

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

Appellate Case No. 2017-000095
Lower Case No. 2016-CP-18-1849

RECEIVED

JUN 30 2017

SC Court of Appeals

IN RE: TRUST EIP CREATED UNDER THE LAST WILL AND TESTAMENT OF EUNICE
I. PAGE DATED OCTOBER 14, 1992,

Richard S. Henson and Vann Kenneth Henson Petitioners,

v.

Albert T. Henson, Jr., and Julian Reid Henson..... Respondents,

Of Whom Albert T. Henson, Jr., is the Appellant.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE APPOINTMENT OF AN INTERIM TRUSTEE PURSUANT TO S.C. CODE ANN. § 62-7-704(E) IS A FINAL ORDER SUBJECT TO IMMEDIATE APPEAL UNDER S.C. CODE ANN. § 62-1-308?
- II. WHETHER THE APPOINTMENT OF AN INTERIM TRUSTEE PURSUANT TO S.C. CODE ANN. § 62-7-704(E) IS A FINAL ORDER AFFECTING A SUBSTANTIAL RIGHT IN A SPECIAL PROCEEDING SUBJECT TO IMMEDIATE APPEAL UNDER S.C. CODE ANN. § 14-3-330(3)?
- III. WHETHER THE APPOINTMENT OF AN INTERIM TRUSTEE PURSUANT TO S.C. CODE ANN. § 62-7-704(E) GRANTS, CONTINUES, OR REFUSES AN INJUNCTION AND IS IMMEDIATELY APPEALABLE UNDER S.C. CODE ANN. § 14-3-330(4)?
- IV. WHETHER THE APPEAL IS MOOT AS A RESULT OF THE INTERIM TRUSTEE FULFILLING HER DUTIES PURSUANT TO THE ORDER APPOINTING HER AS SPECIAL FIDUCIARY?

STATEMENT OF THE CASE

This appeal results from the circuit court's dismissal of an appeal from the Dorchester County Probate Court's order appointing an interim trustee under S.C. Code Ann. § 62-7-704(e). The circuit court dismissed Appellant Albert J. Henson, Jr.'s appeal of the Probate Court's order because it was not a final order subject to immediate appeal under S.C. Code Ann. § 62-1-308.

Eunice I. Page, the grandmother of Respondents Richard S. Henson and Vann Kenneth Henson and Appellant Albert J. Henson, Jr., owned certain real property located at 605 North Main Street, Summerville, South Carolina (the "Subject Property"), which was transferred to the Trust EIP Created under the Last Will and Testament of Eunice I. Page, dated October 14, 1992 (the "Trust") by deed on July 22, 1997. (June 29, 2016 Hearing Tr. Exs. 1-2.) Appellant and Respondents are brothers and beneficiaries of the Trust. Respondents assert that the Subject Property is the sole asset of the Trust. (Am. Pet. pp. 2-4.) Appellant denies that the Subject Property is an asset of the Trust and instead claims that Ms. Page conveyed the Subject Property to him prior to her death. (Answer, Counterclaims & Crossclaims, June 8, 2015.)

Ann Pittillo, Appellant's and Respondents' mother, served as trustee of the Trust until her death on April 20, 2014. (Am. Pet.) Prior to her death, Pittillo, as trustee of the Trust, executed a promissory note borrowing One Hundred Thousand Dollars (\$100,000.00), which was secured by a mortgage on the Subject Property. (June 29, 2016 Hearing Tr. pp. 10-11, 19, Ex. 3.) The promissory note provided that if the note was not paid off on or before December 3, 2016 the borrower would transfer title of the Subject Property to the lender in lieu of foreclosure. (*Id.*)

On January 26, 2015, Respondents filed in Dorchester County Probate Court a Petition to Appoint a Successor Trustee of the Trust and filed an Amended Petition on May 4, 2015. (Pet.;

Am. Pet.) In the Amended Petition, Respondents claim that the trusteeship of the Trust is vacant, and they seek appointment of a successor trustee to administer the Trust. (*Id.*)

