

THE STATE OF SOUTH CAROLINA

In the Court of Appeals~

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Tamara Curry, Probate Court Judge

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DEC 11 2015

Appellate Case No. 2014-002020
Circuit Case No. 2011-CP-10-7819

SC Court of Appeals

BETTY FISHER.....Appellant

v.

BESSIE HUCKABEE.....Respondent

FINAL BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
(Attorney for Appellant)

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I.
INTRODUCTION

This is one in three appeals related to the orders of the probate court in the *Conservatorship of Alice Shaw Baker*, Probate Case no. 2008-GC-10-088. These orders relate to the Conservator Lisa Fisher's Accountings and the duties owed by a conservator to a conservatee's estate, after her death. These specifically involve orders dated September 28, 2011 appointing a Special Fiduciary and October 14, 2011 denying Appellant Betty Fisher's *Motion to Set Aside Void Probate Court Order*.

While these appeals involve to the same tragic factual issues related to Alice Shaw Baker's conservatorship, pending litigation related to a Will contest and revocation of Ms. Shaw Baker's Will, and the safeguarding of her estate assets pending resolution of these matters, each case involves slightly different legal issues. The errors of the Probate Court were not rectified by the Circuit court, so Appellant filed this appeal for this Court's review.

Pursuant to motion by Appellant, this court consolidated the record on appeal, however all briefing will be separate.

Appellant prays that this Court reverse the following Issues on Appeal:

II.
STATEMENT OF ISSUES ON APPEAL

- 1) Did the Circuit Court's Failure to Consider Appellant's Statement of Grounds prior to Oral Argument, and Failure to reverse the Probate Court's Order amount to an abuse of discretion and a deprivation of due process?
- 2) Did the Probate Court have jurisdiction to Appoint a Special Fiduciary in light of the Appeal in the Supreme Court?
- 3) Is the Order Appointing a Special Fiduciary Void, because Huckabee failed to provide Betty Fisher with the statutorily and constitutionally required notice of her intent to seek appointment of the Appointment of Special Fiduciary?

- 4) Is the Order Appointing a Special Fiduciary Void, because Huckabee had no standing to bring said motion when Alice Shaw Baker revoked the Will naming her personal representative?

Further, Appellant Betty Fisher joins in Lisa Fisher's Initial Briefs, and requests that the court consider these issues in her appeal. (Rule 208(b)(6), SCACR)

III. STATEMENT OF THE CASE

On February 25, 2009, Alice Shaw Baker died. (R. 203, Death Certificate) Her great niece, Lisa Fisher, Esquire, had helped her since involuntary commitment proceedings were initiated without notice to her family, including her niece, Appellant Betty Fisher ("Appellant"). (R. 70, 73, 76), Petitions for Incapacity, Emergency, and Conservatorships, etc.) Though she was already conserved, the family rushed to her side from California. (R. 83, Petition for Appointment of Successor) After a hearing, on October 29, 2008, Lisa Fisher was appointed her guardian and conservator. (R. 83, Order Appointing Lisa Fisher as Guardian and Conservator) After her appointment, Lisa Fisher traveled regularly to South Carolina to visit her great aunt, and ensure her health and well being. (R. 249, Motion for Approval of Conservator/Guardian fees)

Appellant also visited with Ms. Shaw Baker before her death, and knew that she had revoked her Will, and reaffirmed her desire that all of her property benefit these animal charities. (R. 321, Motion for Reconsideration, p. 7)

After Ms. Shaw Baker's death, Appellant initiated litigation on April 27, 2009 in the Charleston County Probate Court and removed it to the Charleston County Court of Common Pleas on May 13, 2009 (Case no. 2009-CP-10-3010). (R. 219, p. 220, Opposition to Petition for Discharge) These proceedings included Alice Shaw Baker's family's attack of the validity of the informal appointment of Respondent Bessie Huckabee ("Respondent"), the Will Contest, the

appointment of a Special Administrator, the effect of Attorney Peter Kouten's ex-parte communication in the lower court proceedings, and bond provisions. (Pursuant to SCACR 201(d), Request for Judicial Notice, Court of Appeals, Case no. 2009-CP-10-03010)

