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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

App. Case No. 2015 - 000187

C. Holmes, M.D.

Appellant,

v.

East Cooper Community Hospital, Inc.; and  
Tenet HealthSystem Medical, Inc.,

Respondents.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, the Appellant hereby files a petition for rehearing as to the Court's Order of September 2, 2015, denying Appellant's motion, filed, pursuant to Rule 240(j), for a panel review of Judge Cureton's Order of May 8, 2015, which dismissed this appeal. There are two issues of law that the Appellant believes the Court has misapprehended and which warrant a rehearing.

- I. The Judge who authored the Order being reviewed pursuant to a Rule 240(j) motion should not be included in the panel of Judges reviewing the Order.**

The Honorable Judge Cureton Authored the Order of May 8, 2015, which dismisses this

Appeal. Appellant filed a motion under Rule 240(j) for a panel review of that Order, as opposed to a petition for rehearing, which asks the same judge who authored the Order to review his own decisions and conclusions. Judge Cureton was one of the panel of three judges who issued the Order of September 2, 2015, indicating that Judge Cureton sat on a panel to review his own order. Appellant believes this is a mistake of law. A Judge should not sit in appellate review of his or her own Order.

As argued below, a Rule 240(j) motion should be treated as equivalent to an appeal.

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 case, the Judge or Justice 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." Disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4<sup>th</sup> Cir. 1978). 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 principal from this oft cited case is well stated, sound, and universally accepted as logical and fair. The Appellant respectfully requests that the issues raised in the Appellant's Rule 240(j) motion be re-heard and reviewed by a panel of judges which does not include Judge Cureton.

**II. The Court appears to have used the standard for review from Rule 221 (petition for rehearing) rather than reviewing the issues raised by the Order de novo under Rule 240(j) and S.C. Code Section 14-8-220.**

In the Order of September 2, 2015, the Court states that it is "unable to discovery that any fact or principal of law has been overlooked or disregarded, and hence, there is no basis for granting a

rehearing. Accordingly, the petition for rehearing is denied.” It seems clear, from the language of the Order, that the Court was reviewing the Plaintiff’s Rule 240(j) motion under the standard which was appropriate for a petition for rehearing. Rule 240(j) is actually an appeal from one Judge’s Order, asking for a review by a panel of separate judges. Because a motion for review of an Order under Rule 240(j), SCACR, has a different, less burdensome standard of review, the application of the standard under Rule 221, SCACR, petition for rehearing was improper and this Court should distinguish the proper legal standard under statutory and case law.

The statutory law from which the rule derives specifically refers to this kind of review as an appeal:

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.**

That statute authorizes Rule 240(j), SCACR, which was renumbered in 2009 from Rule 224(j), SCACR. The above statute authorizes the previous Rule 224(j) and the current Rule 240(j), SCACR. The previous Rule 224(j) 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 provision was preserved but reworded with the 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." Significantly and materially, the legislative intent and statutory authority remain the same in S.C. Code § 14-8-220. The legal standard of review for Rule 240(j), SCACR, petition for rehearing is *de novo*, not the more burdensome legal standard under Rule 221, SCACR, petition for rehearing. By analogy, determination that a case is not ripe is reviewed *de novo* Portor

v. Ogden, Newell & Welch, 241 F.3d 1334, 1338 (11th Cir. 2001). Moreover, questions of law should be reviewed *de novo*. As a Rule 240(j) motion is, essentially, an appeal of a judicial Order, the legal issues presented should be reviewed *de novo*, rather than simply reviewing the Order for a fact or legal principal that has been overlooked, as under the Rule 221 standard.

It is well-established that the Federal Rules of Appellate Procedure, upon which the SCACR are based, have long been interpreted to prohibit a single judge from dismissing or finally determining an appeal. See Local Rule 27(e), FRAP. At Rule 240(j), SCACR, rehearing, the case stands before the 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)). "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." See *Thompson v. Merit Sys. Protection Bd.*, 772 F.2d 879, 882 (Fed. Cir. 1985).

As a matter of public policy, it benefits the appellate courts to narrowly construe final determination of appeal by a single judge or justice. Legislative intent and express statutory authority in S.C. Code § 14-8-220 mandate it. This Honorable Court is hereby requested to confirm it. This document is a petition for rehearing, pursuant to Rule 221. Pursuant to that rule's standard, the Appellant is pointing out that the Court has misapprehended the law which defines a Rule 240(j) motion as an appeal, and has applied the wrong standard in its review of Judge Cureton's Order of May 8, 2015. The Appellant believes that Rule 240(j) calls for the review panel to consider Judge Cureton's May 8<sup>th</sup> Order *de novo*, and specifically address the issues raised in Appellant's 240(j) motion including the propriety of dismissing the Appellant's appeal on a *sua sponte* Order when the Appellant has not been given notice or an opportunity to address the issues

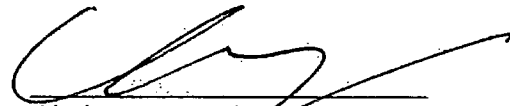
raised in the Order.

### CONCLUSION

The Appellant respectfully requests that the Court appoint a panel to review the May 8, 2015 Order by Judge Cureton, which does not include Judge Cureton. The Appellant respectfully requests that the panel review Judge Cureton's May 8, 2015 Order dismissing this case de novo, and reverse it or remand the issue so that the Plaintiff can be provided with an opportunity to be heard on the issues in the Order which were not raised in the Respondents' motion to dismiss.

Respectfully submitted,

Dated 9-16-15



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Respondents.

PROOF OF SERVICE

I certify that I have served the attached Petition for Rehearing on the Respondents on this date by deposit in the United States Mail, postage prepaid, addressed to the attorney of record at 16 Charlotte St., P.O.D. 22247, Charleston, SC 29403, and also by email to Counsel for Respondents at Lindsay Smith-Yancey <lsy@p-tw.com>.

Dated

9-16-15



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September 16, 2015

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SC Court of Appeals

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App. Case No. 2015-000187

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Enclosed please find the Appellant's Petition for Rehearing. The following documents have been included as well:

- 1) Seven copies,
- 2) Proof of Service and a copy, and
- 3) SASE for return.

Would you please file the Petition for Rehearing, and return a clocked copy of the Proof of Service to me? Thank you.

Sincerely,

Chalmers C. Johnson

cc:  
Lindsay Smith-Yancey  
16 Charlotte St.  
P.O.D. 22247  
Charleston, SC 29403

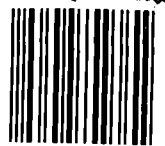
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