On October 12, 2015, Respondents filed a Motion for the Appointment of a Special Fiduciary as an Interim Trustee, and also filed subsequent Motions for an Expedited Hearing. (Mot. Appointment Special Fiduciary, Oct. 12, 2015; Mot. Expedited Hearing, Dec. 9, 2015; Mot. Expedited Hearing, Nov. 1, 2016.) Under those motions, Respondents sought, pursuant to S.C. Code Ann. § 62-7-704(e), the appointment of a special fiduciary who would serve as interim trustee of the Trust and, among other things, ensure that the Subject Property was not foreclosed upon by the lender who holds the mortgage on the Subject Property. (*Id.*)

Dorchester County Associate Probate Judge Molly D. Edwards held a hearing on the Motion for the Appointment of a Special Fiduciary as an Interim Trustee on June 29, 2016. (June 29, 2016 Hearing Tr. pp. 1-50.) On August 31, 2016, Judge Edwards issued an Order Appointing Special Fiduciary as Interim Trustee (the “Order”), in which she appointed Ashley Andrews, Esq., as a special fiduciary to serve as interim trustee of the Trust pursuant to S.C. Code Ann. § 62-7-704. (Order Appointing Special Fiduciary as Interim Trustee, Aug. 31, 2016.) Under the Order, the interim trustee’s powers are limited to the following: (1) negotiating with the lender and/or the parties to extend the due date of the current mortgage in order for litigation to be finalized or have the mortgage paid off prior to December 3, 2016; (2) determining if any other assets are titled to the Trust; (3) recovering all records Appellant may possess regarding the alleged transfer of the Subject Property from Ms. Page to Appellant; (4) collecting copies of all agreements Appellant, Ms. Page, or Ann Page Pittillo may have entered into with another party to lease the Subject Property; and (5) ensuring all actions taken by her are done in the interest of maintaining the status quo pending a final hearing on the merits in this case. (*Id.* at p. 10.) The Probate Court noted that

the primary dispute regarding the ownership of the Subject Property was not before the Court and would be decided after a full merit's hearing. (*Id.* at p. 7.) In the Order, the Probate Court expressly stated that it would not dispossess Appellant of the Subject Property at the time. (*Id.* at p. 8.)

On September 16, 2016, Appellant, pursuant to S.C. Code Ann. § 62-1-308, filed a Notice of Intent to Appeal the Order with the Dorchester County Court of Common Pleas. (Not. Intent Appeal, Sept. 16, 2016.) Respondents filed a Motion to Dismiss Appeal on October 26, 2016. (Mot. Dismiss Appeal, Oct. 26, 2016.) A hearing was held before the Honorable Edgar W. Dickson on November 21, 2016 (Nov. 21, 2016 Hearing Tr.), and Judge Dickson entered an Order granting Respondents' Motion to Dismiss on Appeal on December 12, 2016 (Order Dismissing Appeal, Dec. 12, 2016). In dismissing Appellant's appeal, Judge Dickson ruled that the Order "is not appealable under S.C. Code Ann. § 62-1-308 because it provides only temporary relief and is not a final order." (*Id.* at p. 3.) On January 12, 2017, Appellant served his Notice of Appeal to this Court, thereby providing notice of this appeal. (Not. Appeal, Jan. 12, 2017.)

ARGUMENT

I. A PROBATE COURT'S APPOINTMENT OF AN INTERIM TRUSTEE PURSUANT TO S.C. CODE ANN. § 62-7-704 IS NOT A FINAL ORDER SUBJECT TO IMMEDIATE APPEAL UNDER S.C. CODE ANN. § 62-1-308.

