THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Judge

Court of Common Pleas Case No. 2015-CP-08-00547
Opinion No. 2018-UP-244 (S.C. Court of Appeals filed June 13, 2018)

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, JR. is the Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing *En Banc* was made and finally ruled on by the Court of Appeals on October 10, 2018.

QUESTIONS PRESENTED

I. Did the Court of Appeals err by failing to reconcile the provisions of S.C. CODE ANN. § 62-1-308(a) with those of § 14-3-330 so as to establish a uniform and consistent standard governing the types of interlocutory or intermediate orders issued by lower courts that are immediately appealable, by holding that §§ 14-3-330(3) and 14-3-330(4) do not apply to appeals of Probate Court orders, and by holding that appeals from the Probate Court are governed exclusively by § 62-1-308 and that § 14-3-330 is inapplicable to such appeals?

II. Did the Court of Appeals err by affirming the Circuit Court's ruling that the Probate Court's order appointing a special fiduciary as interim trustee for a trust pursuant to S.C. CODE ANN. § 62-7-704(e) is not immediately appealable when the order is a final order affecting a substantial right made in a special proceeding under S.C. CODE ANN. § 14–3–330(3)?

III. Did the Court of Appeals err by affirming the Circuit Court's ruling that the Probate Court's order appointing a special fiduciary as interim trustee for a trust pursuant to S.C. CODE ANN. § 62-7-704(e) is not immediately appealable when the order grants, continues, or refuses an injunction under S.C. CODE ANN. § 14–3–330(4)?

INTRODUCTION

This appeal involves the novel and important issue of whether an interested party may immediately appeal from an order of the Probate Court appointing a Special Fiduciary as Interim Trustee pursuant to S.C. CODE ANN. § 62-7-704(e) or whether the party must await the Probate Court's resolution of the entire probate case before an appeal can be pursued. Although the special fiduciary has been exercising the authority which the Probate Court granted to her since her appointment during this litigation, including her execution and recordation of mortgage modifications substantially increasing the debt on the real property which is the subject of the underlying litigation, the Circuit Court held the Probate Court's order is interlocutory and not

immediately appealable pursuant to § 62-1-308(a). The Circuit Court rejected Petitioner Albert T. Henson, Jr.'s ("Petitioner") arguments that the Probate Court's order is immediately appealable because (i) it is a final order affecting a substantial right made in a special proceeding under § 14-3-330(3) and (ii) it granted, continued, or refused an injunction under § 14-3-330(4).

The Court of Appeals issued an unpublished opinion summarily affirming the Circuit Court without specifically addressing either §§ 14-3-330(3) or 14-3-330(4). Instead, the Court's opinion cites to case law applying § 62-1-308(a), although it does not clearly elucidate how those cases resolve the present appeal. It appears the Court accepted the contention of Respondents Richard S. Henson and Vann K. Henson ("Respondents") raised for the first time in the Court of Appeals that §§ 14-3-330(3) and 14-3-330(4) purportedly do not apply to appeals of Probate Court orders. The Court apparently found that all appeals from the Probate Court are governed *exclusively* by § 62-1-308 and that § 14-3-330 is altogether inapplicable to Probate Court appeals.

If not reversed, the Court's opinion will fundamentally curtail the types of Probate Court orders that are immediately appealable and will necessarily create an incongruent and irrational appellate system in which the very same types of interlocutory orders are immediately appealable if issued by a Circuit Court or Family Court, but are not immediately appealable if issued by a Probate Court. Nothing in our statutes reflects such an intent. Instead, the Court should have reconciled the provisions of § 62-1-308(a) with those of § 14-3-330 so as to establish a uniform and consistent standard governing the types of interlocutory or intermediate orders issued by inferior courts that are immediately appealable to our state appellate courts. By reconciling the statutes, instead of deeming them to be exclusive of each other, the Court should have held the Probate Court's order is immediately appealable under S.C. CODE ANN. § 14–3–330(3) and/or § 14–3–330(4).

As discussed below, our state is among the considerable number of jurisdictions that have adopted Section 3-107 of the Uniform Probate Code (UPC). Under this section, "each proceeding before the [Probate Court] is independent of any other proceeding involving the same estate." S.C. CODE ANN. § 62-3-107. Thus far our courts have not yet addressed the significance of this section on the appealability of Probate Court orders. However, our Probate Code mandates that our courts must liberally construe and apply this provision to effectuate its underlying purpose to make uniform the law of those states which have enacted it. See S.C. CODE ANN. § 62-1-102. As a result, decisions from other states that have adopted this section of the uniform act are especially persuasive.

Decisions from other states that have adopted UPC § 3-107 make clear that each petition in a probate file is considered as initiating an independent proceeding, so that an order disposing of the matters raised in the petition is considered a final, appealable order even though it does not resolve the entire probate proceeding. The administration of a decedent's estate can involve several special proceedings, and the final orders entered in each such proceeding are independently appealable. It is unnecessary that the order be one which fully and finally disposes of the entire probate proceeding. All that is required for a probate order to be appealable is that it must finally dispose of the issue for which the particular part of the proceeding was brought. In this case, because the Probate Court entered a final order in a special proceeding affecting a substantial right and disposed of the particular issue raised in the Respondents' motions, the order is appealable under § 14–3–330(3).

Additionally, the Probate Court's order has the effect of granting or refusing an injunction, which is immediately appealable under state law. Although not styled as seeking an injunction, the substance of Respondents' motions in the Probate Court sought a mandatory injunction against Petitioner. The motions requested the Probate Court to alter the *status quo* by appointing a special

fiduciary and to require Petitioner to immediately turn over and relinquish possession, use, control, and ownership of real property to the special fiduciary, even though ownership of the property is in dispute. Because the Probate Court's order has the effect of granting or refusing an injunction, it is appealable under § 14–3–330(4).

