

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Feb 16 2021
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

9th Judicial Circuit Court Judge

S.C. Court of Appeals Case No. 2020-000968
Circuit Court Case No. 2002-CP-10-1448
and after change of venue:
Circuit Court Case No. 2007-CP-10-1444

C. Holmes, M.D,

Respondent-Appellant,

v.

Manton Grier, James Y. Becker, and
Haynsworth Sinkler Boyd, P.A.,
as successor to Sinkler & Boyd, P.A.,

Appellant-Respondents.

Motion to Reconsider and

In the alternative, Rule 240j, SCACR, Motion, and

Motion for Abeyance of All Time Limits

Chalmers Johnson
PO Box 1575
Port Orchard, WA 98366
425.999.0900
For Respondent-Appellant

INTRODUCTION

Respondent-Appellant timely enters objection to dismissal of cross-appeal with motion for abeyance pending resolution. Specifically, the order of dismissal dated February 4, 2021, is based on error of material fact and law as the notice of cross-appeal (NOCA) was timely served and timely filed and docketed by the South Carolina Court of Appeals Clerk of Court. Pursuant to Rule 203(c), SCACR, the record reflects the NOCA is timely served and filed. Accordingly, the February 4, 2021, order should be vacated. In addition, there was no allegation/motion before the court alleging that the cross appeal was based on an untimely notice of appeal, thus a sua sponte order dismissing the case without notice or an opportunity to be heard would deny due process.

I. Motion to Reconsider.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference. The order of dismissal dated February 4, 2021, is based on error of material fact and law as the notice of cross-appeal (NOCA) is timely served, timely filed, and timely docketed by the South Carolina Court of Appeals Clerk of Court. Pursuant to Rule 203(c), SCACR, the record reflects the NOCA is timely served and filed:

(c) Cross-Appeals. A respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties, or in the case of an appeal from the administrative tribunal, by serving a notice of appeal on the agency, the administrative law court (if it has been involved in the case) and all parties of record, within five (5) days after receipt of appellant's notice of appeal, or within the time prescribed by Rule 203(b), whichever period last expires. Rule 203(c), SCACR.

Rule 203(b) provides:

(1) Appeals From the Court of Common Pleas. A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCPP), motion to alter or amend the judgment (Rules 52 and 59, SCRCPP), or a motion for a new trial (Rule 59, SCRCPP) has been made, the time for appeal for all

parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

The Notice of Cross Appeal herein was timely served and filed on August 4, 2020, within 30 days of receipt of written notice of entry of the order on Rule 59(e), SCRPC, motion on July 6, 2020.

Accordingly, the record shows that notice of cross-appeal is timely and the Court should reconsider its finding that it was not. reconsideration is respectfully requested.

As a threshold matter, there was no motion before the Court alleging that the notice of appeal was untimely. It seems likely that there has been some mistake here, as the Order of February 4th does not address any motion that was filed in this case and pending before the Court. The Order was accompanied by a letter from the clerk (attached) which implies that the cross appeal was not dismissed, as it grants the cross appeal's respondent (Haynesworth) time to file a responsive brief. Thus, the undersigned really believes that there has been some sort of misunderstanding or mistake here that should be obvious on reconsideration. Out of an abundance of caution, the Respondent/cross Appellant (Dr. Holmes) is raising an issue as to a lack of notice and opportunity to be heard on the issue of the timeliness of the notice of appeal regarding the cross appeal. As there was no such motion pending, the Court's Order would be sua sponte. Dismissing the cross appeal without notice or an opportunity to the affected party denies due process and severely prejudices her rights. Notice and an opportunity to be heard on an issue is "[T]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) 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, 9, 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. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

II. In the Alternative, Rule 240j, SCACR, Motion Is Entered.

The undersigned hopes that this issue will be addressed and corrected upon reconsideration. In the alternative, however, each assertion set forth above is incorporated herein by reference as if here set forth verbatim. If the above Motion to Reconsider is denied, the Respondent/Cross Appellant, Dr. Holmes, hereby submits a Motion under Rule 240j, SCACR. The underlying statutory authority, S.C. Code § 14-8-220, and Rule 240(j), SCACR, expressly provide for appeal of an order by a single judge or justice 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." Rule 240(j), SCACR, is independent of Rule 240(i), SCACR. "The court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition

has the effect of dismissing or finally deciding a party's appeal.” Rule 240(i), SCACR. Accordingly, the legislative intent and underlying statutory authority remain the same in S.C. Code § 14-8-220 and the standard of review is *de novo* (not the same standard as a Rule 221, SCACR, petition for rehearing). 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).