After nearly three years of preservation of the status quo by Appellant's daughter Lisa Fisher, while these matters were before the Supreme Court, Respondent filed her *Motion for Special Fiduciary*. (R. 281, Respondent motion) At no time was Appellant served with her statutory and constitutional notice of the motion or the proceedings. (R.281, p. 284, Respondent's Motion, proof of service)

Respondent knew of Appellant's existence, and knew that the appointment of a Third Party Special Fiduciary, would affect the Estate litigation and was contrary to Ms. Shaw Baker's desires that the monies be used solely for Animal Charities. (R. 347, Motion to Set Aside) Appellant filed her *Motion to Set Aside the Void Order of September 28, 2011*, which the Probate Court denied. The Court Denied said Motion. (R.61, Order Denying Motion) Thereafter, appellant filed her Notice of Intent to Appeal filed October 25, 2011. (R. 396, Notice of Intent) Her *Statement of Grounds Supporting her Appeal Filed on October 25, 2001 seeking to void Probate Orders in Case 2008-GC-088* was timely filed on December 9, 2011. (R.401, Statement of Grounds) Respondent did not file her *Notice of Appearance* until March 11, 2014. (R. 537, *Notice of Appearance*).¹ The court set oral argument for hearing on July 16, 2014. (R. 560, Transcript) Thereafter, the court issued its Form 4–Judgment in Civil Case denying the appeal in this matter. (R. 67, Form 4) The court ruling was:

“Statement of Judgment by the Court: Appellant Fisher's appeal, filed on October 25, 2011, came before this Court on July 16, 2014.

¹ Respondent did not file any response or opposition to Appellant's Statement of Grounds. Thereafter, at oral argument, Respondent's counsel made arguments which were not factually correct and were not part of the record. (R. 583-587, 590, ll. 3-10, Transcript.)

Upon a review of the case, this Court affirms the probate court's order of September 28, 2011, appointing a Special Fiduciary and affirms the probate court's order of October 14, 2011, denying Fisher's Motion to Set Aside Void Probate Court Order." ®. 67)

Appellant filed her Notice of Appeal on September 19, 2014. (R. 540, Notice of Appeal)

By this Appeal, Appellant attacks the Probate Court's orders of September 29, 2011 and October 14, 2011 appointing J. Heyward Harvey, Esquire as Special Fiduciary and denying Appellant's Motion to Void Orders.²

² This order includes findings not requested in the original motion and includes the court's sua sponte appointment of Heyward Harvey, without providing the parties with any information about Mr. Harvey and/or allowing the parties to object. Appellant had no ability to determine prejudice and/or conflict of interest. This is an unnecessary cost to the estate and in direct contravention to the desires of the decedent that her monies be used to benefit animal charities. The order requires the Special Fiduciary Heyward Harvey to:

"receive all assets held by Lisa Fisher within fifteen days of execution of this Order. That Mr. Harvey:

- a. marshall all assets, review accounts and 2009 and 2010 accountings with the powers and discretions as authorized by law with regard to same.
- b. seek formal approval of the final accounting and 2009 and 2010 accountings with authority to amend same, if necessary and further, seek to close the conservatorship estate.
- c. review needs for maintenance, taxes and insurance on real property with authority over same.
- d. maintain authority and control over all estate assets.
- e. keep records of his time devoted to this file and seek approval of his fees through separate order of this Court and it is further." (R. 55, p. 57)

Appellant contends that in light of the pending litigation in the Estate matter, this motion was improper on its face and she should not be forced to litigate the matter while there is a pending matter on Appeal. Appellant is fighting to preserve her Aunt's wishes that all monies benefit Animal Charities in the Estate matter, in light of the revoked will, Bessie Huckabee's interference prior to final determination in this matter is improper.

Further, by this Appeal, she seeks reversal of the Circuit Court's Order affirming the Probate Court Orders, and denial of oral argument as to the issues briefed when the Circuit Court Admitted it had not reviewed the briefing. (R. 560, pp. 565-566 , ll. 24-25 and 1-13, respectively and R. 67, Transcript and Form 4)

The Appointment of the Special Fiduciary without notice to Appellant was in violation of Appellant's Due Process and Equal Protection rights and require immediate reversal.

ARGUMENT

IV.

