

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

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

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Court of Appeals Case No. 2015-000187

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Dr. Cynthia Holmes, M.D.,

Petitioner,

v.

East Cooper Community Hospital Inc., and  
Tenet HealthSystem Meical, Inc.,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI

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## **CERTIFICATE OF COUNSEL**

Counsel certifies that petitioner's Rule 240(j), SCACR, appeal was treated as erroneously petition for rehearing and finally ruled on by the Court of Appeals on September 2, 2015. The Clerk of Court has refused to accept Appellant's most recent petition for rehearing, requiring this petition to be filed in order to toll deadlines for filing a petition for writ of certiorari. Counsel is attempting to remedy this error, but there is no avenue for an appeal of a decision not to accept a document filed with the Appellate Court by the Clerk.

## ISSUES PRESENTED

- I. Pursuant to S.C. Code § 14-8-220, meaningful judicial review by a lower appellate court panel of a single judge's order which finally determines an appeal requires non-participation of that judge in the Rule 240(j), SCACR, appeal of his own order.
- II. The September 2, 2015, order on appeal is reversible as a matter of law for failure to apply the proper legal standard pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR.
- III. As a matter of public policy, it benefits the lower appellate court to narrowly construe/prohibit final determination of appeal by a single judge.

## STATEMENT OF THE CASE

A Notice of Appeal was timely served and filed in this case. Respondents filed Motion to Dismiss. The appellate court acknowledged timely notice and jurisdiction. Without notice, without opportunity to respond, and without sufficient record or Record on Appeal, a single judge finally determined the appeal by Order, dismissing *Sua Sponte*, on grounds that had not been brought before the Court by either party, and without prior notice, or an opportunity to be heard on the issue by either party. Petitioner timely filed Rule 240(j), SCACR, motion for appeal of an order issued by an individual judge pursuant to S.C. Code § 14-8-220. An appeal from the decision of any one judge is allowed to a panel of the appellate court. S.C. Code § 14-8-220. The statutory authorization for that appeal anticipates the non-participation of the individual judge who issued the order. S.C. Code § 14-8-220. Because the individual judge who issued the May 8, 2015, order was a member of the lower appellate court panel reviewing that order, there could be and there was no meaningful judicial review. Petitioner is prejudiced thereby. Further, the lower appellate court erred as a matter of law by applying the improper Rule 221, SCACR, legal standard at petition for rehearing as opposed to the less burdensome, proper Rule 240(j), SCACR, legal standard. In addition, the lower appellate court erred in failing to provide Rule 220(a), SCACR, opinion addressing the merits thereby wrongfully denying appeal and preventing meaningful review. The petitioner seeks access to the Supreme Court to address these issues pursuant to this petition for writ of certiorari.

## ARGUMENT

- I. **For a meaningful review of an Order Pursuant to S.C. Code § 14-8-220 and Rule 240(j), the panel reviewing the Order should not include the judge who authored the Order under review.**

The Court of Appeals has such jurisdiction as the General Assembly prescribes by general law. S.C. Const. art. V, § 9. Its jurisdiction under S.C. Code §14-8-200(a) is as follows:

[T]he court shall have jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit or family court. S.C. Code §14-8- 200(a).

The Court of Appeals is an error-correction court. S.C. Const. art. V, § 9. In a direct appeal, the focus is on the propriety of rulings made by the circuit court. See *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999). The instant matter is a direct appeal.

The Honorable Judge Cureton issued an Order on May 8, 2015, which finally determined this appeal and wrongfully dismissed it. His Order dismissed the case on grounds which had not been raised by either party. It was Sua Sponte. Neither party was given notice or an opportunity to be heard on the issues decided in the Order. Petitioner filed a motion under Rule 240(j), SCACR, for appeal to an appellate court panel of a single judge's order, as opposed to a Rule 221, SCACR, petition for rehearing and as opposed to a request for reconsideration, which asks the same judge who authored the order to review his own decisions and conclusions. S.C. Code § 14-8-220 provides statutory authority for Rule 240(j), SCACR, and provides for **appeal** of the order of a single judge to a panel of lower appellate court judges. S.C. Code § 14-8-220. The panel included Judge Cureton, who authored the Order being reviewed. The appellate panel of three judges, including Judge Cureton, responded to the Petitioner's Rule 240(j) motion by an Order of September 2, 2015. It applied the incorrect standard of review, applying the standard for a petition for rehearing rather than a de novo review, which is what is called for under Rule

240(j). Also, Judge Cureton participated in the appeal of his own order. Accordingly, the lower appellate court erred as a matter of law because meaningful review requires that a judge not participate in appeal of his or her own order. S.C. Code § 14-8-220.

As argued below and incorporated herein, pursuant to S.C. Code § 14-8-220 and State and federal constitutional mandates, a Rule 240(j), SCACR, 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 cases, 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 (4th 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 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 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." *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989). The Petitioner respectfully requests that the issues raised in the Petitioner's Rule 240(j) motion be re-heard and reviewed by a panel of judges, which does not include the individual judge who issued the order that finally determined the appeal. 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, VI, 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).

