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Jan 04 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr.

App. Case No. 2019-001671

J. Doe,

Appellant,

v.

Design Review Board (DRB)
of the
Town of Sullivans Island (S.I.),
Alka Construction Co.,
Svjetlana Bilic Damjanovic,
Individually and d/b/a Alka
Construction Co., Branko
Damjanovic, Individually and
d/b/a Alka Construction Co.,
Kenneth Craft, III, Individually and
d/b/a Craft Design Co.,

Respondents.

Motion For Rule 240(j), SCACR, De Novo Panel Appeal

Appellant hereby submits Rule 240(j), SCACR, motion with abeyance request. Rule 240(j), SCACR, provides *de novo* panel appeal of an individual judge's order. As set forth more fully below, the December 23, 2021, Order is reversible based on error of material fact and law as well as internal inconsistencies. Specifically, that December 23, 2021, Order denies, without adequate, or any, explanation, the motion for permission to file the current initial brief regarding matters of great public importance which exceeds the page limit. Accordingly, Appellant requests reversal of the December 23, 2021, Order.

I. The standard of review for Rule 240(j), SCACR, Panel Appeal is *de novo*.

Questions of law are reviewed *de novo*. S.C. Const. art. V, § 5. The December 23, 2021, Order was issued by an individual judge. Express legislative intent and statutory authority provide that appeal shall be allowed from decision of any one judge to a panel of the Court. S.C. Code § 14-8-220 S.C.; Rule 240(j), SCACR. 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 panel appeal of decisions by a single judge to preserve the integrity of the process and for the court's self-preservation among other reasons, particularly in South Carolina where judges are subject 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 December 23, 2021, Order is subject to *de novo* panel appeal. 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, the necessary element for Rule 240(j), SCACR, panel appeal is that the order is signed by a single judge; Rule 240(j), SCACR, review is an appeal to a panel. A discerning review establishes a different legal standard of review, i.e., *de novo*, reflecting a different purpose for Rule 240(j), SCACR, appeal as opposed to Rule 221, SCACR, petition for rehearing. The Legislative intent as well as the letter and spirit of S.C. Code § 14-8-220 directs *de novo* panel appeal. S.C. Code § 14-8-220 was enacted for good cause and appellant seeks redress thereunder.

Rule 240(j), SCACR, expressly provides for panel appeal of the order signed by a single judge. 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).

Rule 240(j), SCACR, which incorporates that statute, 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." 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*.

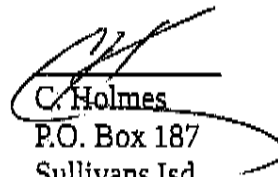
Meaningful review on appeal under Rule 240(j), SCACR, and S.C. Code § 14-8-220 requires that a judge not participate in appeal of his or her own order. Occasionally, a recently appointed Appellate Court Judge or recent Supreme Court Justice will find him or herself in the position of potentially reviewing 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, Appellant respectfully submits the legislative intent, letter, and spirit of Rule 240(j), SCACR, require *de novo* appeal by a panel of judges.

CONCLUSION

Appellant respectfully submits Motion for Rule 240(j), SCACR, *De Novo* Panel Appeal with abeyance request pending resolution and respectfully requests the December 23, 2021, Order of a single judge be reversed.

Respectfully submitted,


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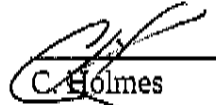
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d/b/a Alka Construction Co.,
Kenneth Craft, III, Individually and
d/b/a Craft Design Co.,

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PROOF OF SERVICE

I certify that a true copy of the above was served upon the respondents by regular first class mail postage pre-paid on this date at this address: Ben Traywick, 171 Church St., Ste. 340, Chas., SC 29401; GT Walker, 66 Hasell St., Chas., SC 29401; and Kenneth Craft III, 204 Spooner Ln., Mt. Pleasant, SC 29464.

Dated 12/31/2021


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SC Court of Appeals

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