

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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OCT 31 2019

APPEAL FROM THE SOUTH CAROLINA  
WORKER'S COMPENSATION COMMISSION

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S.C. SUPREME COURT

Opinion No. 27920 (S.C. – Filed October 2, 2019)

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Scott Ledford, Employee, ..... Petitioner,

v.

Department of Public Safety, Employer, and  
State Accident Fund, Carrier, ..... Respondents.

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RETURN TO PETITION FOR REHEARING

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On October 2, 2019 the Court reversed the decision of the Court of Appeals, vacated the orders of Commissioner Barden and the Workers' Compensation Commission Appellate Panel, and remanded this claim for a new hearing before a single commissioner. On October 17, 2019 the Respondents filed a Petition for Rehearing pursuant to Rules 221(a) and 240, SCACR. On October 21, 2019 the Court requested a return to the Petition pursuant to Rule 221(a), SCACR. The Petitioner files this return and requests the Petition for Rehearing be denied.

- I. The Court found the recusal issue was dispositive and did not overlook or misapprehend the facts relevant to the recusal issue.

Footnote 5 of the Court's decision states the Court found the recusal issue dispositive. In its discretion, the Court declined to address the remaining issues

arising from the Court of Appeal's decision.<sup>1</sup> The Court did not overlook or misapprehend the facts relevant to the recusal issue.

“It is axiomatic that the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process embodied in the United States Constitution.”<sup>2</sup> The Code of Judicial Conduct seeks to ensure judicial proceedings are conducted fairly and impartially both in appearance and fact. Canon 3(E)(1), Rule 501, SCACR, seeks this end by providing, “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”<sup>3</sup>

The Respondents incorrectly state, “Canon 3(E) provides that recusal may be necessary when: (1) the judge has a personal bias or prejudice concerning a party or a party’s lawyer...” There is nothing “may” about it. In cases involving personal bias or prejudice, disqualification is expressly required.<sup>4</sup> The Canon, however, is broader than just personal bias or prejudice and requires disqualification whenever a judge’s impartiality might reasonably be questioned. Commissioner Barden’s threat to refer the Petitioner, a career law enforcement officer, for criminal prosecution unless he settled his admitted, career ending workers’ compensation claim on unfavorable terms caused him to reasonably question her impartiality.

The Court did not just find Commissioner Barden made false statements, it found, “[e]ven if Commissioner Barden’s statements were not intended as bona fide

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<sup>1</sup> *Futch v McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591, 598 (1999).

<sup>2</sup> *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed.942 (1955) cited in *Shaw v. State*, 276 190, 277 S.E.2d 140 (1981).

<sup>3</sup> *Roche v. Young Bros., Inc.*, 332 S.C. 75, 504 S.E.2d 311 (1998).

<sup>4</sup> Canon 3(E)(1)(a) – (d), Rule 501, SCACR.

threats, they were indisputably coercive...”<sup>5</sup> And, “[i]n our view Commissioner Barden’s behavior in this case would undoubtedly lead one to reasonably question her impartiality. Therefore, she should have recused herself.”

It appears the Respondents may have confused personal bias and prejudice with judicial prejudice.<sup>6</sup> The judicial prejudice that is required for reversal of the denial of a motion to recuse is prejudice that “stems from an extrajudicial source.”<sup>7</sup> Black’s Law Dictionary, defines “extrajudicial” as “[t]hat which is done, given, or affected outside the course of regular judicial proceedings.”<sup>8</sup> What the Court found Commissioner Barden did was clearly outside the course of regular judicial proceedings. Threatening a party with criminal prosecution unless they settle their case is coercive, violates the Code of Judicial Conduct, and, therefore, extrajudicial by definition.

The Petitioner not filing a recusal motion until after the hearing is irrelevant. Commissioner Barden’s offending conduct did not occur until after the hearing. The Court did not misapprehend Commissioner Barden’s findings were only tentative at the time of her offending conduct. “Tentative” is how she described them in her Order denying recusal.<sup>9</sup> The notion Petitioner’s counsel sought some tactical advantage has no support in the record. For the first time in his career, Petitioner’s attorney, at

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<sup>5</sup> Commentary to Canon 3(B)(8), Rule 501, SCACR.

<sup>6</sup> *Ellis v. Proctor Gamble Dist. Co.*, 315 S.C. 283, 443 S.E.2d 856 (1983) (If there is no evidence of judicial prejudice, a judge’s failure to disqualify himself will not be reversed on appeal).

<sup>7</sup> *Mallet v. Mallet*, 323 S.C. 141, 145, 473 S.E.2d 804, 807 (Ct. App. 1996) (Such bias must stem from an extrajudicial source...).

<sup>8</sup> Black’s Law Dictionary 5<sup>th</sup> Ed., West Pub. Co. (1979).

<sup>9</sup> Amended Appendix, Vol, 1, p. 163.

great personal risk and expense, filed the recusal motion only after documenting what happened, ordering a transcript from a prior hearing, researching the law of perjury, insurance fraud, and judicial ethics, hiring and seeking the advice from other attorneys and a legal ethics professor, and consulting with his client. This process taking twenty-four days is irrelevant. The Respondents' failure to file a response to the motion being deemed a general denial is relevant. A general denial merely puts averments in issue subject to proof. Proof provided in this case not just by the Petitioner's sworn affidavit and Commissioner Barden's admissions in her Order denying recusal, but by Respondents' counsel answering the Court's questions with candor and professionalism during oral argument. Nor is the fact the Attorney General investigates allegations of insurance fraud relevant. The Attorney General did not threaten the Petitioner with prosecution unless he forfeited his rights to a fair and impartial hearing and judicial review. The facts the Respondent claims the Court overlooked or misapprehended are irrelevant to the recusal issue. The Petition for Rehearing on this ground should be denied.

