

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Thomas L. Hughston, Circuit Court Judge

Appellate Case No. 2010-154986

Dr. Cynthia Holmes, M.D.

Appellant/ Petitioner,

v.

Haynsworth, Sinkler & Boyd, P.A.,
Successor to Sinkler & Boyd, P.A.,
Manton Grier and James Y. Becker,

Respondents.

APPELLANT'S MOTION FOR DISQUALIFICATION

Chalmers Johnson
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Attorney for Appellant

This motion for disqualification of Justice Hearn is governed by the South Carolina Rules of Court, statutory and case law, and constitutional law. The question is not whether she is impartial in fact, but rather whether reasonable men/women might question her impartiality under the circumstances. Under Canon 3(E)(1)(a), a judge should disqualify himself/herself in a proceeding in which his or her impartiality might reasonably be questioned, including but not limited to, instances where he/she has a personal bias or prejudice against a party. *Roche v. Young Bros., Inc.*, 332 S.C. 75, 504 S.E.2d 311 (1998).

Where an affidavit alleges conduct and/or statements on the part of a judge which, if true, show bias and/or prejudice on the part of the judge, it is an abuse of discretion if that judge does not withdraw from the case, even though he or she believes the statements are not correct or that the meaning attributed to them by the party seeking disqualification is erroneous. The judge does not pass upon the truth or falsity of the facts alleged in the affidavit but rather whether reasonable men/women might question her impartiality under the circumstances. The fact that the judge in his or her own mind does not believe that he/she is prejudiced does not prevent disqualification if the motion and affidavit reflect prejudice. See e.g. *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921). It is not sufficient for a party seeking disqualification to simply allege bias; the party must show by affidavit some evidence of bias or prejudice. *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996). A judge's impartiality might reasonably be questioned when his or her factual findings are not supported by the record. *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993).

A judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the appeal therein. C.J.C. Canon 3. A judge may disqualify himself on his own motion for any of said reasons or any party may move for such disqualification. The motion and supporting affidavit speak for themselves and the only question involved is whether, under the facts alleged, reasonable men/women might question her impartiality. *Patel v. Patel*, 359 S.C. 515, 599 S.E.2d 114 (S.C. 2004). The motion and affidavit are legally adequate if they state facts from which it may reasonably be inferred that the judge has bias or prejudice that will prevent him or her from dealing fairly with the party seeking disqualification. *Roche v. Young Bros., Inc.*, 332 S.C. 75, 504 S.E.2d 311 (1998); *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921); 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, V, VII, and XIV.

Federal law is instructive by analogy. "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 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. Judge Mills was being asked to find that he had affirmed an unconstitutional conviction, and, implicitly, that by doing so he had become complicit in sending Russell to prison in violation of Russell's constitutional

rights.” (Emphasis supplied.) *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989). Similarly, Justice Hearn is being asked to find that she essentially affirmed and/or executed unconstitutional FCPSA sanctions including but not limited to, unconstitutional filing restrictions which she wrongfully applied retroactively as well as manifest bias and irregularity in handling of fees, petitions, motions, and/or docketing. Moreover, implicitly, by doing so, she is being asked to find that she was complicit in depriving the appellant of meaningful opportunity to be heard and preventing appeal as a matter of right of substantial unconstitutional monetary and non-monetary FCPSA sanctions. Her impartiality is reasonably questioned requiring disqualification.

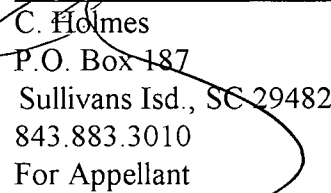
Accordingly, a judge must grant motion for disqualification if the motion and supporting affidavit attached herein state facts from which it reasonably may be inferred that the judge has a bias or prejudice that will prevent him from dealing fairly with the party seeking disqualification. Respectfully, it is submitted that the Honorable Kaye G. Hearn must be disqualified from participation in this matter.

CONCLUSION

For the foregoing reasons and for substantial justice affecting substantial rights, the appellant respectfully makes this motion with request for abeyance of time limits.

Respectfully submitted,

Dated July 25, 2014


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For Appellant

Continued on the following page.

As a licensed attorney in the State of South Carolina, and in accordance with the requirements of Rule 11, SCRCP, I have read this Motion and to the best of my knowledge, information, and belief there is good ground to support it and it is not interposed for delay.

Dated 7-25-14



Chalmers C. Johnson
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Appellant/Petitioner
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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT

Personally appeared before me, Notary Public for the State of South Carolina, C. Holmes, who, first being duly sworn, deposes and says the following:

1) I am the Appellant, over the age of eighteen (18) years, and competent to state the matters herein. This affidavit is based on personal knowledge and on information and belief. This affidavit is submitted in support of the attached Motion for Disqualification. There is good ground to support the attached motion, and it is not interposed for delay.