In light of the exceptional importance and novelty of the issues addressed in this appeal and the impact it will have on existing appellate law, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals in accordance with SCACR 242.

STATEMENT OF THE CASE[1]

This litigation arises from a dispute among three brothers over the ownership of commercial property located at 605 North Main Street, Summerville, South Carolina. Petitioner and Respondents are brothers and are the grandchildren of Eunice I. Page, who died on October 6, 1993. (R. pp. 137-38 ¶¶ 2-3). Petitioner asserts he is the owner of the property based on an agreement he entered into with Mrs. Page in 1988. (R. pp. 138-41 ¶¶ 4-9; pp. 148-51; pp. 152-53 ¶¶ 3-6; p. 154 ¶ 2; p. 158 ¶¶ 4-5; pp. 159-60 ¶ 3). Pursuant to that agreement, Petitioner has been in exclusive possession of the property since 1988; has continuously possessed and used the property since then; has paid the taxes, insurance, and expenses for the property since then; has kept his personal property, equipment, and tools on the property since then; has made permanent improvements to the property; has leased portions of the property to tenants; and earns his livelihood from the business he conducts on the property. (R. pp. 142-44, 146 ¶¶ 10-13, 19; pp. 152-53 ¶ 3; pp. 159-60 ¶ 3). The property is Petitioner's sole source of income. (R. p. 143 ¶ 11).

[1] Throughout this petition citations to the Record on Appeal in the Court of Appeals are referred to as "ROA" and citations to the Appendix in this Court are referred to as "App."

On January 26, 2015, Petitioner's brothers (the Respondents) filed a petition in the Probate Court entitled "Petition to Appoint a Successor Trustee," in which they seek to divest Petitioner of ownership of the property. (R. pp. 21-42). Respondents allege the property is owned by a Trust EIP created under the Last Will and Testament of Eunice I. Page dated October 14, 1992 ("the EIP Trust"). Id. The EIP Trust named Ann P. Pittillo as Trustee. Mrs. Pittillo is the mother of Petitioner and Respondents and is Mrs. Page's daughter. Mrs. Pittillo died on April 20, 2014. Respondents allege that they along with Petitioner and Julian R. Henson (Respondent Richard Henson's daughter) are the "sole remaining qualified beneficiaries of the" EIP Trust. Respondents "desire for the Court to appoint themselves as the successor co-trustees of the Trust for the sole purpose of dissolving the Trust and distributing the [605 North Main property] to its designated beneficiaries." (R. p. 22).

On April 2, 2015, Petitioner filed an Answer to Respondents' petition and denied that the 605 North Main property is owned by the EIP Trust. (R. pp. 43-46). On May 4, 2015, Petitioner filed an Amended Answer, Counterclaims, and Cross-Claim seeking, *inter alia*, a declaratory judgment declaring that Petitioner is the rightful owner of the property. (R. pp. 83-90).

On October 12, 2015, before a trial or evidentiary hearing was conducted or any action was taken on Respondents' Petition or Petitioner's Counterclaims or Cross-Claim, Respondents then filed a separate "Motion for Appointment of Special Fiduciary as Interim Trustee" under S.C. CODE ANN. § 62-7-704(e). (R. pp. 101-04). Section 62-7-704(e) states that "[w]hether 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." S.C. CODE ANN. § 62-7-704(e). On December 9, 2015, Respondents also moved for an expedited hearing on their Motion for Appointment of Special Fiduciary as Interim Trustee. (R. pp. 105-21).

Respondents' Motion for Appointment of Special Fiduciary as Interim Trustee and their Motion for Expedited Hearing requested that a special fiduciary be appointed with the authorization to immediately have "access to all records concerning the assets of the Trust," "authority over Trust assets," and payment of "reasonable compensation." (R. p. 103). Their motions also asked the Probate Court to alter the *status quo* by authorizing the special fiduciary to have immediate possession, control, and authority over the 605 North Main property, including "management" of the property, "collection of rents and other income generated by" the property, and potentially selling the property. (R. p. 106). The motions effectively requested the Probate Court to order Petitioner to vacate the property and to relinquish ownership and possession to the special fiduciary. The motions claimed it was urgent that the Probate Court appoint a special fiduciary because Mrs. Pittillo had previously taken out a loan using the property as collateral that was due on December 3, 2016.

On June 29, 2016, Petitioner filed an opposition to the Motion for Appointment of Special Fiduciary along with sworn affidavits of Petitioner and several witnesses. (R. pp. 122-61). Petitioner argued, *inter alia*, that the substance of the motions sought a mandatory injunction against Petitioner, that Respondents failed to show that injunctive relief is necessary to preserve the *status quo*, and that the motions improperly sought to alter the *status quo* by appointing a special fiduciary and to require Petitioner to immediately relinquish possession, use, control, and ownership of the 605 North Main property to the special fiduciary, even though the property's ownership is in dispute. As an alternative position, Petitioner requested the Probate Court to appoint him as the special fiduciary should it be deemed necessary and appropriate to appoint such a person under § 62-7-704(e).

