

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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AUG 05 2014

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

S.C. Supreme Court

The Hon. Thomas L. Hughston, Jr.,
Circuit Court Judge

Case No. 2007-CP-10-01444

Cynthia Holmes,.....Appellant,

v.

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

RETURN TO MOTION FOR DISQUALIFICATION

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Attorneys for the Respondents

The Respondents respectfully submit this Return in opposition to the Appellant's Motion for Disqualification.

ARGUMENT

The Appellant ("Holmes") has filed a motion seeking to disqualify Justice Hearn from this appeal. As best the Respondents can tell, Holmes bases this motion on the fact that Justice Hearn, while still serving as Chief Judge of the Court of Appeals, signed an order dismissing one of Holmes' appeals. Regardless of the basis for Holmes' motion, however, it is without merit and should be denied for at least four reasons.

First, Holmes has waived any argument on this issue by not asserting it in a timely manner. Justice Hearn was already a member of this Court when it certified this appeal for direct review pursuant to Rule 204(b), SCACR. Although all of the events about which Holmes complains in her affidavit had occurred prior to that time, she did not make any motion to disqualify Justice Hearn when the Court took the case. In addition, Holmes did not make any such motion prior to the oral arguments in this Court on October 16, 2012. The Court had sent the parties a letter on August 15, 2012, informing them that the case would be argued in October. Thus, Holmes had two months prior to oral arguments to file a motion to disqualify, but she did not do so. Instead, she has waited until after this Court issued its decision to make her request. It is now far too late to raise that issue, and the Court should deny the motion on that basis.

Second, even if Holmes had filed a timely motion, it would have failed because she has not demonstrated any prejudice. Although the Court of Appeals originally dismissed Holmes' current appeal pursuant to this Court's order in *Doe v. Duncan* (S.C. Supreme Court Order filed Dec. 2, 2009), the court subsequently reinstated the appeal. Indeed, the Court of Appeals later reinstated the appeal a second time after Holmes' failure to file her initial appellant's brief led to

another dismissal. At that point, this Court certified the appeal for direct review, and the Court has now heard the appeal and issued a decision on the merits. As a result, the procedural dismissals did not prevent Holmes from fully prosecuting her appeal.

Similarly, the “un-filing” of Holmes’ petition for a writ of supersedeas did not result in any prejudice in this case. As a threshold matter, the Respondents contend that Holmes’ petition for a writ of supersedeas was filed in a different appeal than the one presently before this Court.¹ But even if the petition applied to the present case, it has no relevance here. Presumably Holmes would have been seeking a writ of supersedeas to prevent the Respondents from attempting to collect the sanctions award while her appeal was pending. Yet, the Respondents never made any such efforts during the appeal – and they still have not done so to this day. This is true despite the fact that Holmes never had to post any kind of bond during the appeal. Thus, Holmes cannot demonstrate any harm or prejudice resulting from the absence of a specific ruling on her petition for a writ of supersedeas, even if that petition was somehow filed in, or applied to, this case.

Third, even if Justice Hearn were hypothetically removed from the case, the result of the appeal would be the same because all four other Justices voted in favor of affirming the result below. Based on the arguments in her Petition for Rehearing, it appears Holmes believes two of the Justices (Pleicones and Beatty) dissented, but that is inaccurate. Justice Pleicones wrote a concurring opinion in which Justice Beatty joined. This means those two Justices agreed with the other three that the circuit court decision should be affirmed. Thus, the Court’s decision to affirm was unanimous, and the absence of Justice Hearn from the panel would simply make the final tally 4-0 for affirmance rather than 5-0. In other words, the disqualification of Justice

¹ As this Court is well aware, Holmes had multiple appeals from different cases pending in South Carolina’s appellate courts around the same general time.


Hearn – even if it had been timely sought and obtained – would not have made any difference to the final outcome.²

Finally, regardless of all the other deficiencies in Holmes' motion, she has failed to demonstrate any basis for disqualification. Holmes apparently suggests that Justice Hearn's participation in this appeal created an appearance of bias because Justice Hearn was reviewing her own previous decisions. But that is not what happened. The issues on appeal involved only the decisions made by the circuit court. This means Justice Hearn never had to review or rule upon any of the procedural dismissals and reinstatements that occurred while this case was in the Court of Appeals. Justice Hearn's first – and only – exposure to the issues in this appeal came when this Court considered them. Thus, there is no reasonable basis for anyone to conclude that Justice Hearn had preconceived notions or biases about the case or about Holmes. It necessarily follows that no grounds for disqualification exist, or have ever existed, in this case.

CONCLUSION

Holmes' motion is untimely and without merit. Therefore, this Court should deny the motion and leave its decision intact.

Respectfully submitted,



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² Justice Hearn did not write the Court's primary opinion, so that potential argument is inapplicable here.

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Proof of Service

The undersigned, an attorney in this matter for the Respondents, certifies that I have this **23rd day of July, 2014**, served copies of the **Return to Motion for Disqualification** upon the Appellant and counsel of record for the Appellant by causing them to be deposited in the United States mail, first-class postage prepaid, addressed to: C. Holmes; P.O. Box 187; Sullivans Island, SC 29482-0187; and Chalmers Johnson, Esq.; 1029 Bay St., Apt. 11; Port Orchard, WA 98366.

(Signature on next page)

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August 5, 2014