

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 13 2016

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

App. Case No. 2015-002297

John Doe,

Appellant,

v.

Board of Zoning Appeals (BZA) and
Town of Sullivans Island (S.I.),
S. I. Zoning Administrator, and
S. I. Building Dept., Individually
and In Official Capacity,

Respondents.

Reply

Appellant timely submits Reply. The appellant respectfully opposes respondents' return for the reasons set forth below. Additionally, respondents' return fails to address the issues raised, cites no statutory authority, no Constitutional authority, and no case law, and recites the improper standard of review.

STANDARD OF REVIEW

Respondents' return errs as a matter of law because it recites and relies on the inapplicable legal standard for Rule 221, SCACR, petition for rehearing. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E.2d 234 (1933). Pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR, the issue stands before the appellate court for panel appeal and review as if it had never been decided. The legal standard for Rule 221, SCACR, petition for rehearing is inapplicable and is different than the legal standard applied at Rule 240(j), SCACR, petition for rehearing or motion, which is less burdensome.

An appeal from the decision of any one judge is allowed to a panel of the Court. S.C. Code 14-8-220; Rule 224(j), SCACR, now Rule 240(j), SCACR; Toal *et al*, *Appellate Practice in South Carolina* (2002), p. 12.

It is well established that the Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to provide panel review of an order by an individual judge. See Local Rule 27(e), FRAP. That interpretation is consistent with Justice Sandra Day O'Connor's warning to the public about the dangers of electing judges. In South Carolina, the legislature elects judges who are then subjected to reelections by the legislature.

Former Justice Sandra Day O'Connor wrote “. . . many Americans today do not see the need for independent judges. Many prefer a judiciary that acts merely as a reflex of popular will.” *Judicial Independence and 21st Century Challenges*, Sandra Day O'Connor, The Bench, July/August 2012. As she explained, “[t]he reason why judicial independence is so important is because **there has to be a safe place** where being right is more important than being popular; where fairness triumphs strength. That place, in our country, is the

courtroom. It can only survive so long as we keep out political influences.” *Id* (emphasis supplied). Panel review under Rule 240(j), SCACR, fosters judicial independence.

1. The February 3, 2016, order is reversible for lack of jurisdiction.

Jurisdiction may be raised at any time. See *Ex parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (1993). Though the issue was raised, the March 8, 2016, order of an individual judge failed to address the issue. The issue was timely raised at first opportunity. The clerk failed to follow the SCACR and deprived the other side of the opportunity to respond.

The clerk is not authorized by the SCACR, any statute, the constitution, or any other authority to deny either party the opportunity to respond to the motion pursuant to the SCACR and due process. The integrity of the appellate process can only be maintained by even-handedness and fairness on behalf of the clerk of the lower appellate court in fulfilling the clerk's duties which are limited constitutionally and statutorily. The clerk has no authority pursuant to Rule 263(b), SCACR (cited by respondents as the basis for the motion), to violate the SCACR by depriving the other side of

the opportunity to respond under Rule 240, SCACR, as well as under State and federal due process rights. As an example, the attached order of Chief Justice Costa Pleicones expressly provides for an order to be signed by the clerk of the lower appellate court in very narrow and limited circumstances, none of which apply herein. Accordingly, the February 3, 2016, order (copy attached) is void.

2. Rule 240(j), SCACR, panel review is not controlled by or limited by Rule 240(i), SCACR.

The March 8, 2016, order errs because Rule 240(i), SCACR, does not apply to Rule 240(j), SCACR. **S.C. Code § 14-8-220** is the statutory authority underlying Rule 240(j), SCACR, and it 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 (above). Rule 240(i), SCACR, formerly Rule 224(i), SCACR, does not apply to Rule 240(j), SCACR. The March 8, 2016, order errs as a matter of law because it recites and relies on the inapplicable Rule 240(i) and should be reversed.

3. Appellant respectfully requests the panel dismiss the respondents' out-of-time, unsubstantiated motion.

On information and belief, appellant respectfully disputes respondents'

unsubstantiated claim that the initial brief was not received. The Court of Appeals' postmark, certificate of service, and receipt of the initial brief confirms mailing. The copy mailed to respondents was not returned. In fact, the same untrustworthy firm has a pattern of submitting multiple misleading and/or false affidavits to this Honorable Court from employees, paralegals, attorneys, and partners making false claims, including non-receipt which they later had to admit was timely received. Documentation available on request. Respondents have failed to provide supporting affidavit or any other documentation herein. "Certificate of service by mail is conclusive, absent impeachment." *Toal et al, Appellate Practice in South Carolina* (2002), p. 143. Respondents have failed their burden of proof. Accordingly, respondents' motion should be dismissed.

