

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

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Appellate Case No. 2012-213564

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IN THE MATTER OF:  
Estate of Robert Ross Dinkins

Mae Lee Dinkins.....Appellant,

v.

Synovus Trust Company, N.A.....Respondent,

William C. Cantey, Jr., as Successor Co-Personal Representative.....Respondent.

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**INITIAL BRIEF OF RESPONDENT  
WILLIAM C. CANTEY, JR., AS SUCCESSOR CO-PERSONAL  
REPRESENTATIVE**

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TABLE OF CONTENTS

Table of Authorities ..... ii, iii

Statement of Issues on Appeal ..... 1

Statement of the Case ..... 1

Statement of the Facts..... 5

Standards of Review ..... 11

Arguments

I. **THE CIRCUIT COURT ERRED IN RULING THAT THE ISSUE OF WHETHER THE PROBATE COURT HAS THE LEGAL AUTHORITY TO ORDER A PERSONAL REPRESENTATIVE OF AN ESTATE OR INTERESTED PARTY TO LITIGATION TO EXECUTE A PROMISSORY NOTE AND MORTGAGE WAS NOT PRESERVED FOR APPEAL..... 14**

II. **THE CIRCUIT COURT ERRED IN RULING THAT THE ISSUE OF WHETHER SYNOVUS TRUST’S FEES ACCRUED AND WERE CHARGED FOR LONGER THAN THEY SHOULD WAS NOT PRESERVED FOR APPEAL..... 16**

III. **THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT’S ORDER GRANTING FULL COMPENSATION REQUESTED TO SYNOVUS TRUST FROM THE ESTATE AS THERE IS NO LEGAL BASIS OR AUTHORITY FOR SUPPORTING THE ORDER REQUIRING THE PERSONAL REPRESENTATIVE OF AN ESTATE TO SIGN A PROMISSORY NOTE AND MORTGAGE AND SUCH ORDER IS CONTRARY TO THE CLEAR, UNAMBIGUOUS, AND PLAIN LANGUAGE OF S.C. CODE § 62-3-805 AND PUBLIC POLICY..... 17**

IV. **THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT’S ORDER GRANTING THE FULL FEE AMOUNT SOUGHT BY SYNOVUS TRUST TO SYNOVUS TRUST FROM THE ESTATE..... 20**

Conclusion ..... 24

**TABLE OF AUTHORITIES**

**CASES**

CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).....12

City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997).....12, 18

Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999).....12

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).....12, 18

In re Howard, 315 S.C. 356, 360, 434 S.E.2d 254, 257 (1993).....13

In re Estate of Pallister, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005).....14, 20

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).....11

Miller v. Aiken, 364 S.C. 303, 613 S.E.2d 364 (2005).....18

Nicholson v. Nicholson, 378 S.C. 523, 663 S.E.2d 74 (Ct. App. 2008).....11

Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006).....11, 12, 14

Sierra Club v. S. Carolina Dept. of Health & Envtl. Control, 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010).....11, 14

Skinner v. Elrod, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1996).....12

**STATUTES**

S.C. Code Ann. § 62-1-201(20).....22

S.C. Code Ann. § 62-1-308.....13

S.C. Code Ann. § 62-3-703.....22

S.C. Code Ann. § 62-3-711.....22

S.C. Code Ann. § 62-3-713.....22

S.C. Code Ann. § 62-3-719.....2

S.C. Code Ann. § 62-3-805.....1, 2, 13, 17, 18, 19, 24, 25

**COURT RULES**

South Carolina Rules of Civil Procedure Rule 59.....4, 5, 11, 12, 14, 15, 16, 17, 24

**OTHER AUTHORITIES**

Black’s Law Dictionary, (9<sup>th</sup> ed. 2009).....15

1990 Op. Atty Gen No. 90-58.....19

## STATEMENT OF ISSUES ON APPEAL

1. **DID THE CIRCUIT COURT ERR IN RULING THAT THE ISSUE OF WHETHER THE PROBATE COURT HAS THE LEGAL AUTHORITY TO REQUIRE A PERSONAL REPRESENTATIVE OF AN ESTATE OR AN INTERESTED PARTY TO LITIGATION TO EXECUTE A PROMISSORY NOTE AND MORTGAGE WAS NOT PRESERVED FOR APPEAL?**
2. **DID THE CIRCUIT COURT ERR IN RULING THAT THE ISSUE OF WHETHER SYNOVUS TRUST CHARGED FEES IN EXCESS OF ITS OWN FEE SCHEDULE AND ITS OWN BOILERPLATE CONTRACT IT ENTERED INTO WITH THE ESTATE WAS NOT PRESERVED FOR APPEAL?**
3. **DID THE CIRCUIT COURT ERR IN AFFIRMING THE PROBATE COURT'S ORDER GRANTING FULL COMPENSATION REQUESTED TO SYNOVUS TRUST FROM THE ESTATE AS THERE IS NO LEGAL BASIS OR AUTHORITY FOR SUPPORTING THE ORDER REQUIRING THE PERSONAL REPRESENTATIVE OF AN ESTATE TO SIGN A PROMISSORY NOTE AND MORTGAGE AS SUCH ORDER IS CONTRARY TO THE CLEAR, UNAMBIGUOUS, AND PLAIN LANGUAGE OF S.C. CODE § 62-3-805 AND A VIOLATION OF PUBLIC POLICY?**
4. **DID THE CIRCUIT COURT ERR IN AFFIRMING THE PROBATE COURT'S ORDER GRANTING THE FULL FEE AMOUNT SOUGHT BY SYNOVUS TRUST TO SYNOVUS TRUST FROM THE ESTATE?**

## STATEMENT OF THE CASE

This is an appeal from a Circuit Court order dated September 28, 2012, which affirmed the Sumter County Probate Court's order dated January 3, 2012.

