

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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Case No.: 2015-CP-10-05463  
Appellate Case No. 2019-001583

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**RECEIVED**

OCT 02 2019

SC Court of Appeals

The Boathouse at Breach Inlet, LLC, by and through its member,  
Laurence O. Stoney, Jr. .... Respondent,

v.

Richard S. W. Stoney, individually and as a member-manager of  
The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC

and

Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr.  
and Gregory G. Holmes,  
Third-Party Intervenors

of whom

Richard S. W. Stoney is ..... Appellant.

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**RETURN TO MOTION TO DISMISS APPEAL**

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Appellant Richard S. W. Stoney, individually and as a member-manager of The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC (“Appellant”) submits this return to the motion to dismiss appeal and request for expedited ruling filed by Respondent Laurence O. Stoney, Jr. (“Respondent”). The motion to dismiss should be denied because the orders from which an appeal

was taken involve the merits and affect a substantial right and therefore, are immediately appealable. Specifically, the record below shows that the circuit court held a bifurcated hearing on the issue of standing and issued a final order on Appellant's defenses of standing and laches. Further, the court's order affects a substantial right because it permits Respondent to maintain this derivative action rather than bringing an individual claim, directly affecting the mode of trial, and decides Appellants defenses related to standing and laches, effectively striking these defenses from Appellant's answer. Under these circumstances, the orders on appeal are immediately appealable. Finally, the Court should reject Respondent's request for sanctions under Rule 269, SCACR because it is without merit.<sup>1</sup>

### **BACKGROUND**

This appeal arises out of a derivative action Respondent filed on behalf of the Boathouse at Breach Inlet, LLC (the "Boathouse"). The Boathouse is a successful restaurant located on Isle of Palms, South Carolina. The Boathouse is a seven-member LLC, of which six are members of the Stoney family. Appellant Richard Stoney is the majority owner and member-manager, owning 60% of the company. Respondent Lawrence Stoney, who is Richard's cousin, is a 5% owner. According to his complaint, Respondent seeks to recover money from Appellant that Respondent claims was mismanaged and misappropriated from the Boathouse. Because Respondent alleges he is uniquely situated in that he has received disproportionately smaller distributions than the other members, he is bringing the current action on behalf of similarly situated members that includes only himself, effectively making him a "class of one."

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<sup>1</sup> Respondent has also requested that this motion be heard on an expedited basis. Appellant consents to this request.

On March 29, 2018, Appellant and Third-Party Intervenors Ted Stoney and Gregory Holmes filed a motion to bifurcate. *See Ex. A, Mot. to Bifurcate*. In this motion, Appellant sought to have the circuit court bifurcate both discovery and the trial into two phases: a first phase concerning whether Respondent has standing to maintain the current derivative action as a “class of one” and a second phase, to the extent necessary, on the merits of Respondent’s claims against Appellant.

On November 9, 2018, the circuit court held a hearing on the motion to bifurcate. In the memorandum in opposition to the motion to bifurcate and at the hearing on the motion to bifurcate, Respondent’s counsel stated to the circuit court that he opposed bifurcation but consented to a hearing to determine the issue of standing. *See Ex. B, Memo in Opp’n to Mot. to Bifurcate at p. 23 and Ex. C, Nov. 9, 2018 Hr’g Tr. at p. 31, lines 14-18*. During the course of the hearing, the circuit court noted that because Respondent consented to a hearing on the issue of standing, the parties were effectively asking for the same thing. *See Ex. C at p. 37, lines 9-18*. Accordingly, at the conclusion of this hearing, the court announced from the bench that it was scheduling a hearing on the standing issue during which the court would hear witnesses and take evidence. *Ex. C at p. 39, lines 1-9*. The practical effect of this ruling was a partial grant of the motion to bifurcate to allow for a separate trial on the standing issue.<sup>2</sup>

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<sup>2</sup> The circuit court never issued a written order ruling on Appellant’s motion to bifurcate. Admittedly, the circuit court never stated from the bench that it was granting the motion to bifurcate. Equally important, however, is the fact the circuit court never stated that it was denying the motion to bifurcate. Instead, the court simply scheduled a hearing on this issue. The scheduling of this hearing was the relief sought by Appellant and the Third-Party Intervenors in their motion to bifurcate. *See Ex. C at p. 31, line 24 – p. 32, line 3; p. 35, lines 8-25*.

