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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2020-000986

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The Protestant Episcopal Church in the Diocese of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Church Of The Cross, Inc. and Church Of The Cross Declaration Of Trust; Church Of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Bartholomew's Episcopal Church; St. David's Church; St. James; Church, James Island, S.C.; St. Paul's Episcopal Church of Bennettsville, Inc.; The Church Of St. Luke and St Paul, Radcliffeboro; The Church Of Our Saviour Of The Diocese of South Carolina; The Church Of The Epiphany (Episcopal); The Church Of The Good Shepherd, Charleston, SC; The Church Of The Holy Cross; The Church Of The Resurrection, Surfside; The Protestant Episcopal Church, Of The Parish Of Saint Philip, In Charleston, In The State Of South Carolina; The Protestant Episcopal Church, The Parish Of Saint Michael, In Charleston, In The State Of South Carolina and St. Michael's Church Declaration Of Trust; The Vestry And Church Wardens Of The Episcopal Church Of The Parish Of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. Matthew; The Vestry and Wardens Of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis; Vestry and Church Wardens Of The Episcopal Church Of The Parish Of Christ Church; Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. John's, Charleston County, The Vestries And Churchwardens Of The Parish Of St. Andrew,

Respondents,

v.

The Episcopal Church (a/k/a, The Protestant Episcopal Church in the United States of America); The Episcopal Church in South Carolina,

Appellants.

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# INITIAL BRIEF OF RESPONDENTS

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C. Alan Runyan
Andrew S. Platte
Runyan & Platte, LLC
2015 Boundary Street,
Suite 239
Beaufort, SC 29902

Henrietta U. Golding
Burr, Forman & McNair
P.O. Box 336
Myrtle Beach, SC 29578

C. Mitchell Brown
Nelson, Mullins, Riley
& Scarborough
1320 Main Street, 17th Fl.
Columbia, SC 29201

Charles H. Williams
Williams & Williams
P.O. Box 1084
Orangeburg, SC 29116

David Cox
Barnwell Whaley
Patterson & Helms
288 Meeting St; Ste. 200
Charleston, SC 29401

Thomas C. Davis
Harvey & Battey
1001 Craven Street
Beaufort, SC 29901

Attorneys for The Protestant Episcopal Church in the Diocese Of South Carolina and The Trustees of the Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body

C. Alan Runyan
Andrew S. Platte
Runyan & Platte, LLC
2015 Boundary Street
Suite 239
Beaufort, SC 29902

Harry Easterling, Jr.
116 North Liberty Street
Bennettsville, SC 29512

Attorneys for St. Davids Church

G. Mark Phillips
Nelson, Mullins, Riley
& Scarborough
Liberty Center, Suite 600
151 Meeting Street
Charleston, SC 29401

C. Alan Runyan
Andrew S. Platte
Runyan & Platte, LLC
2015 Boundary Street
Suite 239
Beaufort, SC 29902

W. Foster Gaillard
Womble, Bond & Dickinson, LLP
P.O. Box 999
Charleston, SC 29402

Attorneys for The Protestant Episcopal Church of the Parish of St. Philip, in Charleston, in the State of South Carolina

C. Alan Runyan
Andrew S. Platte
Runyan & Platte, LLC
2015 Boundary Street
Suite 239
Beaufort, SC 29902

Henry Grimball
Womble, Bond, & Dickinson, LLP
P.O. Box 999
Charleston, SC 29402

Attorneys for The Protestant Episcopal Church, the Parish of St. Michael, in Charleston, in the State of South Carolina and

St. Michael's Church Declaration of Trust

C. Alan Runyan
Andrew S. Platte
Runyan & Platte, LLC
2015 Boundary Street; Suite 239
Beaufort, SC 29902

Attorneys for Church of the Cross, Inc. and Church of the Cross Declaration Of Trust, The Church of Our Saviour, Of The Diocese of South Carolina, The Vestry and Church Wardens of the Episcopal Church of the Parish Of St. Helena and the Parish Church of St. Helena Trust, The Vestry and Church Wardens of St. Jude's Church of Walterboro, Trinity
Episcopal Church, Edisto Island, Vestry and Church Wardens of the Episcopal Church of the Parish of St. John's, Charleston County, The Vestries And Churchwardens Of The Parish Of St. Andrew, The Church of the Epiphany (Episcopal)