The right of appeal is governed by statutory law. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 266, 692 S.E.2d 894 (2010). Although S.C. Code Ann. § 14-3-330 generally governs the right to appeal, that statute does not apply when a specialized statute governing an appeal exists. *Id.*

In this case, Appellant's argument that the Order is immediately appealable fails because it is based on the incorrect assertion that S.C. Code Ann. § 14-3-330(3) and (4) governs the appealability of the Order. Contrary to Appellant's claim, § 14-3-330 does not control Appellant's

appeal because appeals from the probate court are governed by a specialized statute, specifically § 62-1-308. Section 62-1-308(a) provides, in pertinent part, that a “person interested in a final order, sentence, or decree of a probate court and considering himself injured by it may appeal to the circuit court in the same county.” Because § 62-1-308 is a more specific statute than the general appeal statute of § 14-3-330, § 62-1-308, and not § 14-3-330, governs whether the Order is immediately appealable in this case. *See Long v. Sealed Air Corp.*, 391 S.C. 483, 486, 706 S.E.2d 34, 35 (Ct. App. 2011) (ruling that general appealability provisions of § 14-3-330 did not apply because more specific appeal provision of § 1-23-610 governed).

An order from the probate court that is not a final order is not reviewable under § 62-1-308. *Fulmer v. Cain*, 380 S.C. 466, 469, 670 S.E.2d 652, 654 (2008). Courts of common pleas lack subject matter jurisdiction over appeals of a temporary order issued by a probate court. *Boyce-Abel v. Work*, 305 S.C. 43, 44, 406 S.E.2d 184, 185 (Ct. App. 1991).

In this case, the Order provides only temporary relief pending a final hearing on the merits, and it is not a final order subject to appeal under § 62-1-308. The temporary nature of the relief provided in the Order is clear. The appointment of the interim trustee is *per se* temporary because it applies only in the interim period between the date of appointment and a final hearing on the merits. The Order expressly limits the interim trustee’s powers to maintaining the status quo “pending a final hearing on the merits.” (Order p. 8.) In addition, the Probate Court was careful not to resolve the primary dispute between Appellant and Respondents because that “will need to be decided after a full merit’s hearing.” (*Id.* at p. 7.) The Order also did not dispossess Appellant of his current possession of the Subject Property and is instead a temporary measure intended to preserve the Subject Property from being transferred under mortgage. Therefore, the Order is not an appealable final order under § 62-1-308.

The South Carolina Court of Appeal's decision in *Boyce-Abel* is controlling on the issue of whether the Order is appealable under § 62-1-308. In *Boyce-Abel*, the probate court appointed special administrators of a decedent's estate until a personal representative could be formally appointed. *Id.*, 305 S.C. at 44, 406 S.E.2d at 185. The special administrators' siblings appealed the appointment to the circuit court, and the circuit court disqualified one of the special administrators. *Id.* The Court of Appeals vacated the circuit court's appellate decision and remanded the case to the probate court for further proceedings because the circuit court lacked subject matter jurisdiction over the appeal of the probate order. *Id.* According to the Court of Appeals, the circuit court did not have jurisdiction under § 62-1-308 because the probate court's appointment of the special administrators was not a final order. *Id.* Instead, the probate order was "clearly temporary" pending the formal appointment of a personal representative and only provided the special administrators with limited powers to administer the estate in an interim period. *Id.*

There is no material difference between the appointment of the special fiduciary as interim trustee in this case and the appointment of the special administrators in *Boyce-Abel* for the purpose of determining whether the Order is a final order subject to appeal under § 62-1-308. Just as the appointment of the special administrators in *Boyce-Abel* was temporary, the appointment of the interim trustee in this case is similarly temporary. And like the special administrators appointed in *Boyce-Abel*, the interim trustee in this case is authorized only to perform certain acts to maintain the status quo until final resolution. Furthermore, the procedure used for the appointment of the special administrators in *Boyce-Abel* is the same procedure used in this case for the appointment of the interim trustee. Section § 62-7-704(e) provides that the "procedure for such appointment . . . shall be the same as set forth for special administrators" under § 62-3-614 of the probate code.

As such, the appeal in *Boyce-Abel* arose from the same statutory procedure as the appeal arises in this case, and *Boyce-Abel* directly controls the determination of the issue presented in this case.

