THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

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

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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 ..... Respondents,

v.

Albert T. Henson, Jr., and Julian Reid Henson, Respondents in the Court below,

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

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# RETURN TO PETITION FOR REHEARING

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Trudy H. Robertson
Paul M. Lynch
E. Brandon Gaskins
MOORE & VAN ALLEN PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Attorneys for Respondents

Pursuant to Rules 221 and 240, SCACR, Respondents Richard S. Henson and Vann K. Henson submit this Return to the Petition for Rehearing.[1] For the reasons stated below, Appellant's Motion for Rehearing should be denied in its entirety.

## STANDARD FOR REHEARING

The scope of review for deciding a petition for rehearing is limited to whether the Court "overlooked or misapprehended" a point in reaching its decision. Rule 221, SCACR. Rule 221, SCACR, states: "[a] petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." In order to prevail on a petition for rehearing, a party must demonstrate that the Court overlooked or misapprehended its argument. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

## ARGUMENT

### I. The Court correctly decided the straightforward question presented to it, and Appellant has grossly overstated the import of the decision.

While most of Appellant's Petition for Rehearing merely repeats the arguments that were previously made to and rejected by this Court, Appellant also incredibly claims that the Court's unpublished opinion "will fundamentally curtail the types of Probate Court orders that are immediately appealable and will create an incongruent and irrational appellate system." Put simply, Appellant has dramatically overstated the effect of the Court's decision in this case, which

[1] It is Respondents' understanding that Rule 219(b), which states that "[n]o response [to a petition for rehearing *en banc*] shall be filed by other parties unless the Court shall so order," and the Clerk of Court's correspondence of June 29, 2018 do not require or request Respondents' response to Appellant's request for a rehearing *en banc*. Furthermore, Appellant has failed to argue that rehearing *en banc* is appropriate under the factors set forth in Rule 219(a)(1)-(2). Therefore, this return addresses solely Appellant's Petition for Rehearing without addressing whether such requested rehearing should occur *en banc*.

is neither exceptional nor involves a novel question. Contrary to Appellant's characterization, this case involves a simple, straightforward question: whether the appointment of a temporary interim trustee is a final order which is immediately appealable under S.C. Code Ann. § 62-1-308(a). The Court correctly concluded that such a temporary appointment is not immediately appealable, and therefore, there is no basis for a rehearing.

In seeking a rehearing, Appellant lists several cases in which South Carolina appellate courts have found that non-final orders are immediately appealable under S.C. Code Ann. § 14-3-330. And without conducting any comparison of the facts and analysis of those cases to those involved in the present case, Appellant resorts to hyperbole to predict judicial calamity will ensue if the Court does not reconcile its decision in this case under § 62-1-308(a) with prior decisions under § 14-3-330. According to Appellant, the failure to reconcile § 62-1-308 and § 14-3-330 "will demarcate a radical change to South Carolina law as heretofore understood by members of the bar." Appellant then alleges that such question "will fundamentally curtail" probate court orders and will create an appellate system that is "incongruent and irrational," as well as "illogical and contradictory."

Appellant's dire predictions, however, are contradicted by Rule 268(d)(2), SCACR, which dictates that the Court's decision has no precedential value beyond this case. While this case is obviously important to the parties, the Court's unpublished decision does not constitute a threat to the appellate system as Appellant suggests, especially considering that issues of immediate appealability must be determined on a case-by-case basis. *See Morrow v. Fundamental Long-Term Care*, 412 S.C. 534, 537-38, 773 S.E.2d 144, 146 (2015) ("By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis."). Thus, Respondents respectfully request that the Court deny Appellant's Petition for Rehearing.

## II. Appellant's arguments in support of the appeal and rehearing are inconsistent with the interests of judicial economy.

In Sections B-C of the Petition for Rehearing, Appellant repeats the same arguments he made in his initial and reply briefs. Specifically, Appellant argues that the appointment of the interim trustee was a final order in a special proceeding or, alternatively, an injunction, which would be immediately appealable under § 14-3-330(3) or (4), respectively. The arguments and authority contained in Respondents' brief prove why Appellant's arguments are unavailing, and the Court's decision shows that it correctly understood the issues and arguments made by counsel. By repeating his arguments, Appellant demonstrates that he disagrees with the Court's decision, but mere disagreement is not sufficient to demonstrate that the Court misapprehended or overlooked Appellant's arguments, which is the standard for a rehearing to be warranted.

Repeating Respondents' arguments previously made to the Court in reply to the same arguments which have already been rejected by the Court would be inefficient and superfluous, but it is important to note that Appellant's litigation strategy and arguments, if adopted, conflict with the significant interests of judicial economy. As noted previously in Respondents' brief, the South Carolina Supreme Court has "narrowly construed" § 14-3-330 to avoid "piecemeal appeals." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). Yet, Appellant's appeal seeks to apply § 14-3-330 in a manner which would cause undue delay and result in piecemeal appeals.

In this case, Appellant's appeal has stayed the action in the Probate Court, thereby delaying resolution of the case on its merits. As explained in the briefs on this appeal and in Respondents' motion to lift stay, the subject property is encumbered by a mortgage which can only be renegotiated by a trustee of the Trust. In the absence of a permanent trustee, an interim trustee must necessarily be appointed to secure the property during the pendency of this action. However,

prior to the final hearing, Appellant has filed the current appeal challenging the appointment of the interim trustee, despite the fact that said interim trustee has already acted pursuant to the authority delegated to her by the Probate Court.[2] This appeal is inconsistent with the policy favoring judicial economy because it is unnecessarily delaying the resolution of the action and exposing the subject property to future loss. To promote judicial economy, the Petition for Rehearing should be denied, which would allow the action to proceed to a hearing on the merits.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Appellant's Petition for Rehearing.

Respectfully submitted,

Trudy H. Robertson (S.C. Bar No. 64856)
Paul M. Lynch (S.C. Bar No. 12833)
E. Brandon Gaskins (S.C. Bar No. 73274)
MOORE & VAN ALLEN PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000
trudyrobertson@mvalaw.com
paullynch@mvalaw.com
brandongaskins@mvalaw.com

Attorneys for Respondents

July 9, 2018

[2] As previously argued by Respondents, Appellant's appeal is moot because the trustee has fulfilled her duties under the Probate Court's order of appointment.

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PROOF OF SERVICE

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

Daniel F. Blanchard, III, Esquire
Rosen, Rosen & Hagood, LLC
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402

Trudy H. Robertson (S.C. Bar No. 64856)
Paul M. Lynch (S.C. Bar No. 12833)
E. Brandon Gaskins (S.C. Bar No. 73274)
MOORE & VAN ALLEN PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000
E-mail: trudyrobertson@mvalaw.com
paullynch@mvalaw.com
brandongaskins@mvalaw.com

*Attorneys for Respondents*

July 9, 2018

Charleston, South Carolina

Moore&VanAllen

July 9, 2018

E. Brandon Gaskins
Attorney at Law

T 843 579 7038
F 843 579 8738
brandongaskins@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

**BY HAND DELIVERY**

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

**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**

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of **Respondents' Return to Petition for Rehearing**, together with an original and one copy of the **Proof of Service** in the above referenced case.

Please file the originals and return a date-stamped copy of the Motion and Proof of Service to me by the bearer of this letter.

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

Thank you for your assistance in this matter.

Sincerely,

Moore & Van Allen PLLC

E. Brandon Gaskins

EBG/ws

Enclosures: as stated

cc: Daniel F. Blanchard, III, Esquire