Keith McCarty
McCarty Law Firm
P.O. Box 3005
Charleston, SC 29417

Attorney for Christ St. Paul's Episcopal Church

William A. Scott
Pedersen & Scott
775 St. Andrews Blvd.
Charleston, SC 29407

Attorney for Holy Trinity Episcopal Church

Mark V. Evans
147 Wappoo Creek Drive, Suite 202
Charleston, SC 29412

Attorney for St. James' Church, James Island, S.C.

David B. Marvel
DAVID B. MARVEL,LLC.
P.O. Box 22734
Charleston, SC 29403

Attorneys for The Church of St. Luke and St. Paul, Radcliffeboro

John Furman Wall, III
140 Wando Reach Court
Mt. Pleasant, SC 29464

Attorney for The Church of the Good Shepherd, Charleston, SC

Allan P. Sloan, III
Pierce, Sloan, Kennedy, & Early
321 East Bay Street, P.O. Box 22437
Charleston, SC 29413

Attorneys for Vestry and Church-Wardens of the Episcopal Church the Parish of Christ Church

| | |
|---|---|
| C. Pierce Campbell<br>Turner, Padget, Graham & Laney<br>319 South Irby Street, P.O. Box 5478<br>Florence, SC 29501 | Attorney for All Saints Protestant Episcopal Church, Inc.; The Church of the Holy Cross; St. Bartholomews Episcopal Church |
| Robert R. Horger<br>Horger, Barnwell & Reid, LLP<br>P.O. Drawer 329<br>1459 Amelia Street<br>Orangeburg, SC 29115 | Attorney for Church of the Redeemer |
| Francis M. Mack<br>656 Fort Motte Road<br>Saint Matthews, SC 29135 | Attorney for The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Matthew |
| William A. Bryan<br>Bryan & Haar<br>P.O. Box 14860<br>Surfside Beach, SC 29587 | Attorney for The Church of the Resurrection, Surfside |
| Susan MacDonald<br>Jim Lehman<br>Nelson, Mullins, Riley & Scarborough<br>BNC Bank Corporate Center, Suite 300<br>3751 Robert M. Grissom Parkway<br>Myrtle Beach, SC 29577 | Attorneys for Trinity Church of Myrtle Beach |
| Henrietta U. Golding<br>BURR, FORMAN & MCNAIR<br>P.O. Box 336<br>Myrtle Beach, SC 29578 | Attorney for Saint Luke's Church, Hilton Head |
| Brandt Shelbourne<br>Shelbourne Law Firm<br>131 E. Richardson Avenue<br>Summerville, SC 29483 | Attorney for The Vestry and Wardens of St. Paul's Church, Summerville<br>Trinity Episcopal Church, Pinopolis |
| Harry Easterling, Jr.<br>116 North Liberty Street<br>Bennettsville, SC 29512 | Attorney for St. Paul's Episcopal Church of Bennettsville, Inc. |
| Thornwell F. Sowell<br>Bess J. DuRant<br>SOWELL & DuRANT, LLC<br>1325 Park Street, Suite 100<br>Columbia, SC 29201 | Attorneys for the Church of the Holy Comforter |

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## I. INTRODUCTION

In stark contrast to Appellants' current description to this Court, in another venue, Appellants called these opinions legally and factually "fractured", containing "significant ambiguities" which are based on an "incomplete record." These descriptions were right. Yet the thrust of Appellants' current argument is to tie this "nil ultra" Court's hands to prevent it from fully considering one question: "What is the truth?" The law-of-the-case doctrine does not prevent that question from being answered. The factual result Appellants argue was reached on parish accession to the Dennis Canon was based on an incomplete factual record. Judge Dickson's findings on the complete record have not been appealed. Those findings are that the law of this case, neutral principles of South Carolina law, strictly applied to the complete factual record requires a different result than what Appellants seek.