2) Case No. 2005-CP-10-5113 was pending on appeal in the Court of Appeals (COA) when the Honorable Kaye G. Hearn, now Justice Hearn, served as Chief Judge. The Appellant had timely filed and served Notice of Appeal in that case and had timely filed and served Petition for Writ of Supersedeas regarding alleged unconstitutional FCPSA sanctions and based upon holdings in the cases of *State v. Cooper*, 342 S.C. 389, 536 S.E.2nd 870 (2000) and *Southeastern Site Prep v. Atlantic Coastal Builders and Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (S.C. App. 2011). See: *Appellate Practice in South Carolina* (2000), Toal *et al*, p. 154.

3) The Court of Appeals and Chief Judge issued an Order on December 16, 2009, in Case No. 2005-CP-10-5113, sua sponte and summarily directing the appellate court clerk to “unfile” the Petition for Writ of Supersedeas without consideration on the merits. The purported basis for that unfiled of the Petition was a December 2, 2009, order in an unrelated, non-controlling case involving different parties, which had not been issued until after the Petition had already been timely served, filed, and docketed. The unfiled of the

Petition without consideration of the merits deprived me of my right to meaningful appellate review. It is an example of how FCPSA unconstitutionally deprives parties of appellate review by “poisoning the well” of justice. These and other actions cause me reasonable concern that Justice Hearn has made and is predisposed to making adverse rulings because of, including but not limited to, unconstitutional FCPSA sanctions and reporting in an unrelated case. Once facts have been set forth that create a reasonable inference a “bent of mind” will prevent the judge from dealing fairly with the party seeking recusal, it is incumbent upon the judge to disqualify himself or herself. *See: Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921); C.J.C. Canon 3(C)(1) and Canon 3(E). The fact that the Petition for Writ of Supersedeas was not considered on the merits, but instead was “unfiled” after timely service, filing, and docketing, suggests a decision-maker “bent” on dismissal regardless of, if not because of, the merits.

4) Appellant was prejudiced by the unlawful retroactive application of that December 2, 2009, order in an unrelated case with different parties, and without consideration on the merits. Appellant is prejudiced by denial of my right to appellate review based upon contested matter in an unrelated case not supported by evidence of record in the case on appeal. A judge's impartiality might reasonably be questioned when his or her factual findings are not supported by the record. *See: Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993).

5) Appellant's Petition for Rehearing of the December 16, 2009, Order was timely filed with objections. There is no contention the Petition for Writ of Supersedeas was not timely served, date-stamped, paid for, filed, and docketed. Rehearing was denied. An order was issued promising return of fees. Appellant is prejudiced by wrongful sua sponte

reversal of the appellate court clerk's lawful filing of the Petition for Writ of Supersedeas. Appellant is prejudiced by unconstitutional taking of property including but not limited to, denial of appeal as a matter of right of substantial monetary and non-monetary unconstitutional FCPSA sanctions, which then were unconstitutionally applied to justify, and/or piggyback a second and third unconstitutional FCPSA order.

6) Appellant had retained Counsel of Record, not the Appellant, who filed an appeal in Case Number 2005-CP-10-5113. Appellant's Counsel and Respondent's Counsel had both filed briefs. There was no determination of the merits because the appeal was dismissed for a non-jurisdictional procedural default due to Appellant's Counsel's failure to timely file proof of service of the Record on Appeal (a not uncommon occurrence at the COA among attorneys in general) when he was moving himself and his practice to Washington State after providing advance notice to the COA of his anticipated relocation for the Bar Exam and then relocation for prospective employment. Upon information and belief, the Deputy Clerk of the Court of Appeals (COA) failed to forward that Petition to Reinstate to the Court of Appeals for consideration. *See* Rule 263(b), SCACR:

(b) The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof.

The Appellant was prejudiced because one of the grounds for the appeal that was dismissed due to a non-jurisdictional procedural default by Counsel is that the Order on appeal recited and relied on the improper legal standard at summary judgment as confirmed in *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801, (S.C. 2009). The dismissal of the appeal deprived the Appellant of the right to challenge the improper

standard of proof at summary judgment. That order expressly stated but incorrectly stated, “a mere scintilla of evidence is NOT sufficient to overcome a motion for summary judgment.” Order filed May 23, 2007, in Case No. 2005-CP-10-5113 (emphasis supplied). This standard is improper pursuant to the holding of the Court in *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (S.C. 2009). In *Hancock*, the South Carolina Supreme Court conclusively established, “We recognize that the court of appeals has been somewhat inconsistent on whether a mere scintilla of evidence will overcome a motion for summary judgment. This Court, however, has *consistently* held that where the federal standard applies or where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment. Accordingly, we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Id.* (Emphasis supplied.) Significantly and materially, the Supreme Court documented it was Chief Judge Hearn who had applied the improper heightened legal standard in the opinion cited by the Supreme Court which she authored, *Shelton v. LS & K, Inc.*, 374 S.C. 294, 648 S.E.2d 307 (S.C.App. 2007). *See: Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, fn. 1, 673 S.E.2d 801, fn. 1 (S.C., Jan. 26, 2009). That party and his Counsel were deprived of the constitutional right to trial by jury when Chief Judge Hearn applied the improper heightened legal standard and, thereby, failed to apply the “consistently” held proper legal standard at summary judgment. *Shelton v. LS & K, Inc.*, 374 S.C. 294, 648 S.E.2d 307 (S.C.App. 2007); *see: Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, fn. 1, 673 S.E.2d 801, fn. 1 (S.C., Jan. 26, 2009).