THE ORDER APPOINTING A SPECIAL FIDUCIARY IN THIS CASE MUST BE REVERSED, BECAUSE THE COURT DID NOT HAVE JURISDICTION TO MAKE SAID ORDER AND APPELLANT WAS ENTITLED TO NOTICE

A. Standard of Review

It is well settled that the standard of review for Appeals from the probate court are governed by the provisions of the Probate Code. (*Matter of Howard*, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993).) The Probate Code provides that a final order or decree of the probate court may be appealed to the circuit court. (S.C. Code Ann. § 62-1-308 (2009).)

Moreover, an issue regarding statutory interpretation is a question of law. (*Univ. of S. Cal. v. Moran* , 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct. App. 2005). A petition to remove personal representative is in equity. (See *Dean v. Kilgore*, 313 S.C. 257, 259 (Ct. App. 1993).)

If the proceeding in the probate court is in the nature of an action at law, neither the circuit court nor the appellate court may "disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." (*Neely v. Thomasson*, 365 S.C. 345, 349-50, 618 S.E.2d 884, 886 (2005).)

1) THE CIRCUIT COURT'S FAILURE TO ALLOW ORAL ARGUMENT INTERFERED WITH ITS ABILITY TO REVERSE THE PROBATE COURT'S ERRONEOUS ORDERS AND DEPRIVED APPELLANT OF DUE PROCESS

At the appeals hearing on July 16, 2014, the Court stated:

“Yes, I’ve got the briefs. I have not looked at them but I have got them here. I will probably have to look at them before I make a decision. But go ahead...You don’t have to reiterate everything that’s in there, okay, because I will read them...Or my law clerk and –we both will probably read them.”

®. 560, pp. 565-566 , ll. 24-25 and 1-13, respectively)

The court concluded the argument without allowing counsel to complete the record, although the court did reassure the parties that he would review the memorandum. (R. 560, 566)

While it is true that the law provides:

“the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly, it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction.” (See *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949), emphasis added)

Here, the court stated that it had not read the briefs, therefore the threshold questions as to the need for oral argument and the circumstances that gave rise to the substantial questions of law, raised here, could never be addressed, and mandated a different conclusion that oral argument was necessary. Appellant contends due process was implicated, and that she was deprived of these necessary protections.

Finally, the Circuit Court’s deprivation of further argument on the records, prevented Appellant from curing any misunderstanding the court may have had about the complicated and important issues raised in this case. It also prevents Appellant from demonstrating that the court’s ultimate judgment in this case was based on erroneous application of the law. In light of the fact that: “[b]eing an equity case, the circuit court, sitting as an appellate court, had jurisdiction to make findings in accordance with its own view of the preponderance of the evidence.” (*Eagles v. S.C. Nat’l Bank*, 301 S.C. 402, 408 (Ct. App. 1990).) The court made no findings, and Appellant

contends this coupled with the underlying failure of the probate court to make findings based on appropriate evidence is fatal to the orders, and reversal is mandated.

2) THE PROBATE COURT DID NOT HAVE JURISDICTION TO HEAR THIS MATTER, BECAUSE THE MATTER WAS ON APPEAL.

Appellant contends that the Probate Court had no jurisdiction to hear this matter, because when a matter is on appeal the lower court loses jurisdiction pursuant to Rule 203, SCACR:

“Upon the service of the notice of appeal, **the appellate court shall have exclusive jurisdiction over the appeal**; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal. (Rule 205, SCACR, emphasis added.)

Further, pursuant to S.C. Code Ann. § 62-1-308 (c):

“ When an appeal according to law is taken from any sentence or decree of the probate court, **all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had**. If the appellant, in writing, waives his appeal before the entry of the judgment, proceedings may be had in the probate court as if no appeal had been taken.” (Emphasis added)

At the time of order, the issue of the proper appointment of the personal representative and the appointment of the special administrator was on appeal, thus the Probate Court had no jurisdiction to interfere with the Supreme Court’s jurisdiction.

It is well settled law that a court can not interfere with another court’s order which is subject to the pending litigation. (See Rule 60, SCACR; See also *Dukes & Dukes v. Hygrade Food Products*, 236 S.C. 69 (1960).)

Therefore, any and all orders issued in relationship to the Motion for Special Fiduciary must be reversed.