Although Appellant acknowledges that § 62-1-308 governs this appeal, he summarily dismisses the clear applicability of *Boyce-Abel* to this case by arguing that this Court did not address in *Boyce-Abel* whether an appointment of a special administrator is a special proceeding under § 14-3-330(3) or the issuance of an injunction under § 14-3-330(4). Appellant's attempt to distinguish *Boyce-Abel* from this case is unconvincing.

Appellant argues that *Boyce-Abel* is not controlling in this case because the Court of Appeals failed to address the argument he presents in this case. According to Appellant, the Court of Appeals, like "well-behaved children," should only answer questions when it is asked. (App. Initial Br. p. 26.) Appellants' dismissive view of this Court's authority, however, disregards that the Court may address *sua sponte* issues relating to subject matter jurisdiction over an appeal and is not limited to answering only questions presented by the parties. *See Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 223, 370 S.C. 221, 634 S.E.2d 59, 60-61 (stating that lack of subject matter jurisdiction can be raised *sua sponte* by the court and that the appellate court must always take notice of the lack of subject matter jurisdiction). The Court of Appeals in *Boyce-Abel* could have addressed the argument presented by Appellant in this case, but it had no need to do so because the appeal in that case was governed by § 62-1-308 rather than § 14-3-330. Therefore, the Court's opinion in *Boyce-Abel* controls the issue in this appeal regardless of whether the parties in *Boyce-Abel* actually presented the exact argument advanced by Appellant, and the Court should affirm the circuit court's dismissal of the appeal.

II. A PROBATE COURT'S APPOINTMENT OF AN INTERIM TRUSTEE PURSUANT TO S.C. CODE ANN. § 62-7-704 IS NOT SUBJECT TO IMMEDIATE APPEAL UNDER S.C. CODE ANN. § 14-3-330(3) BECAUSE IT NEITHER ARISES FROM A SPECIAL PROCEEDING NOR AFFECTS A SUBSTANTIAL RIGHT.

Although Appellant acknowledges that § 62-1-308 governs the appeal in this case, he devotes the overwhelming majority of his argument attempting to persuade the Court that the motion for appointment of an interim trustee under § 62-7-704(e) is a “special proceeding” which is subject to immediate appeal under § 14-3-330(3). In so doing, Appellant relies on inapplicable case law from other jurisdictions which cannot override the Court’s decision in *Boyce-Abel*. The Court should reject Appellant’s attempt to overcomplicate the simple issue that has been presented.

Assuming *arguendo* that § 14-3-330 applies rather than § 62-1-308, Appellant nevertheless fails to establish that the appointment of an interim trustee under the South Carolina Trust Code is a special proceeding. Because Appellant cannot rely on any authority from South Carolina to support his argument, he relies solely on decisions from other jurisdictions involving the probate of wills and decedents’ estates in which certain decisions were deemed final orders in special proceedings. Notably absent from Appellants’ litany of cases supporting his “special proceeding” argument, however, is a single case arising from an action seeking the appointment of a trustee to a vacant trusteeship, either on a permanent or temporary basis. Thus, the cases on which Appellant relies cannot support the conclusion that a motion seeking the appointment of an interim trustee is a “special proceeding” under § 14-3-330(3).

Appellants’ reliance on special proceedings involving the probate of wills and decedents’ estates arises from an apparent misunderstanding between the nature of actions under the South Carolina Trust Code and the administration of decedents’ estates under Article 3 of the South Carolina Probate Code. For example, Appellant argues that the fact that South Carolina has adopted Section 3-107 of the Uniform Probate Code (codified as S.C. Code Ann. § 62-3-107) is

“vitaly important to the resolution of the instant appeal,” but fails to recognize that Article 3 of the Probate Code does not govern actions arising under the Trust Code. Rather, the Trust Code is established under Article 7 of the Probate Code, which expressly states that the Trust Code does not apply to decedent’s estates and is thus separate and independent from Article 3. *See* S.C. Code Ann. § 62-7-102 (“This article does not apply to . . . administration of decedent’s estates . . .”). Moreover, judicial proceedings under the Trust Code are governed by § 62-7-201 – not § 62-3-107, and nothing in § 62-7-201 indicates that each separate motion or request for relief arising in an action involving the Trust Code is an independent special proceeding under § 14-3-330(3). As a result, Appellant’s argument that § 62-3-107 renders a motion to appoint an interim trustee a “special proceeding” is misguided and incorrect.