It is well settled that the Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court. The decisions of the Supreme Court bind the Court of Appeals. S.C. Const. art. V, sec. 9; *Daniels v. City of Goose Creek*, 314 S.C. 494, 431 S.E.2d 256 (S.C.App. 1993); *Appellate Practice in South Carolina* (2002), Toal *et al*, p. 12. In *Hancock*, then Chief Judge Hearn was cited for failure to uphold binding law in South Carolina on the proper standard of proof at summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, fn. 1, 673 S.E.2d 801, fn. 1 (S.C., Jan. 26, 2009). Likewise, it is respectfully submitted that then Chief Judge Hearn failed to uphold binding law including but not limited to, matters set forth herein. As another example, wrongful FCPSA Order was used to deny appeal as a matter of right of that very Order. Appellant is prejudiced thereby and respectfully requests disqualification.

Furthermore, Appellant's timely motion to remand for application of the proper legal standard in *Hancock* was wrongfully denied. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (S.C. 2009). The right to trial by jury is denied by the failure to uphold binding law and by failure to uphold the proper legal standard at summary judgment. *Id.* Moreover, to date, there has been no return of fees for Appellant's Petition for Writ of Supersedeas as promised. Appellant is prejudiced by unconstitutional taking of property including but not limited to, denial of appeal as a matter of right of substantial monetary and non-monetary unconstitutional FCPSA sanctions as well as property in the form of promised return of fees. Those fees have not been refunded or accounted for. Appellant has reasonable concerns that Justice Hearn is prejudiced by, including but not limited to, unconstitutional FCPSA sanctions and/or reporting resulting in unreasonable adverse rulings not supported by the record and resulting in denial of the

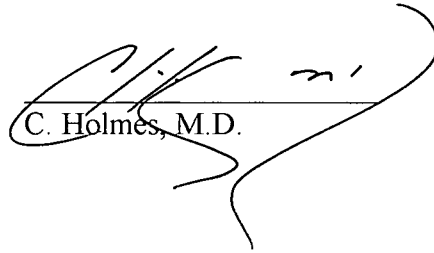
right to meaningful appellate review.

7) In addition, appellant is informed and believes that the Honorable Kaye G. Hearn has made wrongful adverse ruling(s) without meaningful opportunity to be heard, not based on the record, and without fair determination on the merits evidencing bias, lack of impartiality, and/or prejudice against appellant. Further, appellant is informed and believes denial of appeal as a matter of right of substantial unconstitutional FCPSA sanctions as well as irregularities in handling of fees, petitions, and/or motions including, but not limited to, monies due and owing require disqualification from participation. *See: Southeastern Site Prep v. Atlantic Coastal Builders and Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (S.C. App. 2011).

8) Moreover, no appeal herein was dismissed as frivolous, rather interlocutory. Statutory law and case law support appeal of immediately appealable interlocutory order. S. C. Code Sec. 14-3-330 (1976). *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995). See *Toal et al., Appellate Practice in South Carolina* (2002), pp. 86-89. Opposing counsel never claimed appeal was frivolous in the appellate court and thereby waived it. No allegation of violation of Rule 269, SCACR, claiming frivolity was ever made nor was any appeal dismissed as frivolous.

9) Appellant respectfully submits the Honorable Kaye G. Hearn has disqualified herself by, including but not limited to, essentially executing on unconstitutional FCPSA sanctions, now overruled, while pending appeal without consideration on the merits and wrongfully denying appeal as a matter of right as well as denying the opportunity under the rule of law constitutionally guaranteed to all litigants to petition pursuant to the SCACR for writ of supersedeas pending appeal.

FURTHER THE AFFIANT SAITH NOT.


C. Holmes, M.D.

Subscribed and sworn to before me,

Notary Public, this 28th day

of July, 2014.

Alexis D. Masley
NOTARY PUBLIC

My commission expires: 12-30-2023

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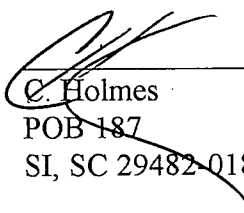
Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the attached on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record for Respondents, on this date, at the following address.

Richard S. Dukes
Turner Padgett Graham & Laney, P.A.
P.O. Box 22129
Charleston, SC 29413

Dated July 28, 2014.


C. Holmes
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