- II. It is the Court's place to reverse the decision of the Commission when substantial rights have been prejudiced because the findings violate constitutional or statutory provisions or are affected by other error of law.

Judicial review is guaranteed by Article I, Section 22 of the South Carolina Constitution as a check on the abuse of administrative decision making. Neither the Court of Appeals nor the Respondent cited authority for allowing cursory administrative review to shield judicial misconduct. Such a rule would defeat judicial review when needed most. A Court may reverse or modify a decision of the Workers'

Compensation Commission when substantial rights have been prejudiced because the Commission's findings violate constitution or statutory provision or are affected by other error of law.<sup>10</sup>

The Appellate Panel's finding appealed was "...there is no evidence to support [Petitioner's] assertion that the Hearing Commissioner 'threatened criminal proceedings' unless the case settled."<sup>11</sup> Not that the Appellate Panel weighed conflicting evidence and found this evidence more persuasive than that. Their finding there was no evidence is not supported by the reliable, probative, and substantial evidence in the whole record consisting of the affidavit of the Petitioner's attorney and Commissioner Barden's admitting the substance of the allegations in findings of fact 10 through 14 of her Order denying recusal. Allegations in the sworn affidavit attached to the recusal motion should have accepted as true.<sup>12</sup> No other evidence was introduced and no hearing was held before Commissioner Barden issued her Order denying recusal. When the facts are admitted or established, the question becomes one of law for the Court rather than the Commission to decide.<sup>13</sup>

The Court should decline to adopt a novel rule that would allow cursory administrative review to defeat meaningful judicial review. The decision of the Appellate Panel was cursory. Having found no evidence existed, the Appellate Panel failed to consider the Code of Judicial Conduct and statutory violations argued to

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<sup>10</sup> *Etheredge v. Montsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); *S.C. Code Anno.*, § 1-23-380 (5) (a) – (f).

<sup>11</sup> Amended Appendix, Vol. 1, pp. 97 – 98.

<sup>12</sup> *Mallett v. Mallett*, *supra*. 473 S.E.2d at 808.

<sup>13</sup> *Jordan v. Dixie Chevrolet, Inc.*, 218 S.C. 73, 61 S.E.2d 654 (1950); *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

support the motion, failed to consider whether Commissioner Barden had the right not to enforce the statute she was charged with enforcing. and, most important, failed to consider whether threatening criminal prosecution unless the Petitioner settled his admitted claim on unfavorable terms was coercive and could reasonably cause him to question Commissioner Barden's integrity, fairness, and impartiality.<sup>14</sup>

While awards of the Commission are binding on questions of fact, the South Carolina Constitution, the South Carolina Workers' Compensation Act, and the Administrative Procedures Act all preserve the right to appeal decisions of the Commission for errors of law.<sup>15</sup> While, "[t]he court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; ... (d) affected by other error of law."<sup>16</sup> The Court has found Commissioner Barden's conduct was "quite simply unacceptable and offensive to the ideals of a fair and impartial judiciary." It further found her conduct was coercive in violation of the Code of Judicial Conduct. For the Respondent to suggest it is not the Court's place to review Commissioner's misconduct is shocking. It is not only the Court's "place" but its constitutional duty to review the decisions of administrative agencies to prevent abuse. It is the Court's place to rule Commissioner Barden should have recused

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<sup>14</sup> *Murphy v. Murphy*, 319 S.C. 324, 461 S.E.2d 39 (1995).

<sup>15</sup> Article I, Section 22, South Carolina Constitution; *S.C. Code Anno.*, § 42-17-60, as amended 2007; *S.C. Code Anno.*, § 1-23-380(5)

<sup>16</sup> *Supra.*, § 1-23-380(5)(a) and (d).

herself as a matter of law. The Court did not overlook or misapprehend its authority to prevent administrative abuses and violations of the Code of Judicial Conduct. The Petition for Rehearing on this ground should be denied.

### CONCLUSION

The Court did not overlook or misapprehend the facts or the law relevant to the recusal issue it found dispositive. Having found Commissioner Barden's conduct was coercive, violated the Code of Judicial Conduct, and was unacceptable and offensive to the ideals of a fair and impartial judiciary, it was the Court's place to reverse the decision of the Court of Appeals, vacate the orders of Commissioner Barden and the Workers' Compensation Commission Appellate Panel, and remand this claim for a new hearing before a single commissioner as a matter of law. The Petition for Rehearing should be denied.

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By: 

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October 25, 2019.

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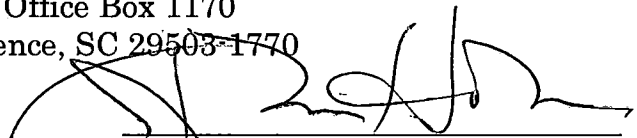
PROOF OF SERVICE

I certify that I have served all counsel of record with a copy of the Return to the Petition for Rehearing by mailing copies thereof by United States Mail, postage prepaid, on October 25, 2019 to the following persons:

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October 25, 2019

The Honorable Daniel Shearouse  
Clerk of Court, S.C. Supreme Court  
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**S.C. SUPREME COURT**

Re: Scott Ledford v. Department of Public Safety  
Opinion No. 27920 (S.C. Filed October 2, 2019)  
Appellate Case No. 2018-0001677

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of the Petitioner's Return to the Petition for Rehearing filed on October 17, 2019 to which the Court requested a return on October 21, 2019. Also enclosed please find proof of service of the return on all counsel of record. Please advise if anything further is required.

With kindest regards, I am

Very truly yours,

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JKH/jkh

Enclosures

cc: J. Gabriel Coggiola, Esq.  
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