CONCLUSION

For the foregoing reasons and for substantial justice affecting substantial rights, the appellant respectfully submits reply with request for abeyance and respectfully requests the following:

- a. An order providing that Rule 240(i), SCACR, is inapplicable to Rule

240(j), SCACR,

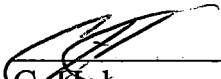
b. Rule 240(j), SCACR, panel appeal of the March 8, 2016, order, with a panel which does not include the individual judge who authored the order on appeal, Judge James Lockemy, or retired judges,

c. De novo review (not Rule 221, SCACR, petition for rehearing) of the unauthorized February 3, 2016, order of the lower appellate court clerk.

d. Because it exceeds the ministerial duties and/or authority of the lower appellate court clerk, the February 3, 2016, order should be stricken, and

e. Appellant respectfully requests the panel dismiss the respondents' out-of-time, unsubstantiated motion, including for lack of supporting affidavit.

Respectfully submitted,


C. Holmes
POB 187
SI, SC 29482-0187
843.883.3010

The Supreme Court of South Carolina

RE: Grants or Denials of Petitions for Writs of
Certiorari Under Rules 242, 243 and 247 of the South
Carolina Appellate Court Rules

ORDER

Under Rule 242(a) of the South Carolina Appellate Court Rules (SCACR), a writ of certiorari to review a decision of the South Carolina Court of Appeals will only be issued upon the concurrence of two members of this Court. Further, under Rule 243(j), SCACR, a writ of certiorari to review a post-conviction relief case will only be issued upon the concurrence of two members of this Court. Additionally, under Rule 247(h), SCACR, a writ of certiorari to review an order in an Access to Justice Post-Conviction DNA Testing Act (DNA Testing Act) case will only be issued upon the concurrence of two members of this Court. In the past, the results of a vote under these rules have been reflected by an order signed by the Court. We now change this practice.

Based on the vote of the Court on a petition for a writ of certiorari filed under Rule 242, 243 or 247, SCACR, the Clerk or a Deputy Clerk of this Court shall issue an order on behalf of the Court either denying or granting the petition. If the petition is granted in whole or part, the order shall indicate the questions that will be considered. The votes of the individual justices will not be revealed.

In addition, in those post-conviction relief or DNA Test Act cases that are pending before the Court of Appeals, the Clerk or a Deputy Clerk of the Court of Appeals shall issue an order on behalf of the panel either denying or granting the petition based on the vote of the panel under Rule 243(l) or 247(h), SCACR. If the petition is granted in whole or part, the order shall indicate the questions that will be considered. The votes of the individual judges will not be revealed.

s/Costa M. Pleicones C.J.

s/Donald W. Beatty J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

Columbia, South Carolina
January 20, 2016

The South Carolina Court of Appeals

John Doe, Appellant,

v.

Board of Zoning Appeals (BZA) and Town of Sullivan's
Island (S.I.), S.I. Zoning Administrator, and S. I.
Building Dept., Individually and In Official Capacity,
Respondents.

Appellate Case No. 2015-002297

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2015CP1000775

ORDER

The time for serving and filing the respondents' initial brief and designation of matter is hereby extended until February 16, 2016.

FOR THE COURT

BY


CLERK

FILED

2-3-16

Columbia, South Carolina

cc:

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S. I. Zoning Administrator, and
S. I. Building Dept., Individually
and In Official Capacity,

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the foregoing on the Respondents by depositing a copy in the United States Mail, postage prepaid, addressed to Respondents' counsel (843.727.2200) on this date at 16 Charlotte St., Chas., SC 29403. All parties required to be served have been served.

Dated April 8, 2016.



C. Holmes

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1 of 2

C. Holmes, M.D.
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SC Court of Appeals

The Honorable Jenny Kitchings
SCCOA
1220 Senate St.
Columbia, SC 29201

Re: Doe v. BZA et al
#15-002297

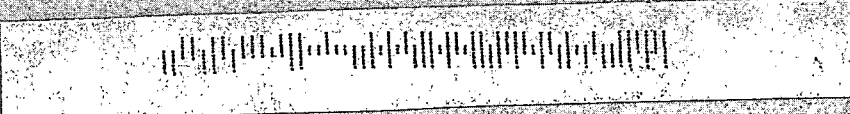
Dear Jenny:

Enclosed for filing please find the originals with request for abeyance of time limits. Also, enclosed please find the following:

- (1) Seven (7) copies,
- (2) Original and one (1) copy of proof of service, and
- (3) A stamped, self-addressed envelope for return of copies.

If you have any questions, please do not hesitate to contact me. Thank you for your kind attention to this matter.

With warmest regards,



CHARLESTON SC 294
MON 11 APR 2016 PM

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SC Court of Appeals

Clerk, SCCOA
1220 Senate St.
Columbia, SC 29201