Even if a motion to appoint an interim trustee under § 62-7-704(e) is a “special proceeding” under § 14-3-330(3), Appellant cannot establish that the Order was a “final order affecting a substantial right” under that provision. As the South Carolina Supreme Court has stated, the “provisions of Section 14-3-330 . . . have been narrowly construed” to avoid “[p]iecemeal appeals.” *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707 (2005). Although the term “substantial right” is not defined in § 14-3-330(3), that term is defined in § 14-3-330(2) to mean when an order “(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof of any pleading in any action.” The South Carolina Supreme Court has further clarified that “[o]rders affecting a substantial right discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) (internal quotations omitted).

Here, the circuit court expressly found that, under the Order, the Appellant “has not lost or had affected any ‘substantial right’ as that term has been defined by South Carolina law.” (Order Dismissing Appeal p. 5.) In arguing that the Order did affect a “substantial right,” Appellant ignores how “substantial right” has been defined under § 14-3-330 by the circuit court and other South Carolina courts. He instead advances a broader definition that is unsupported by South Carolina judicial precedent. Appellant asserts that the Order affects certain rights because (1) the interim trustee can extend or modify the preexisting loan to ensure that the Subject Property is not foreclosed upon before a hearing date, (2) he is required to turn over records to the interim trustee, and (3) the interim trustee will receive compensation. None of these temporary remedies affects substantial rights that would discontinue the action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense. Rather, the Order merely ensures that the subject of this litigation is temporarily preserved so that the case can proceed to a trial on the merits without prejudicing any of the parties. As a result, the Order does not affect substantial rights which would warrant an immediate appeal. *See Terry v. Terry*, 400 S.C. 453, 457, 734 S.E.2d 646, 648 (2012) (holding that temporary order of family court granting temporary possession of marital residence, while clearly important to the parties, neither constituted a “substantial right” or raised issues warranting immediate appellate court intervention).

III. THE PROBATE COURT’S APPOINTMENT OF AN INTERIM TRUSTEE PURSUANT TO S.C. CODE ANN. § 62-7-704 IS NOT SUBJECT TO IMMEDIATE APPEAL UNDER S.C. CODE ANN. § 14-3-330(4) BECAUSE IT DID NOT ISSUE AN INJUNCTION.

Appellant’s final argument mistakenly claims that the Order is immediately appealable as an order issuing an injunction under § 14-3-330(4) because the Order’s practical effect is to restrain him from exercising complete and full ownership over his property. This argument misconstrues the nature of an injunction. Rather than requiring or prohibiting any actions of the parties, the

Order merely authorizes the interim trustee, “[i]n her sole discretion, negotiate with the lender and/or parties to extend the due date on the current mortgage,” take steps to determine if other assets of the Trust exist, and recover records relating to the Trust and the Subject Property. Because the Order does not require the parties to take any action or prohibit the parties from taking any action, the circuit court correctly ruled that the Order is not an injunction subject to immediate appeal.

Injunctions or injunctive relief typically are characterized as mandatory injunctions or prohibitory injunctions. “A prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination on the merits of the action. A mandatory injunction orders a responsible party to take action.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009); *see also Gore v. Skipper*, 255 S.C. 18, 21, 176 S.E.2d 569 (1970) (contrasting mandatory injunction against prohibitory injunction); *Sanford v. South Carolina State Ethics Comm’n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 fn. 6 (2009) (“A prohibitory injunction is defined as an injunction that forbids or restrains an act.”).

