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

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JUN 07 2019
SC Court of Appeals

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.

Motion for Clarification and
Petition for Rehearing En Banc

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SC 29482-0187
(843)883-3010
For Appellant

The appellant respectfully submits that the Court overlooked or misapprehended the following material points and appellant requests clarification. The record, including but not limited to the attached copy of the November 4, 2016, order herein, reflects multiple irregularities and errors by the clerk. The clerk has failed to comply with the SCACR, which she is sworn to uphold with even-handedness, transparency, and fairness. These issues of importance to the public, to the profession, and to the Court are capable of repetition and capable of evading judicial review. Accordingly, the appellant respectfully enters Motion for Clarification of the March 6, 2019, Order on Appellant's Expedited Motion and Petition for Rehearing En Banc of the May 23, 2019, order on Appellant's Expedited Motion with abeyance of all time limits.

Standard of Review

"An issue regarding statutory interpretation is a question of law." *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) (quoting *Univ. of S. California v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005)). As to questions of law, this court's standard of review is de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

I. Rule 240(j), SCACR, is not limited by Rule 240(i), SCACR.

Rule 240(j), SCACR, is independent of, and is not controlled by, Rule 240(i), SCACR. If Rule 240(j), SCACR, were controlled by, Rule 240(i), SCACR, then Rule 240(j), SCACR, would be superfluous. The statutory authority underlying Rule 240(j), SCACR, is S.C. Code § 14-8-220. That statute 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 underlies 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. Accordingly, Rule 240(j), SCACR, is independent of, and is not controlled by, Rule 240(i), SCACR. See Skinner v. Westinghouse Elec. Corp., 394 S.C. 428, 432–33, 716 S.E.2d 443, 445 (2011) (holding that a specific statute governing a certain issue controls over the more general language of another statute addressing the issue); Avant v. Willowglen Academy, 367 S.C. 315, 319, 626 S.E.2d 797, 799 (2006) (noting "the principle that more specific rules prevail over general ones").

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992). "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." Norman J. Singer, Sutherland Statutory Construction § 47.23 at 227 (5th ed.

1992) (citations omitted). Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970).

This Court should not completely disregard the text of an unambiguous statute based on an alleged conflict. In the instant case, the ordinary meaning of S.C. Code § 14-8-220 will not lead to absurd results unintended by the legislature, so the plain language of the statute should not be disregarded. *Hodges v. Rainey*, 533 S.E.2d 578, 341 S.C. 79 (S.C., 2000).

"In that vein, we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." (citation omitted). *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Rule 240(j), SCACR, is independent of, and is not controlled by, Rule 240(i), SCACR. Motion for Clarification of the March 6, 2019, Order on Appellant's Expedited and Petition for Rehearing En Banc of the May 23, 2019, order on Appellant's Expedited Motion is respectfully submitted. Accordingly, this Court should find Rule 240(j), SCACR, is independent of, and is not controlled by, Rule 240(i), SCACR.

II. Rule 240(j), SCACR, appeal requires review by a panel which does not include the appellate court judge who individually signed the order which is the subject of the Rule 240(j), SCACR, appeal.

Pursuant to S.C. Code § 14-8-220, the appellant respectfully submits the Rule 240(j), SCACR, appeal should be *de novo* review by a panel of judges which does not include the individual judge who signed the order which is the subject of the Rule 240(j), SCACR, appeal. Appellant filed the motion under Rule 240(j), SCACR, for appeal of a single judge's order, as opposed to a Rule 221, SCACR, petition for rehearing and as opposed to a request for reconsideration by the same judge who signed 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 judges. S.C. Code § 14-8-220. Meaningful review requires that a judge not participate in appeal of his or her own order. 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 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." *Rule 3(E)(1), CJC, Rule 501,*

SCACR. 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) (emphasis supplied). In that case, then Chief Judge Haynsworth further ruled that, "For many years a federal judge has been prohibited from sitting to hear or determine an appeal in a case or issue tried by him. 28 U.S.C.A. § 47. To say the least, it would be unbecoming for a judge to sit in a United States Court of Appeals to participate in the determination of the correctness, propriety and appropriateness of what he did in the trial of the case. After rendering decisions, some judges remain open minded, and some are unreluctant to confess previous error, but a reasonable person has a reasonable basis to question the impartiality of a judge who sits in a United States Court of Appeals to review his own decision as a trial judge." *Id.* at 1117. 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. On this ground the Fourth Circuit held in *Rice* that section 455(a) required the district judge to recuse himself. [*Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).] We agree with this result." *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989) (emphasis supplied).

