

RECEIVED

DEC - 4 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

App. Case No. 2015 - 002062

Dr. Cynthia Holmes, M.D.

Petitioner,

v.

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

Respondents.

MOTION PURSUANT TO RULE 240(j), SCACR

Chalmers Johnson
1029 Bay St., #7
Port Orchard, WA 98366
425.999.0900
For Petitioner

Pursuant to S.C. Code § 14-3-350 and Rule 240(j), SCACR, Petitioner timely files and serves this motion. Any party aggrieved by an order of an individual justice or judge may seek review of that order by the appellate court. Rule 240(j), SCACR. *See Toal et al., Appellate Practice in South Carolina (2002)*, p. 259, regarding former Rule 224(j), SCACR, currently Rule 240(j), SCACR. Appellant respectfully seeks review of the order of an individual justice dated November 19, 2015.

STANDARD OF REVIEW

Questions of law are reviewed de novo. S.C. Const. art. V, § 5. Moreover, the Rule 240(j), SCACR, motion herein is an appeal of an order by an individual justice finally determining an appeal and the proper legal standard is de novo. S.C. Code § 14-3-350. It is well established that the Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to prohibit an individual judge from finally determining an appeal. See Local Rule 27(e), FRAP. Pursuant to S.C. Code § 14-3-350 and Rule 240(j), SCACR, the case stands before the 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 Petitioner is aggrieved by the November 19, 2015, order of an individual justice. The Petitioner respectfully appeals pursuant to S.C. Code § 14-3-350 for de novo review of the Rule 242, SCACR, petition for a writ of certiorari to the lower appellate court, which certiorari petition is fully incorporated herein by reference.

I. Rule 242, SCACR, expressly requires more than one justice to consider the certiorari petition.

The November 19, 2015, order of an individual justice denying Rule 242, SCACR, certiorari petition errs as a matter of law. Rule 242(a), SCACR, provides for authority in "(t)he Supreme Court, or any **two justices** thereof." Rule 242(a), SCACR (emphasis supplied). The Supreme Court consists of a Chief Justice and four Associate Justices. S.C. Const. art. V, § 2. "An individual judge or justice may grant or deny any motion or petition, except where the SCACR require the concurrence of two or more members of an appellate court (e.g., Rule 226(a), *currently Rule 242(a)*, SCACR - grant of Court of

Appeals certiorari petition requires at least two justices; Rule 227(i), SCACR - grant of PCR certiorari petition requires at least two justices). Rule 224(j), *currently 240(j)*, SCACR." Toal *et al.*, *Appellate Practice in South Carolina (2002)*, p. 259 (emphasis supplied). Accordingly, the November 19, 2015, order of an individual justice denying Rule 242, SCACR, certiorari petition should be vacated for de novo review by the Court without participation of that individual justice whose impartiality Petitioner reasonably questions. S.C. Code 14-3-50; CJC 3(E)(1), Rule 501, SCACR; 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).

II. The November 19, 2015, order errs and exceeds the authority of an individual justice in violation of Rule 240(j), SCACR.

Rule 240(j), SCACR, specifies the authority of an individual justice. Rule 240(j), SCACR, expressly prohibits an order by an individual justice in this case where "these rules (*see Rule 242(a), SCACR, supra*) require the concurrence of two or more members of an appellate court." Rule 240(j), SCACR. The Supreme Court consists of a Chief Justice and four Associate Justices. S.C. Const. art. V, § 2. See *State v. McMillan*, 349 S.C. 17, 561 S.E.2d 602 (2002) (the Court reversed a decision of the Court of Appeals where a hearing was conducted with only two of the three panel judges present). Accordingly, the November 19, 2015, order should be vacated for de novo consideration of the Rule 242, SCACR, certiorari petition by the Court.

III. As a matter of public policy and express legislative intent, prohibiting final determination of appeal by an individual judge or justice benefits appellate courts.

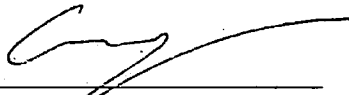
As a matter of public policy, it is in the best interests of the appellate courts to narrowly construe and/or prohibit final determination of appeal by an individual judge or justice. Legislative intent and express statutory authority mandate it, particularly where judges are elected and where judges are subjected to re-elections. Rule 242(a), SCACR. Public policy, State and federal constitutional law, the FRAP, and federal case law restrict a single appellate court judge's authority to finally determine appeal. This Court is respectfully requested to confirm the same. The propriety of an individual judge or justice finally determining appeal without comment is challenged as well. "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). The Petitioner respectfully submits that the November 19, 2015, order misapprehends the law, Petitioner is prejudiced thereby, and that order should be vacated. 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.

CONCLUSION

The propriety of an individual judge or justice finally determining appeal is a matter of importance to the public as well as the bench and bar. Pursuant to Rule 240(j), SCACR, Petitioner respectfully seeks de novo review of the Rule 242, SCACR, certiorari petition by the Court without participation of that individual justice pursuant to S.C. Code § 14-3-50.

Respectfully submitted,

Date 12-4-15



Chalmers C. Johnson
1029 Bay St., #7
Port Orchard, WA 98366
425.999.0900
For Petitioner

RECEIVED

DEC - 4 2015

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

App. Case No. 2015 - 002062

Dr. Cynthia Holmes, M.D.

Petitioner,

v.

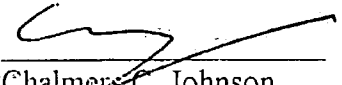
East Cooper Community Hospital, Inc.; and
Tenet HealthSystem Medical, Inc.,

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the foregoing 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 12-4-15


Chalmers C. Johnson
1029 Bay St., #7
Port Orchard, WA 98366
425.999.0900