On June 29, 2016, Associate Probate Judge Molly D. Edwards conducted a hearing solely on Respondents' motions. (R. pp. 247-96). On August 31, 2016, Judge Edwards issued an order

appointing Ashley Andrews, Esquire "as the special fiduciary to serve as the Interim Trustee." (R. p. 6 ¶ 26). In delineating the special fiduciary's "duties and responsibilities," the order states that "it is important that the Court treads lightly in regards to the duties and responsibilities assigned to a special fiduciary in order to ensure that the *status quo* is maintained in this matter to the greatest extent possible." (R. pp. 6-7 ¶ 32). The order also finds that "[w]hile on the face of the Motion, [Respondents] did not request an injunction, it appears that some of their requested relief would have the consequence of altering the *status quo*" and that "[w]hile injunctive relief was not plead by [Respondents], that would be the effect." (R. p. 7 ¶¶ 33, 38). However, Judge Edwards concluded the outstanding mortgage taken out on the property by Mrs. Pittillo "poses a major risk to the ownership of this property," thus she ruled the "appointment of a Special Fiduciary is necessary in order to preserve 605 N. Main Street for all parties and to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion." (R. p. 8 ¶¶ 41-42). The order authorizes the special fiduciary "[i]n her sole discretion, [to] negotiate with the lender and/or parties to extend the due date on the current mortgage in order for litigation to be finalized or [to] have the mortgage paid off prior to the December 3, 2016 due date." (R. p. 10). She necessarily denied Petitioner's request that he be the person appointed to that position. The order also requires that Petitioner turn over certain records to the special fiduciary regarding the property. (R. pp. 8, 10). The order further states that the special fiduciary "shall be compensated at $200/hour." (R. p. 9).

Petitioner's counsel received written notice of the entry of the order on September 6, 2016. On September 16, 2016, Petitioner timely filed and served his Notice of Intent to Appeal to the Circuit Court in accordance with S.C. CODE ANN. § 62-1-308. (R. pp. 177-84).

On October 26, 2016, Petitioners filed a Motion to Dismiss Appeal arguing the Probate

Court's order grants "only temporary relief" and "is not a final order subject to appeal" until there is "a final hearing on the merits." (R. pp. 190-91). Respondent filed his opposition to the motion on November 21, 2016, and argued the Probate Court's order is appealable because it involves (a) a final order affecting a substantial right made in a special proceeding under § 14–3–330(3) and/or (b) an order that grants, continues, or refuses an injunction under § 14–3–330(4). (R. pp. 203-24).

Circuit Judge Edgar W. Dickson conducted a hearing on the Petitioners' motion on November 21, 2016. (R. pp. 320-62). On December 12, 2016, he entered an Order granting the Respondents' motion to dismiss Petitioner's appeal. (R. pp. 12-20). On January 12, 2017, Petitioner timely served his Notice of Appeal to the Court of Appeals. (R. pp. 242-46).

On June 13, 2018, without oral argument, the Court of Appeals issued an unpublished memorandum opinion summarily affirming the Circuit Court's Order. (App. p. 0001). On June 26, 2018, the Petitioner filed a Petition for Rehearing *En Banc*. (App. p. 0003). The Court of Appeals denied the petition by Order filed on October 10, 2018. (App. p. 0012).

ARGUMENTS

I. THE COURT OF APPEALS ERRED BY FAILING TO RECONCILE THE PROVISIONS OF S.C. CODE ANN. § 62-1-308(a) WITH THOSE OF § 14-3-330 SO AS TO ESTABLISH A UNIFORM AND CONSISTENT STANDARD GOVERNING THE TYPES OF INTERLOCUTORY AND INTERMEDIATE ORDERS ISSUED BY LOWER COURTS THAT ARE IMMEDIATELY APPEALABLE, BY HOLDING THAT §§ 14-3-330(3) AND 14-3-330(4) DO NOT APPLY TO APPEALS OF PROBATE COURT ORDERS, AND BY HOLDING THAT APPEALS FROM THE PROBATE COURT ARE GOVERNED EXCLUSIVELY BY § 62-1-308 AND THAT § 14-3-330 IS INAPPLICABLE TO SUCH APPEALS.

Section 62-1-308 provides that "[a] person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county . . . ." S.C. CODE ANN. § 62-1-308(a). Conversely, "[t]he determination of whether a party may immediately appeal an order issued

before or during trial is governed primarily by S.C. CODE ANN. § 14–3–330." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6-7, 630 S.E.2d 464, 467 (2006).

Our case law holds that "[a]bsent a specialized statute, an order must fall into one of several categories set forth in [§ 14-3-330] in order to be immediately appealable." Id. at 6, 630 S.E.2d at 467; Watson v. Underwood, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014); see also Edwards v. SunCom, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006) ("Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within S.C. CODE ANN. § 14-3-330.").

Section 14-3-330, which establishes the "appellate jurisdiction" of our state appellate courts to correct "errors of law in law cases," has been in place in various forms for at least 150 years. It was last amended in 1991. In its present form, § 14-3-330 provides in part that the following types of orders are immediately appealable:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions . . . .;
>
> (2) An order affecting a substantial right made in an action when such 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 or any pleading in any action;
>
> (3) **A final order affecting a substantial right made in any special proceeding** or upon a summary application in any action after judgment; and
>
> (4) **An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction** . . . .

S.C. CODE ANN. § 14-3-330 (emphasis added); see also S.C. CODE ANN. § 18-9-10 ("An appeal may be taken to the Supreme Court or the Court of Appeals in the cases mentioned in Sections 14-3-320

and 14-3-330.").[2] Although § 14-3-330(4) does not explicitly refer to appeals from "probate court" orders involving injunctions, that section has been applied to such orders in at least one unpublished decision. See, e.g., Ex parte McFarlin, 2007 WL 8326605, at *2 (S.C. Ct. App. Feb. 12, 2007).