The court held the hearing<sup>3</sup> on the issue of standing on December 13-14, 2018. *See Ex. D*, December 13-14, 2019 Hr'g Tr. Prior to the hearing, both parties submitted lengthy memoranda<sup>4</sup>, relevant documents, and other written materials for the court's consideration. This hearing lasted a day and a half. At the hearing, and with the consent of the parties, the court heard evidence on two issues: (1) whether Respondent has standing to represent the Boathouse in a derivative action as a "class of one" and (2) whether the defense of laches barred the current action. During the hearing, the circuit court heard live testimony from four different witnesses: Laurence Stoney, Lori Stoney, Ted Stoney, and Richard Stoney. *See Ex. D* at p. 2-3. The court also entered 14 exhibits into evidence and admitted additional testimony from other witnesses either by affidavit or deposition transcript. *See Ex. D* at p. 3, lines 8-23; p. 15, lines 4-6; p. 234, lines 15-17. Further, the court heard and ruled upon evidentiary objections from both parties as to the relevance and admissibility of various pieces of evidence. *See, e.g., Ex. D* at p. 94, lines 1-13. At the conclusion of the hearing, the court took the matter under advisement. *See Ex. D* at p. 234, line 15 – p. 235, line 14.

On May 20, 2019, the circuit court issued an order addressing the issues presented at the December 2018 hearing. *Ex. E*, Ord. dated May 20, 2019. In this order, the circuit court described the December hearing as a "preliminary hearing" and titled its findings of fact section as "preliminary findings of fact." Within its findings of fact, the circuit court qualified some of the of its findings by beginning the paragraph with, "Without making any findings of fact, the court

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<sup>3</sup> At the hearing, the parties alternated between calling this proceeding a "hearing" and a "trial." *See, e.g., Ex. D* at p. 13, line 17 – p. 18, line 15. For purposes of this motion, we will refer to this proceeding as a hearing, although as noted in the argument section, *supra*, this hearing was effectively a mini-trial on the issue of standing.

<sup>4</sup> At the hearing, counsel for Respondent referred to these memoranda as "pretrial briefs." *See Ex. D* at p. 212, lines 13-16.

finds . . .” **Ex. E** at ¶¶ 7, 8, 9, and 11. However, many of the factual findings did not contain this qualification. **Ex. E** at ¶¶ 1, 2, 4, 5, 6, 10, 12, 13, and 14. Importantly, the conclusions of law issued by the court did not contain any such qualification. In this order, the court concludes that (1) Respondent had standing to bring this action on behalf of the Boathouse and had therefore properly brought this action in a derivative capacity and (2) that Laches did not bar Respondent from maintaining the current action. *See Ex. E* at p. 8-11.

On June 4, 2019, Richard Stoney timely filed a motion pursuant to Rules 52(b) and 59(e) asking the circuit court to alter, amend, and reconsider its findings of fact and conclusions of law in the May 20 Order. *See Ex. F*, Mot. to Reconsider. Ten days later, the court held a hearing on the motion to reconsider. *See Ex. G*, June 14, 2019 Hr’g Tr. At this hearing, counsel for Respondent specifically informed the circuit court that Appellants were treating the May 20 Order as a final order on the issues of standing and laches. **Ex. G** at p. 44, line 22 – p. 46, line 15; p. 49, lines 9-12. Counsel for Respondent asked the circuit court to clarify that its rulings were not final and therefore subject to further amendment or modification at the trial on the merits. **Ex. G** at p. 49, lines 15-17; p. 50, lines 18-24. In response, counsel for Appellant confirmed to the court that it considered its rulings on the issues of standing and laches final. **Ex. G** at p. 51, lines 1-22. Ultimately, the circuit court declined to make this clarification and, instead, issued a two-sentence order on August 29, 2019, finding that its May 20 Order should not be altered or amended. **Ex. H**, Ord. dated August 29, 2019.

On September 17, 2019, Richard Stoney filed a notice of appeal from the circuit court’s May 20 Order and the corresponding order denying his motion to reconsider. Shortly thereafter, Respondent filed a motion to dismiss the appeal and requested sanctions against Appellant for pursuing this appeal solely for the purpose of delay.

## ARGUMENT

The Court should deny Respondent's motion to dismiss because the orders on appeal both involve the merits and affect a substantial right and, therefore, are immediately appealable.

"The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). The General Assembly has provided that a party may immediately appeal an interlocutory order if the order (1) involves the merits or (2) affects a substantial right. S.C. Code Ann. § 14-3-330(1)-(2) (Supp. 2018). To involve the merits, an order must "finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 809 (1995). An order affects a substantial right if it "(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." S.C. Code Ann. § 14-3-330(2). "By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis." *Morrow v. Fundamental Long-Term Care Holdings*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015).