Robert Ross Dinkins (hereinafter the "Decedent") executed his Last Will and Testament on July 30, 1982 (hereinafter the "Will"). Thereafter, the Decedent died on April 11, 2008 and his estate is currently being probated in the Sumter County Probate Court as Case Number 2008-ES-43-00208 (hereinafter the "Estate"). Item VII of the Will named the Decedent's wife, Mae Lee Dinkins (hereinafter "Mrs. Dinkins") and the

National Bank of South Carolina (hereinafter "NBSC"), as co-personal representatives of the Estate.

Through a series of mergers or acquisitions NBSC was acquired by Synovus Financial. In a separate transaction, Synovus Trust Company, N.A. (hereinafter "Synovus Trust"), a subsidiary or division of Synovus Financial, purchased the trusts and estates business from the trust department of NBSC.

The Decedent's Estate was opened shortly after his death and Mrs. Dinkins and Synovus Trust were appointed by the Sumter County Probate Court as co-personal representatives of the Estate on May 2, 2008 (Probate Order ¶15).

Mrs. Dinkins and Synovus Trust were unable to cooperate in the administration of the Estate and Mrs. Dinkins requested on numerous occasions for Synovus Trust to resign as co-personal representative (Prob. Hr'g Tr. 21-22). Synovus Trust refused to resign until it received payment of its personal representative's commission, and it filed a Conditional Statement of Resignation on February 23, 2011 in the Sumter County Probate Court. Thereafter, Mrs. Dinkins filed a Petition for Removal of Personal Representative on March 2, 2011. Mrs. Dinkins' Petition requested that the Court remove Synovus Trust as co-personal representative as a new co-personal representative with knowledge of real estate management was needed and Synovus Trust had refused to resign for reasons based on self-dealing (especially in light of the fact that South Carolina law provides protections for personal representatives to receive their commissions<sup>1</sup>). On June 1, 2011, Synovus Trust filed a Request for Compensation wherein it requested the payment of its fees for services it allegedly provided as Co-Personal Representative and a promissory note and mortgage to secure payment of said fee amount. Nowhere in the

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<sup>1</sup> S.C. Code §§ 62-3-719 and 62-3-805

terms of Synovus Trust's fee schedule did it require the Estate to provide a promissory note and mortgage of real estate to Synovus Trust to ensure payment of its personal representative's commissions.

The Sumter County Probate Court Judge, Judge Atkinson, held a hearing on July 7, 2011, on both Mrs. Dinkins' Petition for Removal of Personal Representative and Synovus Trust's Request for Compensation. William C. Cantey, Jr. (hereinafter "Mr. Cantey") testified at the hearing and agreed to accept the office of Successor Co-Personal Representative of the Estate and Trustee of the trusts created under the Will. Mr. Cantey was not a party to the action, he did not have legal counsel, and he was not given notice of the proceedings, and thus he did not participate as a party in such hearing. On January 3, 2012, Judge Atkinson entered his Order Denying Petition for Removal of Personal Representative, Granting Request for Compensation, Accepting Resignation of Co-Personal Representative and Appointing Successor Co-Personal Representative and Trustee. (Probate Order).

In the Order, Judge Atkinson found no evidence or testimony had been presented supporting the removal of Synovus Trust as Co-Personal Representative for cause, awarded Synovus Trust compensation of \$294,317.66, accepted Synovus Trust's resignation as Co-Personal Representative, and appointed Mr. Cantey as Successor Co-Personal Representative of the Estate and sole Trustee of all trusts established under the Will. As part of Synovus Trust's compensation, the Probate Court ordered the Co-Personal Representatives to execute a Promissory Note to and give Synovus Trust a Mortgage of Real Estate as to the Estate's real property located at 601 Hazard Street, Pawleys Island, SC (hereinafter the "Pawleys Island Property") to secure payment of the

fee amount awarded in the Order. In granting said Promissory Note and Mortgage of Real Estate in the Pawleys Island Property, the Order specifically provided that the Pawleys Island Property was “the only Estate asset with sufficient equity to secure the compensation due Synovus Trust.” (Probate Order, ¶ 30). Mr. Cantey was ordered to sign the Promissory Note and Mortgage of Real Estate even though he was not a party to the probate court hearing.

On January 11, 2012, Mrs. Dinkins filed a Motion for Reconsideration and/or Motion to Amend Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Mrs. Dinkins also timely appealed the Probate Order to the Circuit Court on January 9, 2012. (Notice of Appeal, Grounds of Appeal). Synovus Trust’s compensation, per the relief requested in its own Request for Compensation, included the fee amount of the personal representative’s commission, the Promissory Note, and the Mortgage of Real Estate ordered to secure said Promissory Note. (Request for Compensation).

On or about May 22, 2012, Mr. Cantey, as Successor Co-Personal Representative of the Estate requested to be a party to the present action by filing a Notice of Motion and Motion to Intervene in this matter as a matter of right. He was not previously a party to this action and was never provided notice of the same. A hearing was held by the Circuit Court on the Motion to Intervene on June 25, 2012.

Thereafter, an appellate hearing was held by the Circuit Court on June 26, 2012 and counsel for Mrs. Dinkins, Mr. Cantey, Synovus Trust and NBSC made legal arguments. All parties previously submitted briefs to the Circuit Court regarding the issues involved in this matter. The Circuit Court by its Order granted Mr. Cantey’s

Motion to Intervene, denied Mrs. Dinkins' appeal and affirmed the Probate Order. (Circuit Court Order on Appeal).

