rule 240(j), SCACR, appeal is *de novo* and the motions should be granted.

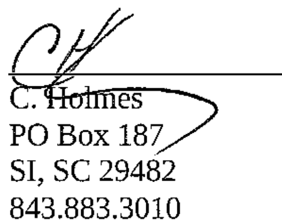
In sum, the record reflects that superior appellate court jurisdiction vested on February 23, 2025. The SCACR generally along with Rule 221, SCACR, provide that the COA SHALL not send remittitur until notified by the superior appellate court. Rule 221(b), SCACR. The record reflects no such notification by the superior appellate court. The record reflects the superior appellate court has

jurisdiction on March 5, 2025, and the COA had no jurisdiction on March 5, 2025, to send remittitur. Rule 221, SCACR. Because the COA had no authority/jurisdiction to send the remittitur on March 5, 2025, it is sent in error and recall is respectfully requested.

**CONCLUSION**

For substantial justice affecting substantial rights, the undersigned respectfully requests expedited S.C. Code § 14-3-350 and Rule 240(j), SCACR, *de novo* appeal hearing for a single individual's opinion with abeyance pending resolution and, if denied, expedited petition for rehearing of that S.C. Code § 14-3-350 and Rule 240(j), SCACR, *de novo* appeal hearing with abeyance pending resolution.

Respectfully submitted,



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