The orders on appeal in this case are immediately appealable because they involve the merits and affect a substantial right. Each argument is addressed in turn below.

### **A. The Orders Involve the Merits**

The Court should deny Respondent's motion to dismiss this appeal because the circuit court's May 20 Order finally determines the issues of standing and laches in this action and, therefore, are immediately appealable.

Subsection 14-3-330(1) of the South Carolina Code provides our appellate courts with jurisdiction to review

[a]ny 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; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.

S.C. Code Ann. § 14-3-330(1). “An order involves the merits under 14-3-330(1) when it finally determines some substantial matter forming the whole or part of a cause of action or defense.” *Stone v. Thompson*, 426 S.C. 291, 294, 826 S.E.2d 868, 870 (2019). An appellate court’s “review of trial court orders is not constrained by how the order is styled.” *Morrow*, 412 S.C. at 539, 773 S.E.2d at 147. The Court is “free to evaluate the trial court’s order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable.” *Id.*

Our Supreme Court’s recent opinion in *Stone v. Thompson* is instructive. 426 S.C. at 291, 826 S.E.2d at 868. In *Stone*, the Supreme Court overruled this Court’s decision to dismiss an appeal and held that an order deciding the bifurcated issue of the existence of a common law marriage was immediately appealable under section 14-3-330. 426 S.C. at 295, 826 S.E.2d at 870. In that divorce case, the family court granted a motion to bifurcate, ordering a trial on the sole issue of whether a common-law marriage existed between the parties. *Id.* at 294, 826 S.E.2d at 869. The family court noted that if a marriage did not exist, then it would not need to address the other issues in the case. *Id.* In determining that the parties were in fact married at common-law, the family court stated that its order was “final,” but expressly noted that the order did not end the case because the divorce and equitable distribution claims were still at issue. *Id.* An appeal followed, in which the appellant argued that the order was not interlocutory and, instead, immediately appealable under section 14-3-330. *Id.*

Overruling the Court of Appeals' holding that the issue was not immediately appealable, the Supreme Court held that the bifurcated common-law marriage order was appealable under section 14-3-330(1). *Id.* at 296, 826 S.E.2d at 870. In its discussion, the Court stated that the determination of whether the parties were married "is substantial, not only as a part of the causes of action, but also in terms of the larger effects of marriage across other areas of law." *Id.* at 295, 826 S.E.2d at 870. "In bifurcating the issues, the family court recognized the central importance of the common-law marriage determination, without which the other causes of action could not proceed." *Id.* The Court noted that "the [family] court weighed the evidence and finally determined a substantial matter forming part" of the relevant causes of action as well as defenses. *Id.* Concluding that the issue was immediately appealable, the Court held "our holding as to appealability would apply only where, following a bifurcated hearing, a claim or defense has been finally determined." *Id.* at 296, 826 S.E.2d at 870.

The analysis in *Stone* is directly on point in this case. Here, the circuit court held a separate hearing on the issues of standing and laches, at which the court heard testimony and admitted evidence. As was the case in *Stone*, the standing issue is of "central importance" to Respondent's claims because "without which [Respondent's] other causes of action could not proceed." *Id.* at 295, 826 S.E.2d at 870. Following this separate hearing, the court issued an order that finally resolved the two bifurcated issues before the court. As was the case in *Stone*, the circuit court's May 20 Order "weighed the evidence" presented at the December hearing and "finally determined a substantial matter forming part" of the relevant causes of action and defenses. *Id.*

Respondent's argument that the day and a half hearing before the court was not a hearing on the bifurcated issue of standing, but instead simply a "preliminary hearing" on this issue, is not

supported by South Carolina Rules of Civil Procedure or the record in this action. The record demonstrates that this case was effectively bifurcated.

First, no other motions were pending before the circuit court. Neither party had filed a motion for summary judgment or motion to dismiss related to the issues of standing and laches. The only motion related to either of these issues was Appellant's motion to bifurcate. The only possible explanation for the procedure that took place is that the circuit court granted the motion to bifurcate, in part, to allow for a separate hearing on the issue of standing.