On October 10, 2012, Mrs. Dinkins and Mr. Cantey filed a Motion for Reconsideration and/or Motion to Amend Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The Circuit Court thereafter issued its Order denying the joint 59(e) motion on November 30, 2012, and Mrs. Dinkins then filed a Notice of Appeal on December 10, 2012, and this appeal followed.

### **STATEMENT OF FACTS**

The Decedent was in real estate development and management. (Prob. Hr'g Tr. 15:24-25; 16:1). The Decedent's activities included developing residential subdivisions and managing commercial and residential rental properties. These activities required the Decedent to maintain the properties and to market and locate tenants for the properties. The proceeds from the sale of real estate and the rental income from the real properties provided the financial support for the Decedent and his family (Prob. Hr'g Tr. 17:4-7).

On or about July 30, 1982, Robert Ross Dinkins (hereinafter referred to as the "Decedent") executed his Last Will and Testament (hereinafter referred to as the "Will). Thereafter, the Decedent died on April 11, 2008. Pursuant to the Item VII of the Will, NBSC and the Appellant, Mrs. Dinkins, were appointed Co-Personal Representatives of the Estate of Robert R. Dinkins (hereinafter referred to as the "Estate").

Due to the Decedent's business, the Estate consisted of primarily real estate. The values of the real properties held by the Estate have decreased significantly in value during Synovus Trust's administration of the Estate (Prob. Hr'g Tr. 117: 12-25; 118: 1-25; 119: 1-19). Neither Synovus Trust nor any of its employees are licensed or trained

real estate managers (Prob. Hr'g Tr. 169: 3-10). Synovus Trust did not list property for sale, properly market property, nor did it properly lease or maintain rental properties. (Prob. Hr'g Tr. 180: 17-25; 181: 1-25; 182: 1-21). When leases expired, Synovus Trust did not actively renew the leases nor seek new tenants and allowed many of the rental properties to remain dormant and in disrepair without renters. (Prob. Hr'g Tr. 187: 11-25; 188: 1).

Synovus Financial either by merger or acquisition came to control NBSC and the assets of NBSC, including the trust and estate department of NBSC (Prob. Hr'g Tr. 78:11-12). Therefore, a division or subsidiary of Synovus Financial, Synovus Trust, came to control the trust and estate business of NBSC by purchasing the trust business from NBSC. (Prob. Hr'g Tr. 77-78).

Item X of the Will directed that NBSC shall receive compensation for its services as co-personal representative according to "its Standard Fee Schedule in effect and applicable at the time of the performance of such services." (Probate Order, ¶12). By its own contract, Synovus Trust thereafter limited its fee amount after being appointed. Synovus Trust's initial fee schedule (hereinafter "April 2008 Schedule") was calculated as follows: "computed using [its] published fee schedule in effect at the time [it] begins those duties," and the April 2008 Schedule further provided that "[t]he account will be charged at these annual rates until the *earlier* of receipt of the Estate Tax Closing Letter or when the estate's administration is substantially completed." (emphasis added). (Synovus Trust's Request for Compensation). The Estate received the Estate Tax Closing Letter from the Internal Revenue Service on October 28, 2009. (Appellant's Brief, Exh. 4).

Thereafter, Synovus Trust attempted to enter into subsequent binding agreements with the Estate to adjust its fee schedule in January of 2009 and August of 2010. Mrs. Dinkins signed these later two fee agreements but did not understand the effect of the agreements, and the agreements were not explained to Mrs. Dinkins by Synovus Trust. (Prob. Hr'g Tr. 70:1-25; 71: 1-25; 72: 1-25; 73: 1-25).

On February 23, 2011, Synovus Trust filed a Conditional Statement of Resignation. In the Conditional Statement of Resignation, Synovus Trust provided that its resignation shall be effective "only upon the appointment and qualification of a successor representative and delivery of the Estate's assets to that person." Furthermore, Synovus Trust provided it "understands that neither resignation nor termination of appointment discharges a personal representative from liability from transactions or omissions occurring before termination, nor relieves it of the duty to preserve the assets subject to its control, to account therefore, and to deliver the assets." Thereby Synovus Trust affirmatively recognized that it owed a fiduciary duty to the Estate, its creditors, and its beneficiaries until being relieved as a co-personal representative for the Estate.

Thereafter, on March 3, 2011, Mrs. Dinkins filed a Petition for Removal of Personal Representative seeking the removal of Synovus Trust as Co-Personal Representative. On June 1, 2011, Synovus Trust filed a Request for Compensation wherein it requested the payment of its fee amount and a Promissory Note and Mortgage of Real Estate as compensation for its personal representative's commission for services it allegedly provided as Co-Personal Representative. A hearing was held before Judge Atkinson on July 7, 2011, on both Mrs. Dinkins' Petition for Removal of Personal Representative and Synovus Trust's Request for Compensation.

Mr. Cantey testified at the hearing and agreed to accept appointment as Successor Co-Personal Representative and Trustee of the Trusts created under the Will, but he was not a party to the action, he was not represented by legal counsel, he was not given notice of the proceedings, and thus he did not participate as a party in such hearing. On January 3, 2012, Judge Atkinson entered his Order Denying Petition for Removal of Personal Representative, Granting Request for Compensation, Accepting Resignation of Co-Personal Representative, and Appointing Successor Co-Personal Representative and Trustee (hereinafter referred to as the "Order"). In the Order, Judge Atkinson found no evidence or testimony had been presented supporting the removal of Synovus Trust as Co-Personal Representative for cause, awarded Synovus Trust the fees it was seeking, accepted Synovus Trust's resignation as Co-Personal Representative, and appointed Mr. Cantey, as Successor Co-Personal Representative of the Estate and sole Trustee of all trusts established under the Will.