Similarly, in this case, "(t)o say the least, it would be unbecoming for a judge" to sit on the appeal panel for his own decision. *Rice v. McKenzie*, 581 F.2d 1114, 1117 (4th Cir. 1978). Moreover, in consideration of legislative intent and the overarching principles incorporated in the State Constitution by its framers, due process requires appeal of a decision by an individual judge to a panel of judges which does not include the appellate court judge who individually signed the order which is the subject of the Rule 240(j), SCACR, appeal. Accordingly, appellant respectfully submits that the Rule 240(j) appeal should be heard by a panel of judges which does not include that judge.

III. This Court is requested to confirm the standard of review for Rule 240(j), SCACR, Petition for Rehearing is *de novo* review.

The Court is requested to confirm *de novo* review is the standard of review at Rule 240(j), SCACR, appeal pursuant to S.C. Code § 14-8-220, which is different than the standard of review at Rule 221, SCACR, rehearing. The Rule 240(j), SCACR, motion is an appeal of an order by an individual judge and the proper legal standard is *de novo*. S.C. Code § 14-8-220. It is well established that the Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to provide for review of decisions by a single judge. See Local Rule 27(e), FRAP. Pursuant to S.C. Code § 14-8-220 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). Significantly and materially in that case, the denial of a transfer motion clearly does not end or finally determine a case; the necessary element under Rule 240(j), SCACR, panel review is that the order is signed by a single judge. Accordingly, the legal standard of review for Rule 240(j), SCACR, appeal is *de novo*.

IV. The record reflects multiple errors, irregularities, and mishandling of the appeal by the Court of Appeals Clerk of Court which is capable of repetition and capable of evading judicial review.

The record, including but not limited to the March 6, 2019, Order(s) herein and the November 4, 2016, Order herein, copy attached, ruled that the Clerk erroneously failed to file pertinent documents relating to appeal thereby prejudicing the Court and the appellant. Specifically, the Court of Appeals Clerk of Court has abused her position and violated her sworn oath to uphold the SCACR and to facilitate appeals with transparency, even-handedness, and fundamental fairness. Despite correction by the Court including, but not limited to, that November 4, 2016, Order, the Court of Appeals Clerk of Court willfully neglected the Court's admonition and failed and refused to facilitate appeal of the May 22, 2018, order. The record evidences the Clerk of Court abusing her position in violation of the SCACR in order to curry favor and/or garner political support at her disposal for the next opportunity to buck for promotion, which is disqualifying. Public policy abhors abuse of position.

V. The March 6, 2019, order acknowledges the Court of Appeals Clerk of Court mishandled the appeal of the May 22, 2018, lower court order. Accordingly, it is respectfully requested that this Court issue its order for docketing the appeal which is timely served, filed, and paid in full.

Appellant is grateful for acknowledgment of the Clerk of Court's mishandling of appeal for the May 22, 2018, lower court order and respectfully requests order for compliance with the SCACR and for docketing that appeal. Rule 203, SCACR.

CONCLUSION

In support of express legislative intent, for substantial justice affecting substantial rights, and for compliance with the SCACR, appellant respectfully requests this Court grant the Motion for Clarification of the March 6, 2019, Order on Appellant's Expedited Motion and Petition for Rehearing En Banc of the May 23, 2019, order on Appellant's Expedited Motion with abeyance of all time limits.

Respectfully submitted,

C. Holmes
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For Appellant

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.

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ORDER

Appellant has filed a "Motion for the Court's Clarification" relating to this court's letter of July 29, 2016, returning Appellant's "Motion for Leave to File and Other Relief" to Appellant and explaining that this court would take no further action on the motion.

After consideration of the "Motion for the Court's Clarification," we find that Appellant's "Motion for Leave to File and Other Relief" was returned to Appellant in error, and we accept the motion for filing.

In the "Motion for Leave to File and Other Relief," Appellant requests that this court strike the supplemental record or allow Appellant to file a response to the supplemental record, arguing it contains matter not ruled upon by the lower court. Because the only matter contained in the supplemental record is a motion that was filed in the circuit court and designated in Respondents' designation of matter, the motion was properly included in the record on appeal pursuant to Rule 210(c), SCACR. Accordingly, "Appellant's Motion for Leave to File and Other Relief" is denied.

FOR THE COURT

FILED
November 4, 2016

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. 2015-002297

John Doe,

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Board of Zoning Appeals (BZA) and
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Respondents.

PROOF OF SERVICE

I certify that I have timely served the foregoing on the Respondents on this date by deposit in the United States Mail, postage prepaid, addressed to Respondents' attorney of record at 66 Hasell St., Charleston, SC 29401.

Dated 6/6/19

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Re: Doe v BZA et al
App. Case No. 2015-002297

Dear Jenny:

Enclosed for filing is the original Petition for Rehearing En Banc and Motion for Clarification with abeyance request in the above case. Also, enclosed are the following:

1) The filing fee,
2) Seven copies,
3) Proof of Service and a copy, and
4) SASE for return.

Thank you for your kind attention to this matter. With best personal regards, I remain

Very truly yours,