Pursuant to § 14-3-330, our appellate courts have held that a multitude of interlocutory, intermediate, and other orders issued by Circuit Courts, Family Courts, or other lower courts that do not dispose of the entire case nevertheless are immediately appealable. Although not an exhaustive list, some of the interlocutory orders that are immediately appealable under § 14-3-330 include:

- Cooke v. Palmetto Health All., 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005) (circuit court's order rejecting one of the defendant's defenses, but not yet disposing of merits of plaintiff's claim, was immediately appealable pursuant to § 14-3-330(1) as involving the merits of case since the circuit court had finally determined a substantial matter forming part of the defendant's defense)

- Kay v. Meadors, 216 S.C. 483, 58 S.E.2d 893 (1950) (circuit court order refusing to dissolve an attachment is immediately appealable under statutory predecessor to § 14-3-330(1) because it involves the merits)

- Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986) (circuit court order granting a Rule 12(b)(6) motion to dismiss as to one of multiple claims is immediately appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading)

- Link v. School Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990) (circuit court order granting summary judgment as to one of plaintiff's four claims is immediately appealable under § 14-3-330(1) as "involving merits" and under § 14-3-330(2) because it has the effect of striking out a pleading)

- Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 773 S.E.2d 144 (2015) (circuit court's bifurcation order which effectively granted summary judgment against plaintiffs on one of their claims is immediately appealable under § 14-3-330(2) because a

[2] S.C. CODE ANN. § 18-9-30 further provides that "[t]he Supreme Court and the Court of Appeals shall have jurisdiction of all questions of law arising in the course of the proceedings of the circuit court in probate matters in the same manner as provided by law in other cases." S.C. CODE ANN. § 18-9-30 (emphasis added). When hearing an appeal from a Probate Court order in a law case, our appellate courts have the same jurisdiction to correct errors of law that they would have if deciding an appeal from another inferior court.

substantial right is implicated)

- Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001), overruled on other grounds by Farmer v. Monsanto Corp., 353 S.C. 553, 579 S.E.2d 325 (2003) (circuit court order granting motion to dismiss as to some, but not all of the defendants in a case, is immediately appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading)

- Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005) (circuit court order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and is immediately appealable under § 14-3-330(2))

- Neeltec Enterprises, Inc. v. Long, 397 S.C. 563, 725 S.E.2d 926 (2012) (circuit court order requiring plaintiff to substitute alleged corporate owners of competitor for defendant named in complaint is immediately appealable interlocutory order under § 14-3-330(2) because it affects plaintiff's substantial right to name his defendant)

- City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 531 S.E.2d 518 (2000) (circuit court order denying motion for preliminary injunction is immediately appealable under § 14-3-330(4))

- Babb v. Scott, No. 2005-UP-424, 2005 WL 7084291 (S.C. Ct. App. June 29, 2005) (circuit court order restraining party from issuing and signing subpoenas on his own behalf and temporarily restraining him from having the clerk issue subpoenas for him until his deposition is taken is immediately appealable under § 14-3-330(4))

In all of these cases, the interlocutory or intermediate orders were immediately appealable despite the fact they did not constitute "final" orders or "final" judgments ending the entire case.

Section 62-1-308 is part of the South Carolina Probate Code, which first became effective on July 1, 1987. Section 62-1-308(a) simply states that "[a] person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county . . . ." S.C. CODE ANN. § 62-1-308(a). Section 62-1-308 nowhere explicitly addresses interlocutory or intermediate orders of any kind, including orders involving the merits, affecting a substantial right, or granting, modifying, or refusing an injunction. There is no provision in § 62-1-308 reiterating or emulating the provisions in § 14–3–330 involving appeals from interlocutory or intermediate orders.

Although not explicitly stated in this Court of Appeals' opinion in this case, the Court apparently held that § 62-1-308 is a "specialized statute," thus implying that § 14-3-330 cannot be applied to appeals from the Probate Court. To accept this holding necessarily means that none of the types of orders at issue in the cases summarized above are immediately appealable if a Probate Court—rather than a Circuit Court or Family Court—issues them because there is no provision in § 62-1-308 covering appeals from interlocutory or intermediate orders. It means that no appeal can be taken from the Probate Court until a "final judgment" concludes the entire case. As examples, if a Probate Court granted a motion to dismiss and struck some of a party's claims or dismissed some of the parties from the suit, granted summary judgment as to some but not all of a party's claims or defenses, compelled a party to substitute parties, refused to dissolve an attachment, disqualified a party's legal counsel, or granted or denied a preliminary injunction, such orders could not be immediately appealed under the Court of Appeals' holding because § 14-3-330 is altogether inapplicable and they are not "final" orders for purposes of § 62-1-308(a).

Petitioner respectfully submits there is no principled basis to hold that these types of orders are immediately appealable if issued by the Circuit Court or Family Court, but are not immediately appealable if issued by the Probate Court. In the past, our courts have reconciled or harmonized different statutes whenever possible. For example, in Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994), this Court rejected the argument that the General Assembly implicitly repealed another provision of the South Carolina Code when it enacted § 62-1-308. The appellant in that case had pointed out the Probate Code was enacted subsequent to § 44-17-620, which addresses appeals of involuntary commitment orders, and therefore argued that § 62-1-308 had repealed § 44-17-620 by implication. However, in rejecting this argument, this Court stated:

> A later enacted general statute does not repeal an earlier more specific statute. Furthermore, repeal by implication is not favored and will be applied only when two statutes are incapable of any reasonable reconcilement. Section 44-17-60 specifically addresses appeals of commitment orders from the probate court while § 62-1-308 addresses appeals of other orders from the probate court. The statutes are capable of reconcilement.

Id. at 313-14, 440 S.E.2d at 358-59 (citations omitted); see also Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) ("The enactment of a later general statute does not repeal an earlier more specific statute. Similarly, we decline to hold the amendment of a general statute impliedly affects an earlier specific statute. Further, repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement.").