As part of the relief requested in the Request for Compensation, the Probate Court ordered the Co-Personal Representatives to execute a Promissory Note and give Synovus Trust a Mortgage of Real Estate in the real property located at 601 Hazard Street Pawleys Island, South Carolina (hereinafter referred to as the "Pawleys Island Property") to secure payment of the fees awarded in the Order. According to the Order, the Pawleys Island Property was "the only Estate asset with sufficient equity to secure the compensation due Synovus Trust" (Probate Order, ¶ 30).

The Inventory and Appraisements ("I&A") filed with the Probate Court and referred to on multiple occasions throughout the hearing indicate and provide that the Estate has about \$5 million worth of equity and that other tracts of land, individually or

collectively, have more equity than the Pawleys Island Property (I&A attached hereto as Exhibits A, B and C; IRS Form 706; Prob. Hr'g Tr. 44: 9-25; 82: 12-18; 87: 6-7).

The terms of the Promissory Note and Mortgage of Real Estate were never negotiated but were dictated by the Probate Court. The Promissory Note and Mortgage of Real Estate were not presented to the Court or other parties before the hearing, but instead were presented to the parties as part of the proposed order. Again, Mr. Cantey was never a party to these proceedings. He never had the opportunity to review the Promissory Note and Mortgage of Real Estate. The terms of the Probate Court's Order, and therefore the Promissory Note and Mortgage, were final before Mr. Cantey had an opportunity to object to them even though they require Mr. Cantey to sign the Promissory Note and Mortgage of Real Estate. Mr. Cantey can be held in contempt of court if he does not sign the Promissory Note and Mortgage. Therefore, Mr. Cantey's first opportunity to object to these documents which bind him to act was at the appeal before the Circuit Court.

The non-negotiated terms of the Promissory Note require not only payment of the personal representative's fee amount to Synovus Trust but also imposes an interest rate of five percent (5%) per annum on the unpaid balance beginning June 1, 2012. (Promissory Note). Furthermore, it requires one-third (1/3) of the fee amount be paid on November 1, 2012, another payment to be made on December 1, 2012 and the remaining unpaid balance on December 1, 2013. (Probate Court Order, Exhibit A: Promissory Note, ¶ 1-2). Paragraph 7 of the Promissory Note also imposes a three percent (3%) penalty if payment is made 10 days after its due date. The terms of the Promissory Note were not

negotiated between the Estate and Synovus Trust. Furthermore, the terms bind Mr. Cantey who was not a party to the action.

The non-negotiated terms of the Mortgage of Real Estate incorporate the terms of the non-negotiated Promissory Note, and impose on the Estate additional payment requirements to Synovus Trust for expenditures and reasonable attorneys' fees, court costs and other amounts (Probate Court Order, Exhibit B: Mortgage of Real Estate, p. 1, Unnumbered ¶ 5; p. 2, Numbered ¶5). Furthermore, Numbered Paragraph 1 requires the Estate to assign its Rents and Profits to Synovus Trust which imposes an additional burden on the Estate as the Estate uses rents and profits to create liquidity (Mortgage of Real Estate, ¶1). Paragraph 14 requires the Estate to indemnify and hold Synovus Trust harmless for "the presence of hazardous materials, substances, waste or other environmentally regulated substances on the Property." (Mortgage of Real Estate, ¶ 14). The most egregious provision contained in the non-negotiated Mortgage of Real Estate is found in Paragraph 15 which provides that the Estate waives its appraisal rights upon Synovus Trust foreclosing on the Pawleys Island Property.

Specifically, it provides in ALL CAPS, Underlined and Bold that "**[THE ESTATE] HEREBY WAIVES AND RELINQUESHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**" (no emphasis added). (Mortgage of Real Estate, ¶15). This is a fundamental right which Synovus Trust, a *fiduciary*, requested and is attempting to impose on the Estate. (emphasis added). Mr. Cantey, as Successor Co-Personal Representative, did not have the opportunity to

negotiate nor object to any of these terms as he was not a party to this action. Furthermore, the terms bind Mr. Cantey and require him to act even though he was not a party to the action.

The Estate now has been open for almost four years and much work still remains to close the Estate, such as selling real property to satisfy the sole creditor of the Estate, NBSC, a division of Synovus Financial (which also owns the Respondent, Synovus Trust), funding the Testamentary Trusts, and paying the remaining administration expenses.

### **STANDARD OF REVIEW**

(1) “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Nicholson v. Nicholson, 378 S.C. 523, 537, 663 S.E.2d 74, 81 (Ct. App. 2008). “If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The two ways to preserve an issue for appeal is by “a ruling by the trial court or a post-trial motion.” Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006). A Rule 59(e) Motion for Reconsideration need not be ruled upon by a lower court in order to be preserved for appellate review as this Court provided: “[L]awyers cannot force trial courts to address an issue, and a proper Rule 59 request is sufficient without a specific judicial decision on the issue.” Sierra Club v. S. Carolina Dept. of

Health & Envtl. Control, 387 S.C. 424, 434, 693 S.E.2d 13, 18 (Ct. App. 2010) quoting Pye at 566, 633 S.E.2d at 511).<sup>2</sup>

A Rule 59(e) motion must also specifically raise the issues the movant wants addressed. Skinner v. Elrod, 308 S.C. 239, 243, 417 S.E.2d 599, 602 (Ct. App. 1996) (“[Appellant made *no* motion under 59(e), SCRCPP for the master to alter or amend his order to consider the *specific* allegation. Therefore, the issue is not properly preserved for review.”). (*emphasis added*). A Rule 59(e) motion was properly filed and raised the specific issue of unreasonable compensation in the present action.

(2) “Questions of statutory interpretation are questions of law, which [the Court is] free to decide without any deference to the court below.” CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “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.” Id. “Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.” City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997).

