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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the 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.

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Should a Judge be allowed to issue an order on an issue that is not before the Court without offering the affected party to have notice and an opportunity to be heard?

II. Does Rule 240(j) SCACR require a de novo review standard?

III. Should a Rule 240(j) SCACR review panel exclude the Judge who issued the Order being reviewed by the panel?

CERTIFICATE OF COUNSEL

The undersigned certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on March 29, 2021.

STATEMENT OF THE CASE

The Petitioner's cross appeal in this case was dismissed by an Order on February 4, 2021. The opposing party (Appellant/Respondent) had moved to dismiss the appeal because the Petitioner's brief was filed 34 days after Petitioner had indicated that she received a hearing transcript, arguing, as the sole basis for the motion:

> Pursuant to Rule 208(a)(1), an appellant must serve its initial brief on all parties and file its initial brief with the clerk of the appellate court within thirty days after receiving the transcript. Despite having received the requested transcripts on October 11, 2020, however, Holmes did not serve her initial brief on all parties until November 15, 2020, and the Court did not file the brief until November 16, 2020—four and five days beyond the thirty-day deadline, respectively. Rule 208(a)(4) states that, "[u]pon the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court shall sign an order dismissing the appeal[.]" Because Holmes failed to timely file her initial brief, her cross-appeal must be dismissed.

(Appellant/ Respondent's Motion to Dismiss Cross Appeal, Dec. 15, 2020)

The Judge granted the motion and dismissed the appeal on the grounds that "Holmes failed to timely serve and file a notice of appeal from all of the remaining orders listed in her appeal, therefore, the appeals from those orders are dismissed" (Order Feb. 4, 2021) This Order does not address the issues

raised in the Appellant/Respondent's motion. In addition, the assertion that the notices of appeal were not timely filed is incorrect.

The petitioner filed a petition for rehearing, and also specifically requested a review *de novo* of the decision by a panel review as opposed to an application of the Rule 221 rehearing standard (material facts or principal of law overlooked). The petition was denied and the appeal was dismissed by an Order on . That Order stated "The Court is unable to discover that any material fact or principal of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing." (Order of March 29, 2021) This is that standard language from a Rule 221 petition for rehearing denial and indicates that there was not a de novo consideration of the Order at issue.

Finally, it appears that the same Judge who issued the erroneous February 4, 2021 order was on the panel of judges reviewing the order. This is counter to the general integrity checks inherent in an appellate review.

ARGUMENT

I. The Court issued an Order on an issue that was not raised before the Court and failed to address the issue that had been raised and briefed by the parties.

The Court dismissed the Petitioner's appeal based on a determination that the notice of appeal was untimely. However, the motion before the Court alleged no such thing. The motion before the Court asked the Court to dismiss the Petitioner's appeal for filing the initial brief 34 days after the receipt of transcript when it should have been filed 30 days thereafter. 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. There has been some sort of misunderstanding or mistake here that should have been obvious on reconsideration.

If the Court did, on its own, ignore the basis of the motion and make a decision on an unrelated issue, then 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). As argued below, the notice of appeal in this case was clearly timely filed. Denying the Petitioner the right to respond and brief the issue has caused the ultimate prejudice of dismissal, and an erroneous dismissal at that.

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, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) 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), SCRCP, motion on July 6, 2020. Accordingly, the record shows that notice of cross-appeal is timely. The Appellate Court has not only dismissed this case based on an issue that was never before the Court, but it was in error on the issue on which it did base its ruling.

II. The standard of review for Rule 240(j), SCACR, Petition for Rehearing is *de novo* when a panel is reviewing a decision by an individual judge. It was error to apply the standard for review from a Rule 221 Petition for rehearing.

The Order at issue in this petition, the Order of February 4, 2021, was issued by an individual judge. The Petitioner filed a motion for reconsideration and also a motion for review under Rule 240(j)SCACR. This rule provide a party may appeal a decision of any one judge to a panel of the Court. S.C. Code § 14-8-220 S.C.; Rule 240(j), SCACR. The Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to provide for panel review of decisions by a single judge for preservation of the integrity of the process and for the Court's self-preservation as well as other reasons, particularly in South Carolina where judges are subjected to elections and re-elections. See Local Rule 27(e), FRAP. Pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR, the order dismissing this appeal should therefore have stood before the Rule 240(j) review panel as if it had never been decided and should be reviewed de novo.

Rule 240(j), SCACR, expressly provides for panel appeal and review of order signed by a single judge. "(j) Authority of an Individual Judge or Justice. Except where these rules require the

concurrence of two or more members of an appellate court, an individual judge or justice may grant or deny any motion or petition on behalf of the court. Any review of an order issued by an individual judge or justice shall be by petition for rehearing." Rule 240(j), SCACR The statutory authority underlying Rule 240(j), SCACR, is found in S.C. Code § 14-8-220. That statute is set forth 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 which underlies Rule 240(j), SCACR, 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. In contrast to Rule 221, SCACR, petition for rehearing, the legal standard of review for Rule 240(j), SCACR, appeal is de novo.

The appellant respectfully requests that the Court accept this case for review and is seeking that it be remanded for a de novo review by a panel pursuant to Rule 240(j). There has been a clear misapplication of the Rules of Appellate Procedure in this case. It is a procedural issue that has a profound effect on the petitioner's right to review and the denial of a de novo review by a panel in favor of a reconsideration standard is sever prejudice to the party requesting the Rule 240(j) review. As

such, an opinion on this procedural matter from the Supreme Court is needed to set the matter straight and not only to avoid prejudice to other parties seeking and entitled to de novo review in the future, but to clarify the application of the rule for South Carolina practitioners and the Appellate judiciary. The 249(j) panel review on a de novo standard of review offers a last chance for a de novo review of an Order for a petitioner before going to the Supreme Court. It is an important tool for judicial efficiency, as a de novo review of an order by a panel of judges is much more likely to resolve issues decided on Orders in an appeal (as opposed to a decision on the merits) before they must proceed to the Supreme Court via a petition for writ of certiorari.

III. The panel in a Rule 240(j) SCACR should not include the Judge who issued the Order under review.

The Supreme Court should address the issue of whether the panel in a Rule 240(j) review must exclude the Judge who issued the Order under review. Meaningful review on appeal 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 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). In the *Rice* 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). Accordingly, the appellant respectfully submits the legislative intent, letter, and spirit of Rule 240(j), SCACR, appeal requires de novo review by a panel of judges, which does not include the individual judge who issued the order.

CONCLUSION

The Petitioner’s appeal was wrongfully dismissed based on error of material fact, law, and what appears to have been a clear misapprehension of the issues raised before the Court. The Supreme Court should recognize and respond to a duty to correct a matter of such obvious mistake by one of the State’s Appellate Courts.

In addition, the Supreme Court is needed in order to clarify the rights and obligations of a moving party and the Court under Rule 240(j), SCACR. This case should be reviewed and heard by the Supreme Court both to right a substantial injustice and to offer clarity and explanation for a procedural matter that will affect substantial matters such as standard of review and right to a multiple judge panel

at the last stage of review before a petition for writ of certiorari for petitioners seeking relief from an Order in the Appellate Court.

Respectfully submitted,

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