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3) **THE ORDER APPOINTING A SPECIAL FIDUCIARY IS VOID, BECAUSE HUCKABEE FAILED TO PROVIDE BETTY FISHER WITH THE STATUTORY AND CONSTITUTIONALLY REQUIRED NOTICE OF HER INTENT TO SEEK APPOINTMENT OF THE APPOINTMENT OF SPECIAL FIDUCIARY**

Appellant contends that there is no statutory authority under the law governing conservatorships for appointment of a Special Fiduciary—that the Court’s expansive view of Trust law actually constituted an improper interference by the Court in Estate property in a decedent’s estate and acted as unwarranted “removal proceedings” of Lisa Fisher.

Respondent's reliance on South Carolina Code Ann. § 62-7-704(e) can not interfere with the Appellate Jurisdiction of the Supreme Court. In light of the fact that the matter was on appeal about the very appointment of Respondent Huckabee, as personal representative (and the appointment of a potential special administrator), any orders issued while the underlying appeal was still going forward are void. Therefore, Lisa Fisher must protect the property until the determination of the appropriate person to deliver the property.

The law governing a conservatorship is set forth in § 62-5-425(d) provides in pertinent part:

"If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into his possession, inform the executor or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto...."(Emphasis added)

Under this scenario, the controlling issue is who is duly appointed and/or entitled to delivery of the property. Additionally, the code mandates retention of the property by the conservator after conservatorship terminates as a matter of law by death. Appellant has joined in the argument that Lisa Fisher had a continuing duty pursuant to the statute.

However, even if trust law **did** control, the motion brought by Respondent would require notice as follows pursuant to § 62-7-704(e):

"(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust. **The procedure for such appointment and the notice requirement shall be the same as set forth for special administrators under South Carolina Code Section 62-3-614.**" (Emphasis added)

Thus, §62-7-704(e) and § 62-3-614 required Huckabee to provide notice to Betty Fisher. The notice required is the type contemplated by § 62-1-401 which requires 20 days notice and a hearing.

The notice required is the same as for appointment of a special administrator:

"A special administrator may be appointed:

(1) informally by the court on the application of an interested person when necessary:

(a) to protect the estate of a decedent **prior to the appointment of a general personal** representative or if a prior appointment has been terminated as provided in Section 62-3-609; or

(b) for a creditor of the decedent's estate to institute any proceeding under Section 62-3-803(c);

(2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice." (See § 62-3-614)

In light of the fact that there was **no** evidence presented at trial, **no** testimony, and **no** opportunity to be heard, there could be no support for the finding of an "emergent" situation warranting the Appointment of a Special Fiduciary without notice. (R. 313)

Moreover, the fundamental requirements of due process under the South Carolina and United States Constitutions include notice and an opportunity to be heard. (See U.S. Const. amends. V and XIV, § 1; S.C. Const. art. 1, § 22; *S.C. Dep't of Soc. Serv. v. Holden*, 319 S.C. 72, 78, 459 S.E. 2d 846, 849 (1995).) Appellant as the family member of Alice Shaw Baker had a right to object to the improper interference of Respondent Huckabee into the Estate of Alice Shaw Baker, however the lack of notice prevented her from exercising this right.

A void judgment is one that from its inception is a complete nullity and without legal effect. (*Thomas v. Howard Co. & T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).) It is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are to be affected. (*Tyron Fed. Sav. & Loan Ass'n v. Phelps*, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992).)

In proceedings in the probate court where notice is required, an order is binding only as to persons given notice of the proceedings. (See S.C. Code Ann. § 62-3-106).

Appellant, Betty Fisher, the niece of Alice Shaw Baker and litigant in the Will Contest, etc. action did not receive actual notice. The Attorney General, on behalf of animal charities, did not receive actual notice. (R. 284, Motion to Appoint Special Fiduciary Certificate of service)

This failure and refusal by Respondent to give notice to persons entitled to notice deprived them from objecting to the appointment of a Special Fiduciary and is not binding against them. It has deprived them from inquiry into the cost, conflict of interest, and role of a Special Fiduciary in this action, and that is an abuse of discretion.

This court's unilateral choice of an "unknown" fiduciary, without opportunity to review his record and/or object is improper and mandates reversal in this case.

//

4) **THE ORDER APPOINTING A SPECIAL FIDUCIARY IS VOID, BECAUSE HUCKABEE HAS NO STANDING TO BRING SAID MOTION WHEN ALICE SHAW BAKER REVOKED THE WILL NAMING HER PERSONAL REPRESENTATIVE.**

The statutory definition for an “interested party” in a Probate matter is set forth in S.C.