The Appellant has appealed the Circuit Court’s Order affirming the Probate Court’s award of compensation to Synovus Trust. This award of compensation has two components: (i) the amount of the fee and (ii) security for payment of the fee. When the

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<sup>2</sup> See: “Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised.” Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999) (quoting James Flanagan South Carolina Rules of Civil Procedure 475 (2d ed. 1996).

Probate Court's order granted a security interest in the Pawleys Island Property to Synovus Trust, it violated the clear and plain meaning and intent of S.C. Code § 62-3-805 which governs priority of payment of administration expenses and creditor's claim. This rewrote the statute which is expressly prohibited, and it violates public policy by favoring one creditor over all others. Therefore the Probate Court's order granting compensation should be reversed as the Probate Court made an error of law and violated public policy, and the former Co-Personal Representative, Synovus Trust, abused its fiduciary duty in requesting that its fee for services be given security, especially under the terms of the Promissory Note and Mortgage, as to the Estate's real property rights.

(3) Appeals from the Probate Court are governed by S.C. Code § 62-1-308. "As used in this statute, the phrase 'according to the rules of law' means according to the rules governing appeals." In re Howard, 315 S.C. 356, 360, 434 S.E.2d 254, 257 (1993).

"The standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity." Id. In this case, the Appellant initially appealed the Probate Court's award of compensation to Synovus Trust to the Circuit Court. (Notice of Intent to Appeal and Grounds for Appeal). ("The Appellant will seek a trial appealing the Probate Court's decision to award compensation to Synovus Trust Company, N.A." and "Mae Lee Dinkins hereby sets forth the following grounds for her appeal from the Order granting Respondent's Request for Compensation as Co-Personal Representative and Trustee of the subject estate"). The award of compensation has two components: (a) the amount of the fee and (b) the promissory note and mortgage for payment of the fee.

A dispute over the appropriate amount of money to be paid by one party to another is a legal dispute. “If the proceeding in the probate court is in the nature of an action at law, the circuit court and the appellate court may not disturb the probate court’s findings of fact unless a review of the record discloses there is no evidence to support them.” In re Estate of Pallister, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005).

### ARGUMENTS

I. **THE CIRCUIT COURT ERRED IN RULING THAT THE ISSUE OF WHETHER THE PROBATE COURT HAS THE LEGAL AUTHORITY TO ORDER A PERSONAL REPRESENTATIVE OF AN ESTATE OR AN INTERESTED PARTY TO LITIGATION TO EXECUTE A PROMISSORY NOTE AND MORTGAGE WAS NOT PRESERVED FOR APPEAL**

The Circuit Court erred in ruling that the issue of whether the Probate Court has the legal authority to order a personal representative of an estate or an interested party to litigation to execute a promissory note and mortgage was not preserved for appeal. As provided in the first Standard of Review above, the South Carolina Court of Appeals has provided that the two ways to preserve an issue for appeal are by “a ruling by the trial court or a post trial motion.” Pye, at 633. Furthermore, a trial court need not rule on a Rule 59(e) motion to preserve the issue raised therein as it is sufficient to preserve the issue raised in the motion “without a judicial decision on the issue.” Sierra Club, at 434.

It is clear that the issue of the promissory note and mortgage were properly before the Probate Court as it was requested in the Respondent’s prayer for relief in its “Request for Compensation” and the Probate Court did rule on said issue by granting all relief requested by the Respondent, Synovus Trust. (Probate Order). This issue was also raised during the hearing before the Probate Court where counsel for Synovus Trust specifically requested the security interest (Mortgage) and thereafter counsel for the Appellant

specifically stated that “We don’t think there’s any authority for the Court to impose essentially a mortgage or a security for fees in this situation.” (Prob. Hr’g Tr. 289: 12-24; and 290:10-25).

Additionally, a Rule 59(e) motion was timely filed by the Appellant with the Sumter County Probate Court on January 11, 2012. In the Rule 59(e) motion the Appellant raised the issue of the Probate Court granting “unreasonable compensation” on page 3, paragraph 7 of such motion. Black’s Law Dictionary defines “compensation” as “[r]emuneration and other benefits received in return for services rendered.”<sup>3</sup> Certainly the award of not only a fee amount but also a promissory note and mortgage securing payment of said fee amount would clearly fall under both the definitions of “remuneration” and “other benefits” and therefore also the definition of compensation. Because of this, the issue of both the fee amount and the Promissory Note and Mortgage awarded to Synovus Trust were properly preserved as these issues were before and ruled upon by the Probate Court and clearly part of the timely filed Rule 59(e) motion.

Synovus Trust may attempt to argue that the Rule 59(e) Motion was not specific enough, but it is clear that Synovus Trust considered all three components [(1) the fee amount; (2) the Promissory Note; and (3) Mortgage] as part of the definition of “compensation” as Synovus Trust specifically filed a “Request for *Compensation*” and the relief requested as compensation included all three components. (emphasis added). Please note that Synovus Trust did not seek just the fee amount as compensation. Instead of filing a Request or Petition for Payment of personal representative commissions or fees, Synovus Trust overreached and sought the promissory note and mortgage as part of *compensation*. (emphasis added). Synovus Trust purposefully chose to caption its

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<sup>3</sup> Black’s Law Dictionary, (9<sup>th</sup> ed. 2009).

Petition as a "Request for Compensation." Synovus Trust made such request to specifically receive the relief of a promissory note and mortgage to ensure it was paid its commission or fee amount. Therefore, the Rule 59(e) motion specifically addressing the issue of "unreasonable compensation" was specific enough to address the compensation requested and awarded to Synovus Trust (the fee amount, promissory note and mortgage).