In the present case, although § 62-1-308 governs appeals from a "final" order of a Probate Court, nothing in that section purports to deal with appeals from interlocutory or intermediate Probate Court orders that do not constitute a "final" order as to the entire case. The Court of Appeals apparently held that the omission in § 62-1-308 of any mention of interlocutory or intermediate orders means the legislature repealed by implication the applicability of § 14-3-330 to Probate Court orders. However, nothing in § 62-1-308 suggests it cannot be reconciled with § 14-3-330. Section 62-1-308 simply contains a general statement that "final" orders may be appealed, but it nowhere states that *only* "final" orders may be appealed. It nowhere states that the types of interlocutory and intermediate orders delineated in § 14-3-330 are not appealable if issued by the Probate Court.

Petitioner respectfully submits that §§ 62-1-308 and 14-3-330 are capable of reasonable reconcilement. Those statutes can be reconciled by holding that § 62-1-308(a) states the general rule that "final" orders in the Probate Court may be appealed and by holding that § 14-3-330 augments

the Probate Code with respect to appeals from interlocutory orders of the Probate Court. See S.C. CODE ANN. § 62-1-103 ("the principles of law and equity supplement" the Probate Code). In an unpublished decision, our Court of Appeals reached a similar result. In Ex parte McFarlin, No. 2007-UP-073, 2007 WL 8326605, at *2 (S.C. Ct. App. Feb. 12, 2007), the Court held that a Probate Court's order freezing certain bank accounts "until a court may conduct a full hearing on the merits" was "in the nature of an injunction" and was immediately appealable pursuant to § 14–3–330(4). This could not be so if § 62-1-308 *exclusively* governs appeals from the Probate Court.

If §§ 62-1-308 and 14-3-330 are not reconciled, it will demarcate a radical change to South Carolina law as heretofore understood by members of our state bar. It will fundamentally curtail the types of Probate Court orders that are immediately appealable and will create an incongruent and irrational appellate system in which the same types of interlocutory orders are immediately appealable if issued by a Circuit Court or Family Court, but are not immediately appealable if issued by a Probate Court. Instead of such an illogical and contradictory system, the Court should reconcile the statutes and establish a uniform and consistent standard involving the types of interlocutory or intermediate orders issued by inferior courts that are appealable to our state appellate courts.

II. THE COURT OF APPEALS ERRED BY AFFIRMING THE CIRCUIT COURT'S DISMISSAL OF PETITIONER'S APPEAL OF THE PROBATE COURT'S ORDER APPOINTING A SPECIAL FIDUCIARY AS INTERIM TRUSTEE ON THE GROUNDS THE ORDER IS NOT IMMEDIATELY APPEALABLE.

A. The Probate Court's Order is Immediately Appealable as a Final Order Affecting a Substantial Right Made in a Special Proceeding under S.C. CODE ANN. § 14–3–330(3).

The Probate Court's order constitutes a final order affecting a substantial right made in a special proceeding within the meaning of § 14-3-330(3).

1. Distinction Between "Actions" and "Special Proceedings."

Despite the fact that § 14-3-330(3) and its predecessor versions have been around for over a century and a half, South Carolina has few reported decisions addressing this subsection. Our state law has historically divided the remedies in the courts of justice into (1) "actions" and (2) "special proceedings." Actions are distinguished from special proceedings according to the remedy sought. The two terms are used in contradistinction to each other. An "action" is an "ordinary proceeding in a Court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence." Allen v. Partlow, 3 S.C. 417, 418, 1872 WL 5562, *1-2 (1872). In contrast, a "special proceeding" is any other remedy—"such proceedings being in their nature independent remedies, that cannot be taken by an action." Id.; see also Gibbes v. Elliott, 8 S.C. 50, 62, 1876 WL 6768, *8 (1876).

Our state law is consistent with the law in a substantial majority of other states. See, e.g., Agricultural Labor Bd. v. Superior Court, 196 Cal. Rptr. 920, 923 (Cal. Ct. App. 1983) ("'[A]ctions' are distinguished from 'special proceedings' according to the remedy sought. Thus, '[a]n action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' A 'special proceeding' is '[e]very other remedy . . . .'" (citations omitted)); see also Phil Mechanic Const. Co., Inc. v. Haywood, 325 S.E.2d 1, 2 (N.C. Ct. App. 1985); Morton v. Beery, 1933 WL 2222, *3 (Ohio Ct. App. 1933); State ex rel. Reid v. District Court of Fifth Judicial Dist. in and for Madison County, 256 P.2d 546, 549 (Mont. 1953); West Branch Pants Co. v. Gordon, 200 N.W. 908, 909 (N.D. 1924).

In applying statutes identical to § 14-3-330(3), other states have held that "[a] special

proceeding includes every special statutory remedy which is not in itself an action." Williams v. Baird, 735 N.W.2d 383, 389 (Neb. 2007); Sullivan v. Storz, 55 N.W.2d 499, 502 (Neb. 1952); 4 AM. JUR. 2D Appellate Review § 116 (2016) (citing cases). "A special proceeding is defined as usually meaning such a proceeding as may be commenced independently of a pending action by petition or motion, upon notice, in order to obtain special relief." In re GlaxoSmithKline PLC, 699 N.W.2d 749, 756 (Minn. 2005). "Its existence is not dependent upon the existence of any other action and it therefore is not an integral part of the original action but is separate and apart" and "[i]t adjudicates by final order a substantial right distinct from any judgment entered upon the merits of the original action." Id.; see also In re Estate of Janecek, 610 N.W.2d 638, 642 (Minn. 2000); Schuster v. Schuster, 87 N.W. 1014, 1015 (Minn. 1901).