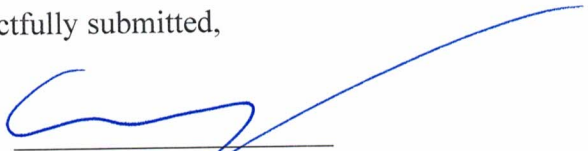
In addition, pursuant to S.C. Code § 14-8-220, the Respondent-Appellant respectfully submits that the Rule 240(j), SCACR, appeal should be with *de novo* review by the court or panel which does not include the individual justice who signed the order that is the subject of the Rule 240(j), SCACR, appeal. Appellant filed the motion under Rule 240(j), SCACR, for appeal of a single justice's order, as

opposed to a Rule 221, SCACR, petition for rehearing. S.C. Code § 14-8-220 provides statutory authority for Rule 240(j), SCACR, and provides for **appeal** of the order of a single justice. S.C. Code § 14-8-220. The panel should not include the Judge who issued the Order under review. “(t)o say the least, it would be unbecoming for a judge (*or justice*)” to sit on the appeal panel for his own decision. *Rice v. McKenzie*, 581 F.2d 1114, 1117 (4th Cir. 1978) (emphasis supplied).

CONCLUSION

Dr. Holmes, the Respondent-Appellant, respectfully enters objection to dismissal of cross-appeal with motion for abeyance pending resolution and requests that the Court reconsider its decision in light of the facts that 1) the record shows the notice of appeal was timely filed for the cross appeal and 2) there was no pending motion to dismiss the cross appeal based on an allegation that the notice of appeal was untimely served or filed. A Rule 240j, SCACR, Motion herein is submitted in the alternative in the event the Motion to Reconsider is denied and/or if order of dismissal dated February 4, 2021, based on untimely NOCA is not vacated/reversed.

Respectfully submitted,


Chalmers Johnson
PO Box 1575
Port Orchard, WA 98366
425.999.0900
For Respondent-Appellant

2-13-21

EXHIBIT A



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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February 04, 2021

Ms. Mary M Caskey, Esquire
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Mr. Chalmers Carey Johnson, Esquire
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Port Orchard WA 98366

Ms. Clara Elizabeth Weston, Esquire
PO Box 11889
Columbia SC 29211

Re: Cynthia Holmes v. Haynsworth (8)
Appellate Case No. 2020-000968

Dear Counsel:

Please see the enclosed order regarding this appeal.

All parties are advised that Appellant/Respondent Haynsworth Sinkler Boyd, P.A. may serve and file its respondent's initial brief and designation of matter no more than 30 days from the filing date of the enclosed order. If Appellant/Respondent chooses to not serve and file a respondent's initial brief, then the record on appeal must be served within 30 days and proof of service must be immediately filed with this Court.

Very truly yours,

V. Claire Allen

CLERK

cc: Mary Cothonneau Eldridge, Esquire

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as successor to Sinkler & Boyd, P.A.,

Appellant-Respondents.

PROOF OF SERVICE FOR:

Motion to Reconsider and
In the alternative, Rule 240j, SCACR, Motion, and
Motion for Abeyance of All Time Limits

I certify that on this date I have served a copy of the counsel for the Respondents via emails:
mcaskey@hsblawfirm.com , lweston@hsblawfirm.com , meldridge@hsblawfirm.com on February 13,
2021. A copy of the sent email is attached.

2-13-21


Chalmers Johnson
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Chalmers Johnson <chalmersjohnson@gmail.com>

Appeal No. 2020-000968 - Respondent/Appellant's motion to reconsider and motion 240j

1 message

Chalmers Johnson <chalmersjohnson@gmail.com>

Sat, Feb 13, 2021 at 1:08 PM

To: "Caskey, Mary" <mcaskey@hsblawfirm.com>, lweston@hsblawfirm.com, "Eldridge, Mary Cothonneau" <meldridge@hsblawfirm.com>

Cc: hharrington@hsblawfirm.com

Dear Haynesworth Appeals team:

Attached please find my motion to reconsider/ 240j motion regarding the Court's feb 4th order.

—
Sincerely,
Chalmers C. Johnson

Longshot Law, Inc.
P.O. Box 1575
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(425) 999-0900

2 attachments **Proof of service 2-13-21.pdf**
289K **motion to reconsider 240j.pdf**
3080K