

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

9<sup>th</sup> Judicial Circuit Court Judge

**RECEIVED**

**Jun 21 2021**

**S.C. SUPREME COURT**

App. Case No. 2021-000451  
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.,

Appellant/Petitioner,

v.

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

Respondents.

REPLY

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TABLE OF AUTHORITIES

CASES

*Avant v. Willowglen Academy*, 367 S.C. 315, 626 S.E.2d 797 (2006)..... 6-7

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## ISSUES PRESENTED

- III. Should a Judge be allowed to issue an order on an issue that is not before the Court without offering the affected party notice and an opportunity to be heard?**
  
- II. Does Rule 240j, SCACR, require a de novo review standard?**
  
- III. Should a Rule 240j, SCACR, appeal panel exclude the Judge who issued the Order being reviewed by the appeal panel?**

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*Rice v. McKenzie*, 581 F.2d 1114 (4<sup>th</sup> Cir. 1978)..... 8

*Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 716 S.E.2d 443 (2011)..... 7

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STATUTES

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## STATEMENT OF THE CASE

The Respondent has entered an Objection to the Petitioner's request for review by the Supreme Court. The Petitioner hereby enters a reply.

## REPLY

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

Respondents' return mischaracterizes the lower court order on appeal herein. Specifically, Respondents mischaracterize the lower court order as sua sponte action. The order does not purport to be sua sponte. The order does not state it is sua sponte. If it had been sua sponte motion, the Judge would have so stated, and notice and opportunity to be heard would have been provided. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). 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).

In addition, Respondents' return mischaracterizes the Order at issue as determining that there is

a lack of jurisdiction. The Order does not say this. Even Respondents' statement of facts concedes timely filing and service of Petitioner's Notice of Cross-Appeal on August 4, 2020. Respondents' Return, p.4. Pursuant to Rule 263(b), the time prescribed by these Rules for performing any act except the time for serving the notice of appeal (NOA) under Rules 203 and 243 may be extended. Rule 263(b), SCACR. As such, given that Respondents admit the filing of the initial brief is only three or so days late, Petitioner should be granted a reasonable brief extension for filing under Rule 263(b), SCACR. *Connor v. City of Forest Acres*, 560 S.E.2d 606 (2002) (no jurisdiction in the absence of a NOA).

It is well-settled that after final judgment is entered, the appellate court may then review any intermediate orders. The March 20, 2020, order in Court of Appeals App. Case No. 2019-000880, ruled the earlier appeal of the April 9, 2019, and May 9, 2019, orders is interlocutory and dismissed the appeal. Now that there is a final judgment and Petitioner brought the appeal, it would be counter to the law of the case to find that the appeal was untimely. The *Link* case provides that a party need not challenge the final judgment itself in order to contest an intermediate order. *Link v. School District of Pickens County*, 393 S.E.2d 176 (1990).

## **II. Does Rule 240j, SCACR, require a de novo review standard?**

The standard of review for Rule 240(j), SCACR, Panel Appeal /Petition for Rehearing is *de novo*. The Court of Appeals decision is reversible as a matter of law for failure to apply the proper legal standard. Ambiguity regarding the legal standard required and/or applied herein is a denial of due process. This Honorable Court is respectfully requested to exercise its jurisdiction to provide clarification for the Bench and Bar of the legal standard required under Constitutional and statutory authority to comply with meaningful appellate review and to ensure uniformity.

Respondent's position seeks to elevate form over substance by conflating Rule 221, SCACR, petition for rehearing with Rule 240(j), SCACR, petition for rehearing. The underlying statutory authority, S.C. Code § 14-8-220, along with Rule 240(j), SCACR, and former Rule 224(j), SCACR, confirm a different purpose with a different legal standard than Rule 221, SCACR, petition for rehearing. S.C. Code § 14-8-220 expressly provides 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, "Any review of an order issued by an individual judge or justice shall be by petition for rehearing." 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”).

**III. Should a Rule 240j, SCACR, appeal panel exclude the Judge who issued the Order being reviewed by the appeal panel?**

Respondent seems to misconstrue the legislative intent and the plain language of S.C. Code § 14-8-220. Meaningful judicial review requires that a judge not participate in appeal of his or her own order for the following reasons. “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 *panel for appeal* to review his own decision as *an individual judge.*” *Rice v. McKenzie*, 581 F.2d 1114, 1117 (4th Cir. 1978)(emphasis supplied). 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.* Accordingly, the petitioner 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 issues raised by the Petitioner are not only legitimate but important matters to be addressed by the Supreme Court which will substantially affect the rights of the Citizens of the State of South Carolina. Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,



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