Because the issue of the fee amount, promissory note and mortgage were raised and ruled upon by the Probate Court and a Rule 59(e) motion was filed addressing the issue of unreasonable compensation which clearly addresses the *compensation* requested by the Respondent, Synovus Trust, this issue was preserved for appeal and was properly before the Circuit Court and is now properly before this Court. (emphasis added).

**II. THE CIRCUIT COURT ERRED IN RULING THAT THE ISSUE OF WHETHER SYNOVUS TRUST CHARGED FEES IN EXCESS OF ITS OWN FEE SCHEDULE AND ITS OWN BOILERPLATE CONTRACT IT ENTERED INTO WITH THE ESTATE WAS NOT PRESERVED FOR APPEAL**

The Circuit Court erred in finding that the issue of whether Synovus Trust charged fees in excess of its own fee schedule and its own boilerplate contract it entered into with the Estate was not preserved for appeal. The Order states that this issue was "never raised to or ruled upon by the Probate Court." (Circuit Court Order p. 11).

However, the issue of the fee schedules and charging in excess of the initial fee schedule was specifically before the Probate Court as this too was part of Synovus Trust's Request for Compensation and the Probate Court's Order. Synovus Trust attached its fee schedules to its Request for Compensation and incorporated them by reference as proof it should be paid a certain amount. (Request for Compensation).

Furthermore, the fee schedules were specifically addressed throughout the trial before the Probate Court (Prob. Hr'g Tr. 93: 8-20; 133: 16-25; 134: 1-20). The issue was raised again when the Appellant filed its Rule 59(e) motion in response to the Probate Court's Order and said Rule 59(e) motion addressed the Probate Court's award of "unreasonable compensation" which clearly includes the award of a fee amount in excess of what was originally agreed upon. Under the first Standard of Review provided above, the issue was raised and ruled upon in the Probate Court and a Rule 59(e) Motion was properly filed, and therefore, the issue of the fee amount and charging in excess of the amount agreed upon was properly before the Circuit Court and is now properly before this Court.

**III. THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT'S ORDER GRANTING THE FULL COMPENSATION REQUESTED TO SYNOVUS TRUST FROM THE ESTATE AS THERE IS NO LEGAL BASIS OR AUTHORITY FOR SUPPORTING THE ORDER REQUIRING THE PERSONAL REPRESENTATIVE OF AN ESTATE TO SIGN A PROMISSORY NOTE AND MORTGAGE AND SUCH ORDER IS CONTRARY TO THE CLEAR, UNAMBIGUOUS, AND PLAIN LANGUAGE OF S.C. CODE § 62-3-805 AND A VIOLATION OF PUBLIC POLICY**

The Circuit Court clearly erred by affirming the Probate Court's order granting full compensation requested to Synovus Trust from the Estate as there is no legal basis for supporting the Order requiring the personal representative of an estate to sign a Promissory Note and Mortgage of Real Estate and such order of compensation to Synovus Trust violated the clear, unambiguous and plain language of S.C. Code § 62-3-805 and is a violation of public policy. This award of a promissory note and mortgage from the Estate effectively rewrites the statute to change the order of priority of payment of creditors' claims and administration expenses, and this award of a promissory note and mortgage should not have been affirmed by the Circuit Court as the issue of unreasonable

compensation, which includes the award of the promissory note and mortgage from the Estate to Synovus Trust, was preserved for appeal as previously provided.

This is a question of statutory interpretation and this Court need not give any deference to the lower court's ruling. Again, "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "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." Id. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Miller v. Aiken, 364 S.C. 303, 613 S.E.2d 364 (2005).

"Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997).

The order of priority of payment of creditors' claims and administration expenses of an estate is governed by S.C. Code § 62-3-805. By its Order for compensation, the Probate Court changed the statute by changing the clear and unambiguous order of payment of administration expenses and creditors' claims and favored one creditor over all others. The Order makes Synovus Trust a secured creditor that has priority over all other creditors' claims and administration expenses. See S.C. Attorney General's Opinion which provides that "[c]reditor holding security interest would have priority over, or at least be accorded more preferential treatment than, persons or entities who

would be paid pursuant to classification scheme established in Section 62-3-805(a)(1), (2), and (3).” 1990 Op. Atty Gen No. 90-58.

Synovus Trust may attempt to argue that S.C. Code § 62-3-805 does not apply unless an estate does not have sufficient assets to pay all claims in full to which the Respondent, Mr. Cantey, strongly disagrees. Even if Synovus Trust’s argument is correct, the determination of whether an estate has enough assets to pay all claims in full must be made at the time the estate seeks to close and at no time before. If not, then, as the case is here, a creditor or claimant against an estate could seek and receive priority over all others without the Estate having the proverbial crystal ball and knowing what the future may hold. This is clearly against the plain language of the statute and also against public policy. One need only look at the recent downturn in the economy to see that values can fluctuate greatly based on time alone, and therefore an estate may have sufficient assets to pay all claims in full today but clearly may not tomorrow (especially when those assets are not liquid assets-as the case is here). It is clear that the plain language of the statute and public policy mandate and require that the application of this statute either sets priority for all claims made against an estate, or in the alternative, that the application of S.C Code § 62-3-805 in determining whether an estate has sufficient assets to pay all claims in full must be made at the time an estate closes and not before.

In light of the above, the Probate Court and Circuit Court clearly violated the clear, unambiguous, plain language of the statute and intent of the legislature and public policy by effectively rewriting the statute and changing the order of priority for payment of creditors’ claims and administration expenses. Rewriting a statute is expressly prohibited where the language of the statute is clear and unambiguous, as is the case here.

Also favoring one creditor or claimant over all others is a violation of the plain language of the statute and a violation of public policy. Therefore, this Court does not need to give any deference to the Probate Court or Circuit Court's ruling and the Probate Court's order should be reversed and Synovus Trust should not be awarded a promissory note and mortgage to secure payment of its personal representative commission/fee amount.