**II. The September 2, 2015, order on appeal should be reversed, as a matter of law, because it fails to apply the proper legal standard pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR.**

In the Order of September 2, 2015, the lower appellate court states that it is “unable to discover that any fact or principle of law has been overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.” That language makes clear the lower appellate court erred in reviewing the Petitioner’s Rule 240(j), SCACR, motion under the standard for a Rule 221, SCACR, petition for rehearing. Rule 240(j), SCACR, provides for appeal of an order by a single judge to a panel of separate judges. Because a motion for appeal of an order by a single judge under Rule 240(j), SCACR, has a different, less burdensome legal standard of review, the application of the standard under Rule 221, SCACR, petition for rehearing was improper. This Court is respectfully requested to distinguish the proper legal standard under statutory and case law.

S.C. Code § 14-8-220, the statutory authority underlying Rule 240(j), SCACR, expressly provides for appeal of an order by a single judge as follows:

**S.C. Code § 14-8-220**

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.**

S.C. Code § 14-8-220 (emphasis supplied).

HISTORY: 1979 Act No. 164 Part IV-A Section 1, eff July 1, 1979; 1979 Act No. 194 Part III Section 5, apparently effective Aug. 8, 1979; 1983 Act No. 89 Section 1, eff June 2, 1983; 1983 Act No. 90 Section 2, eff July 1, 1985.

That statute authorizes 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 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." Significantly and materially, the legislative intent and underlying statutory authority remain the same in S.C. Code § 14-8-220. The legal standard of review for Rule 240(j), SCACR, appeal is de novo. The lower appellate court erred in applying the more burdensome legal standard under Rule 221, SCACR, petition for rehearing. Moreover, questions of law are reviewed de novo. The Rule 240(j), SCACR, motion herein is an appeal of an order by a single judge finally determining an appeal and the proper legal standard is de novo with Rule 220(a), SCACR, opinion to facilitate meaningful judicial review. S.C. Code § 14-8-220. Accordingly, the September 2, 2015, order on appeal is reversible as a matter of law for failure to apply the proper less burdensome legal standard pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR.

It is well established that the Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to prohibit a single judge from finally determining an appeal. See Local Rule 27(e), FRAP. At Rule 240(j), SCACR, appeal, the case

stands before the lower 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). Accordingly, the September 2, 2015, order errs as a matter of law, the Petitioner is prejudiced thereby, and the orders should be reversed. 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).

**III. As a matter of public policy, it benefits the lower appellate court to narrowly construe/prohibit final determination of appeal by a single judge.**

As a matter of public policy, it benefits the lower appellate court to narrowly construe and/or prohibit final determination of appeal by a single judge. Legislative intent and express statutory authority in S.C. Code § 14-8-220 mandate it, particularly where judges are elected and

are subjected to re-elections. Public policy, Federal case law, State and federal constitutional law, and the FRAP restrict a single lower appellate court judge's authority to finally determine appeal. This Court is respectfully requested to confirm the same. Indeed, many Federal circuits postpone decision on such motions until merits briefs and Record on Appeal are filed. The Petitioner respectfully submits there is insufficient record and there is no Record on Appeal for finally determining appeal and/or for meaningful judicial review.

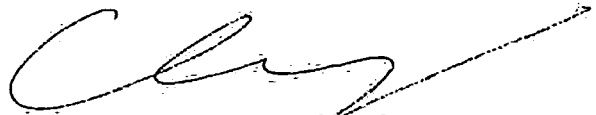
The Petitioner respectfully submits that the lower appellate court has misapprehended the law, which defines a Rule 240(j) motion as an appeal and has erred in applying the improper legal standard. Petitioner is prejudiced thereby. The applicable legal standard is less burdensome, and the appeal requires Rule 220(a), SCACR, opinion addressing the merits in order to facilitate meaningful review. Rule 240(j), SCACR, calls for de novo review by a lower appellate court panel which does not include the individual judge who issued the order and requires Rule 220(a), SCACR, opinion, which expressly addresses the merits of the issues raised. The propriety of finally determining appeal on a sua sponte order by a single judge without adequate record and without Record on Appeal when the non-moving party has not been given notice or opportunity to respond is challenged as well. 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).

## CONCLUSION

There has been a miscarriage of justice, a failure to follow proper procedure in this case and a denial of the Petitioner's right to due process. The Petitioner respectfully seeks writ of certiorari and an opportunity to present her arguments on these issues to the Supreme Court of South Carolina.

Respectfully submitted,

Date 10-1-15



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THE STATE OF SOUTH CAROLINA  
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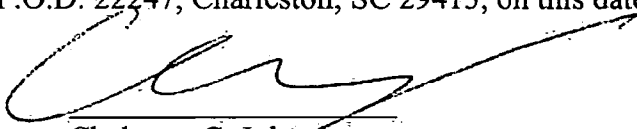
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PROOF OF SERVICE

I certify that I have served a copy of the foregoing including Appendix on the Respondents' counsel L. Smith-Yancey by depositing a copy of it in the United States Mail, postage prepaid, addressed at 16 Charlotte St., P.O.D. 22247, Charleston, SC 29413, on this date.

Date 10-2-15

  
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