Code Ann. § 62-1-201(20).

“Interested person” includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. **The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.**” (Emphasis added)

Bessie Huckabee had no standing while Ms. Shaw Baker was alive to involve herself in the conservatorship (S.C. Code § 62-5-309), and Appellant contends that the statutory language and facts of this case preclude her from intervening and attempting to gain favor in the Probate Court by her forum shopping.

The language governing Trusts also makes clear that she did not have standing to bring the motion as a “representative” because it amounted to a removal of Lisa Fisher and only a beneficiary can exercise this right, unless there is admissible evidence for the court to consider and initiate the removal after hearing. (See S.C. Code Ann. § 62-7-706 [“**a beneficiary** may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.”]) Here, the court did not “remove” Lisa Fisher on its own initiative, it was at the insistence of Respondents and in a assail of Lisa Fisher’s character without evidence or testimony and without cause.

Due to their lack of standing in the conservatorship, both Respondent and Kay Passailague are merely interlopers who have now caused Appellant to incur costs to protect Alice Shaw Baker’s Estate, where her daughter Lisa Fisher was (and continues to) properly protect the assets pending final resolution during the Appeal process.

The language of S.C. Code Ann. § 62-1-201(20) makes it clear that the role of an interested party may “vary from time to time” in litigation. Here, while the matter is on Appeal, the issue of the standing of Respondent is also on appeal. Therefore, any order’s from the Probate Court in this matter is precluded and constitutes an improper interference with the Circuit Court’s jurisdiction. (See S.C. Code Ann. § 62-1-302)

To allow Respondent to come in, seek the appointment of a third party, whose very appointment will squander away funds rightfully held for the protection of the animals, is inherently wrong.

Ms. Shaw Baker’s life was about animals and their protection. Therefore, Respondent Huckabee must not be allowed to interfere with the protection and preservation of these assets, nor with the principles which mandate a conservator distribute assets only to the appropriate person. (See S.C. Code Ann. § 62-5-425(d).)

It doesn’t take the wisdom of Solomon to understand that a Third Party Fiduciary’s appointment, necessitates additional fees and costs to the estate, including attorney fees—all causing unnecessary waste to the estate, and ultimately undermines Alice Shaw Baker’s desires that her monies be used for the benefit and protection of animals.

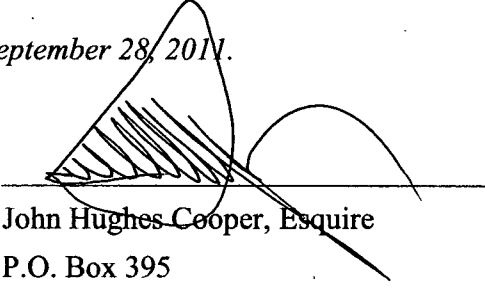
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Appellant respectfully requests that the court reverse the Order of the Circuit Court affirming the Probate Court Order Appointing Special Fiduciary and Denying Appellant *Motion to Set Aside Void Probate Court Order dated September 28, 2011*.

December 8, 2015



John Hughes Cooper, Esquire
P.O. Box 395
Sullivan's Island, SC 29482
(843) 883-9099
Attorney for Appellant

Other Counsel of Record:

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEALS FROM CHARLESTON COUNTY
Court of Common Pleas

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Tamara Curry, Probate Court Judge

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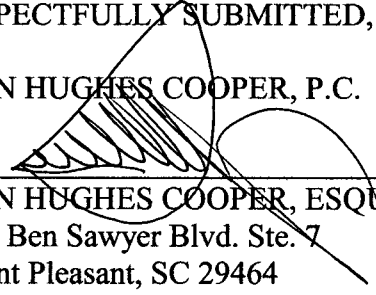
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

December 8, 2015

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 
JOHN HUGHES COOPER, ESQUIRE

1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
843-883-9099; fax 843-883-9335

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PROOF OF SERVICE

I certify that I have served the **Final Brief of Appellant and Final Reply Brief of Appellant** upon Respondent Bessie Huckabee by depositing a copy of it in the United States Mail, postage prepaid, on December 9, 2015, addressed to her attorney of record Peter A. Kouten, Esquire, P.O. Box 340, Johns Island, SC 29457.

December 9, 2015

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT