The South Carolina Court of Appeals

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November 6, 2013

Harold Simmons, Jr.
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Mr. James A. Stuckey, Jr.
123 Meeting Street
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Ms. Alissa Robyn Collins
123 Meeting Street
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Re: Harold Simmons v. Charleston County
Appellate Case No. 2011-186587

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jenny A Kitchings / B

CLERK

cc: Roger M. Young

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Harold Simmons, Jr., Appellant,

v.

Charleston County Family Court, Paul W. Garfinkel and South Carolina Department of Social Services, Pamela Brown, Respondents.

Appellate Case No. 2011-186587

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Unpublished Opinion No. 2013-UP-406
Submitted October 1, 2013 – Filed November 6, 2013

AFFIRMED

Harold Simmons, Jr., of Charleston, pro se.

James A. Stuckey, Jr., and Alissa R. Collins, both of Stuckey Law Offices, LLC, of Charleston, for Respondents.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *B & A Dev., Inc. v. Georgetown Cnty.*, 372 S.C. 261, 271, 641 S.E.2d

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Robert M. Young, Circuit Court Judge

Cause No. 09-CP-10-4264

Harold Simmons, Jr.....Plaintiff-Appellant,

v.

Charleston Family Court, Paul W. Garfinkel and
South Carolina Department of Social Services,
Pamela Brown, ...Defendants-Appellees.

Appellate Case no. 2011-186587

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT REQUIRED BY RULE 35(b)

Rehearing *en banc* is warranted because this case involves a question of exceptional importance. The Panel's holding that if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e) motion to alter or amend the judgment in order to preserve the issue for appellate review and that it is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review dramatically curtails the absolute protection the conception of the due process of law clause was designed to provide, and is in direct conflict with decisions of other circuits that have addressed the issue.

The Due Process of Law Clause prohibits that no person shall be deprived of "life, liberty, or property, without due process of law and regulates actions taken by state governments. See Barron v. Baltimore, 32 U.S. [7 Pet.] 243, 8 L. Ed. 672 [1833]) and Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 15 L. Ed. 691 [1856]). The Clause is designed to protect the procedural guarantees of due process entitle litigants to fair process and represent the very essence of ordered liberty" and embody "principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental, (Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 [1937]).

In this case, the trial circuit court ordered a summary of judgment in favor of the Appellee without allowing the Appellant the equal amount of time for arguments. And the trial circuit court clerk failed to issue the Appellant with all rules and notices ordered in the common pleas. While disregarding the known fact that the Appellant is a Pro Se litigant that is limited and lack literary ability with a feeble intellect. The Panel relied on

B & A Dev., Inc. v. Georgetown Cnty., 372 S.C. 261, 271, 641 S.E.2d 888, 894 and L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), cases that challenged that if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e) motion to alter or amend the judgment in order to preserve the issue for appellate review and that it is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.

The Panel decision is in direct conflict with the decision of the United States Supreme Court in Bute v. Illinois, 333 U.S. 640 (1948), Powell v. Alabama, 287 U.S. 45 (1932). These cases hold that a right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. He is unfamiliar with the rules of evidence. Left without the aid of counsel, He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. It never has been doubted by this court, or any other, so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted,

that, by "the law of the land" is intended "a law which hears before it condemns" have been repeated in varying forms of expression in a multitude of decisions.

These decisions, and not the decision of the panel, appropriately apply the Due Process of Law Clause. The Panel's holding leaves the government free to impose on the fundamental and constitutional rights of the Appellant—in direct violation of the Clause.

This Court should grant rehearing en banc to address the important issue of the scope of the protection afforded to a Pro Se litigant with limited and or lack of literacy abilities by the Due Process of Law Clause, and to fully consider the Appellant challenge to the evidence heard by the trial court in this case. Moreover, to the extent that B & A Dev., Inc. v. Georgetown Cnty., 372 S.C. 261, 271, 641 S.E.2d 888, 894 and L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), is deemed to have controlled the panel decision, en banc review is particularly appropriate for it will allow the full court to address the Due Process of Law Clause issues in this case in light of the subsequent analysis by other circuits.

BACKGROUND

On July 10, 2009, this action was brought by Harold Simmons alleging false imprisonment and violations of his civil rights by the Charleston County Family Court: Judge Paul W. Garfinkel and South Carolina Department of Social Services: Attorney Pamela Brown. Due to the fact that when he appeared before the court on August 16, 2006 for a previously ordered review of his Workers' Comp cases, the review was turned into a Rule to Show Cause hearing on issues that were already resolved and he was subsequently found in civil contempt and imprisoned. This action was amended on December 7, 2010 in order to include negligent infliction of emotional distress.