AMERICAN JURISPRUDENCE (SECOND) explains the difference between an "action" and a "special proceeding" as follows:

> The word "action" refers to an entire proceeding, not to one or more parts within a proceeding. Specifically, an action not only encompasses the complaint but also refers to the entire judicial proceeding at least through judgment. An "action" is an ordinary proceeding.
>
> The phrase "special proceeding" has no reference to provisional remedies in actions at law or in equity, and it has reference only to such proceedings as may be commenced independently of a pending action by petition or motion upon notice in order to obtain special relief. Special proceedings include civil statutory remedies not encompassed in the civil procedure statutes. As a general rule, a special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity. A special proceeding instead arises from a right conferred by a statute which authorizes a special application to the courts to enforce the right. Special proceedings have been distinguished from actions by characterizing the latter as ordinary proceedings in court by which one party prosecutes another for a declaration, enforcement, or protection of a right; or the redress or prevention of a wrong, with all other remedies being deemed special proceedings. Special proceedings have also been distinguished from actions by characterizing actions

> as ordinary proceedings for the punishment of a public offense. Additionally, special proceedings may be distinguished from other civil actions by the manner of pleading, practice, and procedure prescribed by the law.

1 AM. JUR. 2D Actions § 3 (2016) (footnotes omitted).

Importantly, proceedings in the Probate Court are examples of a "special proceeding." See Matter of Estate of O'Neill, 519 N.W.2d 750, 752 (Wis. Ct. App. 1994) ("Probate is a series of special proceedings."); Reid, 256 P.2d at 549 ("The administration of an estate of a deceased person is neither an action at law nor a suit in equity but it is a special proceeding."); see also Pfeil v. State, 727 N.W.2d 214, 218 (Neb. 2007); Williams, 735 N.W.2d at 389; In re Guardianship of Forster, 856 N.W.2d 134, 146 (Neb. Ct. App. 2014); In re Trust of Rosenberg, 693 N.W.2d 500, 504 (Neb. 2005); Wead v. Lutz, 831 N.E.2d 482, 485 (Ohio Ct. App. 2005); In re Estate of Janet N. Price, 1995 WL 628344 (Ohio Ct. App. Oct. 26, 1995); Sheets v. Antes, 470 N.E.2d 931, 934 (Ohio Ct. App. 1984); In re Putka, 2001 WL 210027, at *1 n.1 (Ohio Ct. App. Mar. 1, 2001); 4 AM. JUR. 2D Appellate Review § 116 (citing cases).

In applying statutes identical to § 14-3-330(3), courts have held that "[a] substantial right is an essential legal right as distinguished from a mere technical one." Sullivan, 55 N.W.2d at 502; In re Estate of Muncillo, 789 N.W.2d 37, 42 (Neb. 2010). "A 'substantial right' is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.'" Barnes v. Kochhar, 633 S.E.2d 474, 479 (N.C. Ct. App. 2006) (citation omitted); see also In re GlaxoSmithKline PLC, 699 N.W.2d at 754.

2. Impact of S.C. CODE ANN. § 62-3-107.

The fact that South Carolina is among the jurisdictions that have adopted Section 3-107 of

the UPC is vitally important to the resolution of the instant appeal. Under this section, unless supervised administration of an estate is involved, which is not applicable here, "each proceeding before the [Probate Court] is independent of any other proceeding involving the same estate." S.C. CODE ANN. § 62-3-107; see also UPC § 3-107; Cotty v. Yartzeff, 309 S.C. 259, 422 S.E.2d 100, 102 (1992) (quoting § 62-3-107). The comment to UPC § 3–107 provides in part: "When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the Code is framed by the petition." UPC § 3–107 cmt.

Thus far our courts have not yet addressed the significance of § 62-3-107 on the appealability of Probate Court orders. However, the Probate Code statutorily mandates that our courts must liberally construe and apply this provision to effectuate its underlying purpose to make uniform the law of those states which have enacted it. See S.C. CODE ANN. § 62-1-102 (mandating that "[t]his Code shall be liberally construed and applied to promote its underlying purposes and policies" and that "[t]he underlying purposes and policies of this Code are . . . to make uniform the law among the various jurisdictions"). As a result, decisions from other states that have adopted this provision of the uniform act are especially persuasive. Hoover v. Hoover, 271 S.C. 177, 182, 246 S.E.2d 179, 181 (1978); In re Estate of Geier, 809 N.W.2d 355, 359 (S.D. 2012); In re Estate of Zimmerman, 633 N.W.2d 594, 599 (N.D. 2001); Savig v. First Nat. Bank of Omaha, 781 N.W.2d 335, 346 (Minn. 2010); In re Estate of Kotowski, 704 N.W.2d 522, 526 (Minn. Ct. App. 2005); In re Swanson's Estate, 397 So.2d 465, 466 (Fla. Ct. App. 1981); Teague v. Estate of Hoskins, 709 So.2d 1373, 1374 (Fla. 1998).

Case law from other jurisdictions applying their versions of UPC § 3–107 have held that "as a practical matter each petition in a probate file should ordinarily be considered as initiating an

independent proceeding, so that an order disposing of the matters raised in the petition should be considered a final, appealable order." Matter of Estate of Newalla, 837 P.2d 1373, 1377 (N.M. 1992); In re Estate of Sanders, 750 N.W.2d 806, 813 (Wis. 2008) ("Because the probate of an estate may consist of a series of special proceedings, unlike other forms of litigation, probate can result in a series of potentially final orders."); Estate of Marsh, 2016 WL 6581173, at *5 (Cal. Ct. App. Nov. 7, 2016) ("The administration of a decedent's estate can involve several 'independent collateral proceedings,' and the 'final orders' entered in each such proceeding are independently appealable and can be the basis for a *res judicata* defense." (citations omitted)).