**IV. THE CIRCUIT COURT ERRED IN AFFIRMING THE PROBATE COURT'S ORDER GRANTING THE FULL FEE AMOUNT SOUGHT BY SYNOVUS TRUST TO SYNOVUS TRUST FROM THE ESTATE**

The Circuit Court erred in affirming the Probate Court's Order granting the full fee amount sought by Synovus Trust to Synovus Trust from the Estate as there is no factual evidence supporting the Order of the full fee amount to Synovus Trust.

Part of the unreasonable compensation awarded to Synovus Trust by the Probate Court's Order is the full fee amount. A dispute over the appropriate amount of money to be paid by one party to another is a legal dispute. "If the proceeding in the probate court is in the nature of an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." In re Estate of Pallister, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005).

There is no evidence in the record to support the award of the full fee amount to Synovus Trust. In granting the full fee amount to Synovus Trust, the Probate Court factually found that "Synovus has performed all the duties of its office in a capable and competent manner. Indeed, Synovus has provided extraordinary services above and beyond those typically required for an estate the size of the Estate." (Probate Order ¶10). Furthermore, the Probate Court factually found that "[t]he Synovus Co-Executor

Compensation Schedule in effect on the date of the Decedent's death is the schedule referred to by the parties as the [']April 2008 PR Fee Schedule[']." (Probate Order ¶13). The Probate Court also found that Synovus Trust "did not [...] fail to perform any duty pertaining to its office." (Probate Order ¶19). The evidence is quite to the contrary.

The April 2008 Fee Schedule is attached to the Respondent's Request for Compensation as Exhibit 1. (Request for Compensation). Paragraph 4 of the April 2008 Fee Schedule provides that "[t]he account will be charged at these annual rates *until the earlier of* receipt of the Estate Tax Closing Letter or when the estate's administration is substantially completed, usually 13-24 months, depending upon complexities of the estate." (emphasis added). The Estate Tax Closing Letter was received by the Estate from the Internal Revenue Service on October 28, 2009.

Upon being appointed as Co-Personal Representative, Synovus Trust voluntarily chose to limit its fee by using its own contract. (April 2008 Fee Schedule). Therefore there is *no evidence* supporting payment to Synovus Trust past October 28, 2009 according to the plain language of Synovus Trust's April 2008 Fee Schedule. (emphasis added). But Synovus Trust continued to charge fees beyond the deadline it set.

All evidence surrounding the subsequent fee agreements between Synovus Trust and the Estate indicate that the fee agreements were not effective. Synovus Trust unilaterally changed the terms of calculating its fee. Once Synovus Trust realized the administration of the Estate would take additional time it wanted to unilaterally change the original agreement with the Estate. To that end, Synovus Trust placed its own interest above the Estate's. Specifically, Synovus Trust charged fees for an additional

seventeen (17) months after receipt of the Estate Tax Closing Letter which total nearly \$83,000.

Pursuant to S.C. Code § 62-3-703(a) a personal representative is a fiduciary “who shall observe the standards of care applicable to trustees. Furthermore, S.C. Code § 62-3-711 provides that a personal representative has the “same power over title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interest in the estate.” S.C. Code § 62-1-201(20) provides that an “interested person” includes “heirs, devisees, children, spouse, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent[...]. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons.” S.C. Code § 62-3-713 provides that “any transaction which is affected by a substantial conflict of interest on the part of the personal representative” is voidable.

Synovus Trust, as a fiduciary, was required to prudently administer the estate, administer the estate in good faith, and had a duty of loyalty to the creditors and other interested parties of the Estate. (Prob. Hr’g Tr. 72: 25; 73: 1-22). One of the hallmarks of the “duty of loyalty” is the fiduciary’s obligation not to place its own interests over those of the beneficiaries. It appears clear that where a fiduciary increases its own fee it has a conflict of interest and it is putting its own interests above the other interested parties of the Estate and should fully disclose the conflict of interest to those in which it owes the fiduciary duty. The testimony of its own trust officers indicates Synovus Trust clearly did not do this. (Prob. Hr’g Tr. 70:1-25; 71: 1-25; 72: 1-25; 73: 1-25; 93: 8-25; 103: 21-25; 104: 1-25; 105: 1-25).

Therefore, the subsequent fee schedules after the April 2008 Fee Schedule were not effective and voidable as Synovus Trust attempted to unilaterally increase its fee amount without it disclosing the conflict of interest. This action breached Synovus Trust's fiduciary duty of loyalty by updating its fee schedule to ensure payment in excess of the amount for which it initially contracted under its own boilerplate contract. Furthermore, it is clear that the subsequent Fee Schedules presented to Mrs. Dinkins were not effective and are voidable as she did not understand the effect of what she was signing and the conflict was not explained to Mrs. Dinkins by Synovus Trust. (Prob. Hr'g Tr. 70:1-25; 71: 1-25; 72: 1-25; 73: 1-25). Synovus Trust failed to fully disclose its conflict of interest when it entered into the subsequent contract with the Estate.

There is no evidence supporting the finding that Synovus Trust was entitled to compensation beyond its April 2008 Fee Schedule. A review of the record discloses there is no evidence to support the Probate Court's finding that Synovus Trust performed its duties in a "capable and competent manner" nor was there any evidence that Synovus Trust "did not [...] fail to perform any duty pertaining to its office." It is clear from the record and evidence contained therein that Synovus Trust breached the fundamental duty pertaining to its office, that being the duty of loyalty. The record is clear that Synovus Trust put its own interest above that of all other creditors and beneficiaries of the Estate and therefore any subsequent fee schedule after the April 2008 Fee Schedule was not effective and is voidable. Because there is no evidence which supports the Circuit Court affirming the Probate Court's findings, an award of the full fee amount requested by Synovus Trust beyond the amount calculated under its original April 2008 Fee Schedule is not proper and the Circuit Court Order and Probate Court Order should be reversed.