The respondent's moved for a Motion for Summary Judgment arguing that they were entitled to judicial immunity. On December 10, 2010, the case came before Judge Roger M. Young, who granted the respondents' Motion for Summary Judgment. During the hearing of the case Judge Young stopped Mr. Simmons from giving his argument and ruled on the case. Mr. Simmons did not fully know, comprehend, or understand exactly as to why he was not given the proper time as the Defendants were allowed and exactly how the court proceedings should have been handled. Mr. Simmons has always requested a jury trial and yet has not received one until this day. Mr. Simmons inquired with the court clerk that informed him of the fact the he has to wait for the court to send him information on the next step of process in the form of a pre post order and the actual court order. On February 22, 2011, Mr. Simmons served the Notice of Appeal on Respondent's after he had reviewed the Appeal Chart for guidance on the next step in the process since the court clerk never sent him proper papers as were stated to him.

ARGUMENT

1. **Rehearing should be granted to determine whether, in the Pro Se Context, federal courts overlooked the non-professional in a professional system and the limited literary ability of appellant and is in direct conflict with the decision of other circuits.**

The panel's conclusion that the losing party failed to comply with and file Rule 59(e) motion to alter or amend the judgment in order to preserve the issue for appellate review and that the appellant raised first time issues on appeal, and that the issues were never raised and ruled upon in trial court was an accurate opinion without

consideration of the fact that the Appellant was Pro Se and therefore falls in the category of a non-professional in a professional system and could have not been made aware of the Rule and or given the next proper process step or documents, coupled with the denial to finish arguments and have limited or lack of literary ability otherwise known as being feeble intellect is a huge oversight.

Powell v. Alabama, 287 U.S. 45 (1932), involved the conception of the due process of law clause. "While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character. It never has been doubted by this court, or any other, so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that, by "the law of the land" is intended "a law which hears before it condemns" have been repeated in varying forms of expression in a multitude of decisions." The rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard.

Bute v. Illinois, 333 U.S. 640 (1948), involved the due process of law clause "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is

unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

The Panel did not consider the Pro Se Context, federal courts overlooked the non-professional in a professional system and the limited literary ability of appellant along with the denial of a jury trial puts the decision in direct conflict with the decision of other circuits.

2. **Rehearing should be granted to determine if South Carolina Code of Laws Section 14-17-260 applies to the lack of filing Rule 59(e).**

The panel did not consider that the Pro Se Appellant did not have the proper information given to him and or that he comprehended the information. The trial court clerk failed to give the proper rules according South Carolina Code of Laws Section 14-17-260 (b) which clearly states that the clerk shall issue all processes and sign all judgments. The clerk shall (b) issue all rules and notices ordered in the common pleas, The Panel should be willing to consider and determine if the clerk failed to comply with the South Carolina Code of Laws.

3. **Rehearing should be granted because the decision carries "Exceptional importance" Because it will open the floodgates to litigation against domestic**

The practical implications of the panel's decision further support granting review. By opening the door to suits against officials challenging official government actions, the panel's decision potentially creates jurisdiction in this Circuit over every human rights case in the world—an outcome that, is very needed in the legal system. Indeed, if a Pro Se litigant with limited literary abilities could be heard and obtain judicial review of virtually any official government action simply "by (the) artful pleading" of suing the responsible officer (person in their official capacity), the statute would become "optional." And the flood of potential suits allowed by the panel decision may well include challenges to the actions of important allies of the Official persons. See Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008).

4. **Rehearing should be granted to determine the proper remedy.**

If the Due Process Law Clause applies to Pro Se litigants that have been denied the right to equal time in the court of law to present argument and the right to be given the proper rules and documents along with being limited and or lack the literary abilities and if such application is unconstitutional, rehearing should be granted to determine the proper remedy. If the Due Process Law Clause does apply than the appellant should be granted the opportunity to properly submit Rule 59 (e) and be allowed to resubmit the appellant brief. See US Constitution Amendment Article Fourteen.

CONCLUSION

For the reasons set forth above, the Petition for Rehearing and Rehearing *En Banc* should be GRANTED. If Rehearing is granted, the Appellant requests supplemental briefing.

Respectfully submitted,

Harold Simmons Jr.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-4264

Harold Simmons, Jr., Appellant,

v.

Charleston County Family Court, Paul W. Garfinkel and South Carolina Department of Social Services, Pamela Brown, Respondents.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Charleston County Family Court, Paul W. Garfinkel and South Carolina Department of Social Services, Pamela Brown by depositing a copy of it in the United States Mail, postage prepaid, on Nov. 20, 2013 addressed to their attorney of record, James A. Stuckey, 123 Meeting Street, Charleston, South Carolina 29401.

Nov. 20, 2013

Harold Simmons, Jr.

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