"Because each proceeding [before the Probate Court] is independent, there needs to be finality, for purposes of appealability, only for the proceeding being appealed." In re Estate of Ketterling, 885 N.W.2d 85, 87 (N.D. 2016); see Schmidt v. Schmidt, 540 N.W.2d 605, 607 (N.D. 1995). "[M]ultiple judgments final for purposes of appeal can be rendered on certain discrete issues" in a single probate matter. In re Guardianship of Glasser, 297 S.W.3d 369, 372 (Tex. App. 2009) (citation omitted). "[I]n order to authorize an appeal in a probate matter, it is not necessary that the decision, order, decree, or judgment referred to therein be one which fully and finally disposes of the entire probate proceeding." Kelley v. Barnhill, 188 S.W.2d 385, 386 (Tex. 1945); White v. Pope, 664 S.W.2d 105, 107 (Tex. Ct. App. 1983). Instead, "[t]he order must finally dispose or be conclusive of the issue or controverted question for which the particular part of the proceeding was brought." Wittner v. Scanlan, 959 S.W.2d 640, 641 (Tex. Ct. App. 1995); see also Kelley, 188 S.W.2d at 386; In re Estate of McKillip, 820 N.W.2d 868, 875–76 (Neb. 2012); Matter of Estate of Olson, 440 N.W.2d 792, 793 (Wis. Ct. App. 1989).

"An order affecting a substantial right, when made in a special proceeding is a final order and

is appealable, even though it does not terminate the action, nor constitute a final disposition of the case." Sullivan, 55 N.W.2d at 502; Forster, 856 N.W.2d at 146. "In other words, 'an order is appealable if it finally adjudicates some substantial right, whereas if it merely leads to further hearings on the issue, it is interlocutory.'" White, 664 S.W.2d at 107 (citation omitted); see also In re the Estate of Paul J. Gadash, 2017 WL 1404237, *4 (Colo. Ct. App. 2017).

Importantly, "it is substance and not mere nomenclature which determines the nature and finality of the order." In re Estate of Sims, 540 S.E.2d 650, 651 (Ga. Ct. App. 2000); see also Gomes v. Kauwe's Heirs, 472 P.2d 119, 119-120 (Haw. 1970); Howell v. Reimann, 288 P.2d 649, 651 (Idaho 1955); Airline Ground Serv. Inc. v. Checker Cab Co., 39 N.W.2d 809, 811 (Neb. 1949); Peninsula Prop. Co. v. Santa Cruz County, 235 P.2d 635, 640 (Cal. Dist. Ct. App.1951). The fact that a probate order is designated as "interim" does not negate the conclusion that it is appealable as a "final" order under § 14-3-330(3). Rentz v. Rentz, 2016 WL 6270439, at *3 (Ga. Ct. App. Oct. 26, 2016); In re Estate of Adams, 2013 WL 84925, *2 (Tex. Ct. App. Jan. 8, 2013); In re Merlino's Estate, 294 P.2d 941, 943 (Wash. 1956); In re Estate of Williams, 2011 WL 345848, at *5 (Tex. App. Feb. 3, 2011).

In the case at bar, Respondents' motion seeking the appointment of a special fiduciary pursuant to § 62-7-704(e) of the South Carolina Probate Code is a "special proceeding." The motion is not in itself an action, but requests special relief (appointment of a special fiduciary on an interim basis) that is not dependent upon the existence of any other action or the outcome of Respondents' original petition seeking the appointment of a successor trustee. The motion for appointment of a special fiduciary is not essential to Respondents' original petition and is discrete from it. The original petition did not seek appointment of an interim special fiduciary. It is unnecessary for the

Probate Court to appoint a special fiduciary to adjudicate Respondents' original petition, which seeks the appointment of a successor trustee to administer and dissolve the Trust. The appointment of a special fiduciary on an interim basis is not an integral part of the original petition, but is separate and apart from that petition. It is merely collateral to it; a special and independent step.

The Probate Court's order also fully and finally adjudicates the parties' rights involving Respondents' request for the appointment of a special fiduciary. The order is "final" because no further action is required in the Probate Court to determine the parties' rights with respect to the discrete issue involving the appointment of a special fiduciary. The order does not advise that any further hearings or proceedings will occur on whether to appoint a special fiduciary. There is nothing left for the Probate Court to do involving the appointment of a special fiduciary. Instead, the Probate Court has already decided that discrete issue. The special fiduciary has already been—and is currently—acting pursuant to the authorization granted to her in the Probate Court's order.

Finally, the Probate Court's appointment of a special fiduciary involves a substantial right, not merely a technical or procedural matter. The order specifically authorizes the special fiduciary "to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion." (R. p. 8 ¶ 42). It authorizes the special fiduciary "[i]n her sole discretion, [to] negotiate with the lender and/or parties to extend the due date on the current mortgage in order for litigation to be finalized or [to] have the mortgage paid off prior to the December 3, 2016 due date." (R. p. 10). Pursuant to the powers granted to the special fiduciary, the special fiduciary can borrow money or obtain a loan from a lender to pay off the existing loan and place a mortgage or other lien on the 605 North Main property, which Petitioner maintains he owns. Indeed, the special fiduciary already has extended the original loan that became due on December 3, 2016 by increasing the

amount due from $190,000.00 to $247,000.00 and by executing a corresponding mortgage using the property as security. (R. pp. 363-67). The Probate Court also denied Petitioner's request to be appointed to the position of special fiduciary, thus depriving him of this right. The order affirmatively requires that Petitioner turn over records to the special fiduciary regarding his ownership of the property and any leases of the property. (R. pp. 8, 10 ¶ 44). The order further states that the special fiduciary "shall be compensated at $200/hour." (R. p. 9 ¶ 46).