Respondent has subsequently argued that the hearing in December 2018 was a result of his "Motion for Hearing on Laurence Stoney's Standing as Representative-Plaintiff for the Boathouse at Breach Inlet, LLC" that was filed on November 21, 2018. **Ex. I**, Mot. for Hr'g on Standing. However, this motion was filed nearly two weeks after the circuit court set the hearing date at the November 9, 2019 hearing on the motion to bifurcate. *See Ex. C* at p. 37, line 19 – p. 41, line 23. Moreover, this motion was not based on any rule of civil procedure or statutory provision that would authorize the circuit court to take up the matters as it did in this case. Simply put, the practical effect of this motion is that Respondent requested the same relief sought by Appellant in his motion to bifurcate—asking that the circuit hold a separate hearing to hear evidence and rule upon the preliminary issue of standing.

Finally, the hearing before the circuit court in December 2018 was, for all intents and purposes, a mini-trial on the issue of standing. The court accepted testimony, admitted evidence, and heard and ruled upon evidentiary objections. These are all functions of trial, not a motions hearing. Where, following a bifurcated hearing, the court makes a final determination as to a claim or defense, the order containing such a ruling is immediately appealable. *See Stone*, 426 S.C. at

296, 826 S.E.2d at 870 (concluding that an interlocutory order was immediately appealable “where, following a bifurcated hearing, a claim or defense has been finally determined”).

The May 20 Order is a final order. Respondent’s argument that this order was not final as to the issues of standing and laches is unsupported. While the May 20 Order characterizes the hearing in December 2018 as a “preliminary hearing” and qualifies its findings of fact as “preliminary findings of fact,” it does not include a similar qualification for the conclusions of law. *See Ex. E*, p. 8-11. The court does not call its conclusions of law “preliminary” or make any statement that these rulings are subject to modification at the hearing on the merits of Respondent’s claims.

Moreover, through Appellant’s motion to reconsider and the corresponding hearing before the court on the same, the circuit court was well aware that Appellant considered its conclusions of law to be final rulings on the issues of standing and laches. In fact, at hearing on the motion to reconsider, Respondent’s counsel repeatedly requested that the circuit court amend its May 20 Order to clarify that the order was not final and that the circuit court was reserving the right to amend, modify, or add to its rulings. Counsel made this request on no less than four different occasions. *Ex. G* at p. 49, lines 5-17; p. 50, lines 20-24; p. 61 lines 16-20, p. 74, lines 13-20. But the circuit court declined to modify its order, instead issuing a short order denying the motion to reconsider.

Finally, Respondent’s characterization that the circuit court “made it clear that it had not made any final rulings” is not supported by the transcript. *See Resp. Mot. to Dismiss Appeal* at pp. 3-4, 6. While the circuit stated that the findings of fact in its May 20 Order were not final and therefore subject to modification at the trial on the merits, the court never stated that its rulings on the issue of standing and laches were not final. To the contrary, during a discussion about the

contents of its order, the circuit court stated “I wanted to [be] clear that I wasn’t making any final determination on any issue other than the preliminary issue of standing and the fact that this problem is within the corporation has been going for a long time, he is not barred by laches from maintain this action.” **Ex. G** at p. 72, ln. 4-9 (emphasis added). Thus, the circuit court specifically delineated between the preliminary nature of its findings of fact and the final nature of its conclusions of law on the issues of standing and laches.

Ultimately, this Court has the ability to make its own determination about whether the May 20 Order is a final order on the merits of the two issues addressed therein. *See Morrow*, 412 S.C. at 539, 773 S.E.2d at 147 (noting that appellate courts are “not constrained by how the order is styled” and “free to evaluate the trial court’s order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable”). Based upon the statements from the circuit court at the hearing on the motion to reconsider and the circuit court’s refusal to amend its order to clarify that the rulings contained therein were not final as requested by Respondent, the circuit court has demonstrated its intent that its May 20 Order was a final order. This Court should not be constrained by how the portions of that order are styled to reach an inconsistent interpretation.

Because the May 20 Order followed a bifurcated hearing and finally determines the defenses of standing and laches, this order “involves the merits” and is immediately appealable under Subsection 14-3-330(1) of the South Carolina Code.

**B. The Orders Affect a Substantial Right**

Even if this Court determines that the May 20 Order does not involve the merits, this court should nevertheless deny Respondent’s Motion to Dismiss the Appeal because this order affects a substantial right.

Subsection 14-3-330(2) provides our appellate courts with jurisdiction to review

[any] 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.

S.C. Code Ann. § 14-3-330(2). Our Supreme Court has held that “orders affecting the mode of trial affect substantial rights under [this section].” *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997).