In this case, Appellant fails to articulate how the Order appointing an interim trustee for limited purposes constitutes either a prohibitory or mandatory injunction. The Order does not restrain any party from taking action; nor does it require any party to take any action. Instead, as the circuit court properly recognized, the Order merely authorized the interim trustee to negotiate an extension or modification of the loan and mortgage and seek information relating to the Subject Property and the Trust. The Probate Court purposefully avoided granting any relief which would have restrained Appellant’s control and possession over the Subject Property. The Probate Court further stated it was intentionally limiting the requested relief of Respondents to avoid issuing an injunction and would not dispossess Appellant of the property. (Order ¶¶ 33-40.) Therefore,

Appellant's argument that the Order effectively serves as an injunction which is subject to immediate appeal is incorrect and should be rejected.

IV. APPELLANT'S APPEAL IS MOOT BECAUSE THE INTERIM TRUSTEE FULFILLED HER DUTIES UNDER THE ORDER OF APPOINTMENT AND THE RESOLUTION OF THIS APPEAL WILL HAVE NO PRACTICAL EFFECT ON THE UNDERLYING ACTION.

“An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.” *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). “A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. This is true when some event occurs making it impossible for the reviewing court to grant effectual relief.” *Id.*

In this case, the determination of whether the Order appointing the interim trustee is subject to immediate appeal under § 14-3-330(3) or (4) is a moot and academic question that should be avoided because the Court's ruling would have no practical legal effect. As explained above, the interim trustee was authorized to performed limited tasks to preserve the Subject Property from being foreclosed upon prior to the final hearing on the merits. Appellant acknowledges in his initial brief that the interim trustee has fulfilled her duties by extending and modifying the note and mortgage on the Subject Property, which was filed with the Dorchester County Register of Deeds. (App.'s Initial Brief p. 23.) Appellant does not argue that this extension and modification was ineffective or otherwise challenge it in this appeal. Moreover, Appellant does not contend that the interim trustee is otherwise interfering with his possession of the Subject Property or even has the authority to do so. It also does not appear that the Court's reversal of the circuit court's dismissal of Appellant's appeal from the Probate Court's Order would have any practical effect on the underlying action or the parties' relationships to each other and the Subject Property. As a result, this appeal is moot and should be dismissed.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court affirm the circuit court's dismissal of Appellant's appeal from the Probate Court's order appointing the interim trustee.¹

Respectfully submitted,



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June 30, 2017

Attorneys for Respondents

¹ Because the appeal does not involve a final order subject to immediate appeal and is moot, Respondents contend that the Court may dismiss this appeal without further briefing, and they reserve the right to file a motion to dismiss at any time. To the extent that the Court wishes to address the merits of Appellant's appeal, the appeal should be decided on the briefs and without oral argument pursuant to Rule 215, SCACR, because the appeal does not involve a final judgment.

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v.

Albert T. Henson, Jr., and Julian Reid Henson..... Respondents,

Of Whom Albert T. Henson, Jr., is theAppellant.

PROOF OF SERVICE OF INITIAL BRIEF OF RESPONDENTS

This is to certify that I have this day served counsel for the Appellant in the foregoing matter with a copy of the foregoing *Initial Brief of Respondents* by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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Re: Richard S. Henson and Vann Kenneth Henson v. Albert T. Henson, Jr., and Julian Reid Henson
Appellate Case No. 2017-000095
Case No.: 2016-CP-18-1849
Our File No.: 036899.000004

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SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed for filing an original and one (1) copy of the Initial Brief of Respondents, Counter Designation of Matter to be Included in the Record on Appeal, and Proofs of Service for same in the above referenced case.

Please file the originals and return a date-stamped copy of each to me in the enclosed self-addressed stamped envelope provided.

By copy of this letter, I am serving all counsel of record with a copy of the same.

Thank you for your assistance in this matter.

Sincerely,

Moore & Van Allen PLLC



E. Brandon Gaskins

THR/meh

Enclosures: as stated

cc: Daniel F. Blanchard, III, Esquire