Notably, even if the Circuit Court or this Court should later determine that the Probate Court erred in appointing a special fiduciary and in allowing transactions involving the property to proceed, it will be impossible to undo the transactions that have already taken place under the Probate Court's order before the appellate court has ruled on its validity. The transactions will have already occurred and there is nothing this Court could do to rectify the Probate Court's improper rulings. This Court will be unable to provide an effective remedy to Petitioner if he has to wait until the entire controversy is disposed of before he can appeal the order. See Ex parte Capital U-Drive-It, Inc., 369 S.C. at 8, 630 S.E.2d at 468 (order unsealing family court records was immediately appealable because no appellate remedy is likely to repair any damage done by an improper disclosure); Muncillo, 789 N.W.2d at 41-42 (Court held that probate court order denying application for appointment of a special administrator was a "special proceeding" and "affects an essential legal right" which "cannot be vindicated upon appeal from entry of the later final judgment.").

In summary, because the Probate Court has entered a final order in a special proceeding affecting a substantial right, the Probate Court's order is appealable.

3. The Opinion in Estate of Boyce is not Controlling.

The Court of Appeals placed considerable reliance on its decision in Estate of Boyce v.

Work, 305 S.C. 43, 406 S.E.2d 184 (Ct. App. 1991).[3] However, that reliance is misplaced because the Court was never asked to—and did not—address the appealability of a Probate Court's order under either § 14–3–330(3) or § 14–3–330(4). The Court in Boyce also did not address the impact of S.C. CODE ANN. § 62-3-107, which adopted UPC § 3-107 and significantly affects the appealability of Probate Court orders that rule on independent proceedings involving the same estate.

In Boyce, the Court of Appeals held that a Probate Court order appointing two sisters as "special administrators" for an estate was "clearly temporary" because it stated the sisters are appointed "until such time as a Personal Representative(s) shall be formally appointed."[4] The order also forbade the sisters from distributing any estate assets and required them to post a substantial bond. On appeal, the Circuit Court disqualified one of the sisters from serving as special administrator. The sisters then appealed to the Court of Appeals, which vacated the Circuit Court's order based on its conclusion that the Probate Court's "temporary order" was not final.

However, nothing in the Court's opinion indicates that it was presented with any argument that the order was a final order affecting a substantial right made in a special proceeding under § 14–3–330(3) or an order that grants, continues, or refuses an injunction under § 14–3–330(4). The Court also did not address the impact of § 62-3-107. "[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). The Court in Boyce did not decide the issues presented

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[3] The Court of Appeals' opinion in Boyce was appealed to this Court. However, the parties settled before this Court could decide the merits of the matter. Boyce-Abel In re Estate of Boyce v. Work, 308 S.C. 234, 417 S.E.2d 597 (1992).

[4] The order at issue in this case is noticeably different from the order in Boyce. Although the Probate Court's order in this case states the "special fiduciary [is] to serve as the Interim Trustee," it nowhere states when the special fiduciary's appointment will terminate. (R. p. 6 ¶

in this case and that decision is not controlling of the issues raised in Petitioner's appeal.

B. The Probate Court's Order is Immediately Appealable as an Order that Grants, Continues, or Refuses an Injunction under S.C. CODE ANN. § 14–3–330(4).

The Probate Court's order also has the effect of granting or refusing an injunction within the meaning of § 14-3-330(4). Orders granting or refusing an injunction are immediately appealable. Babb v. Scott, 2005 WL 7084291, *1 (S.C. Ct. App. 2005); Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc., 360 S.C. 473, 602 S.E.2d 83, 86 (Ct. App. 2004); S.C. CODE ANN. § 14–3–330(4). In determining what constitutes an injunction subject to interlocutory review the court should look to the substance of the order rather than its form. Sanford v. South Carolina State Ethics Com'n, 385 S.C. 483, 495-96, 685 S.E.2d 600, 607 (2009). "An order—including a postjudgment order—is properly characterized as an 'injunction' when it substantially and obviously alters the parties' pre-existing legal relationship." Jones-El v. Berge, 374 F.3d 541, 544 (7th Cir. 2004).

Although Respondents' motions did not expressly ask for or analyze the requirements for injunctive relief, their substance sought a mandatory injunction against Petitioner. The motions requested the Probate Court to alter the *status quo* by appointing a special fiduciary and to require Petitioner to immediately relinquish possession, use, control, and ownership of the 605 North Main property to the special fiduciary, even though ownership of the property is in dispute. Respondents asked the Court to authorize the special fiduciary to have immediate possession, control, and authority over the property, including "management" of the property, "collection" of the rents and income, and potentially selling the property. (R. p. 106).

The Probate Court's order alters the parties' legal relationship. It appoints a special fiduciary

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26). Instead, the special fiduciary is appointed for an indefinite period.

with powers over the property for an indefinite period of time. Even though ownership of the property is in dispute, the order permits the special fiduciary "to negotiate an extension of the current loan or other appropriate action to pay the mortgage in her sole discretion." (R. p. 8 ¶ 42). "In her sole discretion, [the special fiduciary may] negotiate with the lender and/or parties to extend the due date on the current mortgage in order for litigation to be finalized or [to] have the mortgage paid off prior to the December 3, 2016 due date." (R. p. 10). Pursuant to these powers, the special fiduciary already has increased the debt on the property from $190,000.00 to $247,000.00. (R. pp. 363-67).

The practical effect of the Probate Court's order is to grant injunctive relief because it effectively restrains Petitioner from exercising complete and full ownership over his property. By granting the special fiduciary the power to negotiate and obtain an extension of the existing note and mortgage involving the property and to take steps to obtain a new loan and place a new mortgage on the property, it necessarily alters the parties existing legal relationship.

CONCLUSION

For the reasons stated, the Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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November 8, 2018.

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Judge

Court of Common Pleas Case No. 2015-CP-08-00547
Opinion No. 2018-UP-244 (S.C. Court of Appeals filed June 13, 2018)

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, JR. IS the Petitioner.

PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari and Appendix (Volumes 1 and 2) on the Respondents by mailing a copy to their attorneys of record on November 8, 2018, via first-class mail, postage prepaid, and addressed as follows:

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