Because the May 20 Order determines that Respondent can proceed in this derivative action rather than pursuing individual claims against Appellant and the Boathouse, this order directly affects the mode of trial in this case. As such, Appellant must appeal this issue or risk having this decision become law of the case and consequently unappealable. *See Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985). (noting that where a party fails to appeal an order affecting the “mode of trial” that ruling becomes law of the case and no appellate review is available to correct any error).

Further, because the May 20 Order finds that the defense of laches is inapplicable and that Respondent has standing to pursue his claims in a derivative action, this order effectively strikes the defenses related to those issues from Appellant’s Answer. **Ex. J**, Answer. The fourth, fifth, and eighth defenses found in Appellant’s Answer directly concern the issues that form subject of the May 20 Order. **Ex. J** at p. 4-8. Because the May 20 Order made a final determination that these defenses are not available to Appellant in this action, the circuit court effectively granted a partial summary judgment in favor on Respondent on these defenses. Such an order would clearly be immediately appealable under either subsection 14-3-330(1) as “involving the merits” or Subsection 14-3-330(2)(c) as “striking an answer or any part thereof.” *See Thornton v. S.C. Elec.*

*& Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011) (“Generally, orders granting partial summary judgment may be immediately appealable under either the ‘involving the merits’ or ‘substantial right’ categories of section 14–3–330(1) and (2)(c).”)

### CONCLUSION

Because the order on appeal involves the merits and affects a substantial right, the motion to dismiss should be denied.<sup>5</sup> This appeal should be allowed to proceed, so that this Court can decide the novel issue under South Carolina law as to whether Respondent can maintain a derivative action against the Boathouse as a “class of one.”

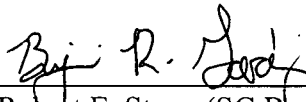
Further, the Court should deny Respondent’s request for sanctions under Rule 269, SCACR. As is evidenced by Appellant’s consent to have this motion heard on an expedited basis, the instant appeal is not being made for the purpose of delay, but rather to protect Appellant’s ability to adequately defend this action. Under these circumstances, sanctions are not appropriate.

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<sup>5</sup> To the extent the Court believes the issue of appealability presents a close call, the Court should enter an order denying the motion to dismiss but allowing Respondent to argue this issue again when the case is assigned to a panel. *See Stone v. Thompson*, 418 S.C. 599, 602 n.1, 795 S.E.2d 49, 51 n.1 (Ct. App. 2016), *rev'd*, 426 S.C. 291, 826 S.E.2d 868 (2019) (noting the court denied Respondent’s motion to dismiss the appeal but “stated in the order that its decision did not preclude Stone from arguing the issue when the case was assigned to a panel”). By allowing the case to proceed to briefing, the Court will have a better opportunity to examine the full record and make a decision about whether this issue is appealable.

Respectfully submitted,

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October 2, 2019

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM CHARLESTON COUNTY  
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Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr.  
and Gregory G. Holmes,  
Third-Party Intervenors

of whom

Richard S. W. Stoney is .....Appellant.

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**PROOF OF SERVICE**

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I certify that I have caused the Return to Motion to Dismiss Appeal to be served on Respondent by U.S. Mail and electronic mail on October 2, 2019, addressed to their attorneys of record at the following address:

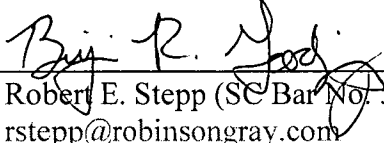
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October 2, 2019

**BY HAND-DELIVERY**

Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
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**OCT 02 2019**

**SC Court of Appeals**

Re: Boathouse at Breach Inlet, LLC, et al. v. Stoney, et al.  
Appellate Case No.: 2019-001583  
Our File No.: 7466/1500

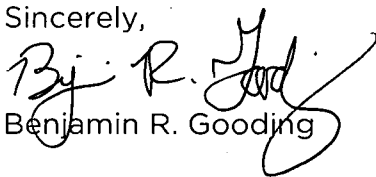
Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of a Return to Motion to Dismiss Appeal and Proof of Service in the above-referenced matter.

I would appreciate your filing as appropriate and returning a clocked-in copy of each via our courier.

By copy of this letter, and as evidenced by the Proof of Service, I am serving same upon counsel of record.

Sincerely,

  
Benjamin R. Gooding

BRG:sec

Enclosures

cc: Capers G. Barr, III, Esquire  
George J. Kefalos, Esquire  
Stafford J. McQuillin, III, Esquire  
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