## CONCLUSION

The four questions on appeal are (1) whether the Circuit Court erred by ruling that the issue regarding whether the Probate Court had the legal authority to require a personal representative or an interested party to litigation to execute a promissory note and mortgage to a creditor of an estate was preserved for appeal; (2) whether the Circuit Court erred in ruling that the issue regarding Synovus Trust charging fees in excess of its own fee schedule and its own boilerplate contract was preserved for appeal; (3) whether the Circuit Court erred in affirming the Probate Court's award of full compensation, including the fee amount, note and mortgage, to Synovus Trust as there is no legal basis or authority for supporting the Order requiring a personal representative of estate to sign a promissory note and mortgage and the Order is contrary to the clear, unambiguous, and plain language of S.C. Code § 62-3-805 and a violation of public policy; and (4) whether the Circuit Court erred in affirming the Probate Court's Order granting the full fee amount requested by Synovus Trust?

It is clear that the issues regarding the award of compensation, including the fee amount, promissory note and mortgage, were preserved for appeal as these issues were raised before and ruled upon by the Probate Court. The fee amount, promissory note and mortgage were part of the pleadings filed by the Respondent, Synovus Trust, and these issues were specifically litigated throughout the hearing before the Probate Court. In addition, the fee amount, promissory note and mortgage all fall under the Rule 59(e) motion which specifically addressed the "unreasonable compensation" granted to Synovus Trust by the Probate Court's Order.

It is also clear that the Circuit Court's affirming of the Probate Court's award of the promissory note and mortgage to Synovus Trust is an error of law and violation of public policy as this violated the legislature's intent and clear, unambiguous and plain language of S.C. Code § 62-3-805. The purpose of S.C. Code § 62-3-805 is to determine, by statute, the order in which creditors' claims and administration expenses are paid from an estate. The Probate Court's Order has the effect of rewriting the Probate Code so as to change the order of priority for payment of creditor's claims and administration expenses as previously determined by the legislature in S.C. Code § 62-3-805. It is clear that the determination of whether an estate has assets sufficient to pay all claims must be made at the time the estate seeks to close based upon both the plain language of the statute and also public policy.

Furthermore, Synovus Trust breached its fiduciary duty of loyalty to the Estate by requesting said promissory note and mortgage as this put its interest ahead of the all interested parties and creditors of the Estate. The Probate Court failed to recognize this breach of fiduciary duty by Synovus Trust.

Lastly, there is no evidence supporting the Circuit Court affirming the Probate Court's Order granting the fee amount to Synovus Trust in excess of its original April 2008 Fee Schedule. The subsequent fee agreements Synovus Trust had Mrs. Dinkins sign created a conflict of interest between the Estate and Synovus Trust. This acted as a breach of its duty of loyalty to the Estate by unilaterally extending and increasing its fee amount without adequate disclosure which made the fee agreements voidable. All evidence in the record clearly indicates that Synovus Trust used its boilerplate April 2008 Fee Schedule to initially charge the Estate for its services and that Synovus Trust

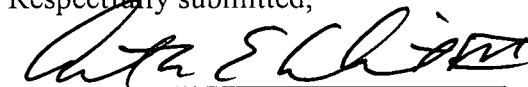
unilaterally changed the terms of its fee schedule to the detriment of the Estate and for its own benefit without disclosing the conflict of interest to the Appellant.

Public Policy should also require the limitation of the fee amount to the original contract as to hold otherwise would place an Estate, an elderly widow as is the case here, at the mercy and whim of a corporate fiduciary any time it desires to increase its fees. Furthermore, contentious litigation would also result if a corporate fiduciary is allowed to unilaterally increase its fee without proper disclosures of the conflict of interest.

Accordingly, Mr. Cantey, as Successor Co-Personal Representative, respectfully requests that this Court issue its opinion providing that the issues regarding the Probate Court's Order which require a personal representative of an estate to sign a promissory note and mortgage and the award of the total fee amount sought by Synovus Trust, the promissory note and mortgage to secure said fee amount, were preserved for appeal, and that this Court further issue its opinion reversing the Probate Court's Order awarding the promissory note and mortgage, and reverse the Probate Court's Order awarding the full fee amount requested by the Respondent, Synovus Trust, and deny Synovus Trust's total fee amount for breach of fiduciary duty or in the alternative, limit Synovus Trust's fee amount to the date originally provided in its own boilerplate April 2008 Fee Schedule.

May 23, 2013

Respectfully submitted,



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Estate of Robert Ross Dinkins

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

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Appellate Case No. 2012-213564

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IN THE MATTER OF:  
Estate of Robert Ross Dinkins

Mae Lee Dinkins.....Appellant,

v.

Synovus Trust Company, N.A.....Respondent,

William C. Cantey, Jr., as Successor Co-Personal Representative.....Respondent.

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**PROOF OF SERVICE**

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I certify that I have served the Initial Brief of Respondent, William C. Cantey, Jr., as Successor Co-Personal Representative, on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid, on May 23, 2013, addressed to the attorneys of record as follows:

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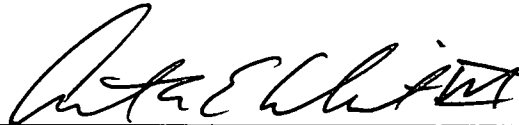
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MAY 23 2013

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A handwritten signature in cursive script, appearing to read "Arthur E. White III", written in black ink on a white background.

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Arthur E. White III