Nor did this Court hold that Appellants became the owners of Respondent Diocese's property or the beneficiary of its trusts simply because the Diocese withdrew from TEC. Neutral principles of corporate and associational law did not deprive the University of South Carolina of its real, personal and intellectual property when it exercised its constitutional right to withdraw from the Atlantic Coast Conference. The law is no different here. Nor does there exist any consensual agreement which might create that result because the Dennis Canon expressly does not apply to the Diocese or the Trustees.

The doctrine of the law of the case is not a tool to promote injustice. It does not compel the result Appellants argue because its discretionary application to the complete facts would be clearly erroneous and manifestly unjust.

## II. STATEMENT OF ISSUES ON APPEAL

1. Does the law-of- the-case doctrine limit the power or jurisdiction of the circuit court on remittitur and this Court in this appeal to interpret *Protestant Episcopal Church in the Diocese of South Carolina v. The Episcopal Church*, 421 S.C. 211, 806 S.E.2d 82 (2017) ("Collective Opinions")?

2. Is it the law of this case that under neutral principles of South Carolina law the Dennis Canon does not create a trust unless each Respondent parish expressly acceded (agreed) in a signed writing directly to it?

3. Are the circuit court's findings that no Respondent parish acceded to the Dennis Canon under South Carolina's neutral principles of trust law binding because they are supported by the evidence?

4. Would the result Appellants claim the Collective Opinions reached be clearly erroneous and manifestly unjust?

5. Was the circuit court constitutionally required to hear and rule on those issues in the Collective Opinions which had never been presented to, nor ruled on by, the circuit court, which were raised in the petition for rehearing and which were not considered by this Court's 2-2 rehearing denial?

## III. STATEMENT OF THE CASE

Because the issues in this appeal involve the doctrine of the law of the case, it is necessary to understand what the parties pled, what legal and factual issues were tried, what their resolution was, what legal and factual issues were appealed and what legal issues were decided by the Collective Opinions.

### A. Respondents' Complaint

This appeal arises out of an action styled "Complaint for Declaratory Judgment and Injunctive Relief", which Respondents initially brought against Appellant, The Episcopal Church ("TEC") on January 4, 2013. The complaint sought two things under three statutes: a declaration (§15-53-10 *et. seq*, "Uniform Declaratory Judgments Act"*)* that Respondents were the exclusive owners of the real and personal property they had possessed, constructed and maintained for centuries in which Appellants had no interest and a permanent injunction prohibiting Appellants

(and all those acting in concert with them) from using Respondents' names and marks in violation of two statutes, one involving state registered marks, (§§39-15-1105, *et. seq.*, "Trademarks and Service Marks"), and the other involving improper use of names, (§§16-17-310, 320, "Improper Use of Names"). Second Amended Complaint at 85-88 (Mar. 3, 2014). Before answering the initial complaint, Appellant TEC consented to the entry of a temporary injunction on January 31, 2013 which enjoined it and all those acting in concert with it from using the names and marks of the first-named Respondent in this appeal, The Protestant Episcopal Church in the Diocese of South Carolina (the "Diocese" or the "Disassociated Diocese"). Temp. Inj. (Consent) (Jan. 31, 2013).[1] The temporary injunction prohibited all except officers and directors, Trustees and employees of the Diocese and the second named Respondent, The Trustees of the Protestant of the Protestant Episcopal Church in South Carolina (the "Trustees") from using those names and marks. *Id.*

**B. Appellants' Responsive Pleadings**

TEC answered asserting affirmative defenses and 41 counterclaims for declaratory judgment and injunctive relief. However, none of those counterclaims were against Respondents. Instead they were against 720+ "individual counterclaim Defendants" (vestry members, and officers and directors of Respondents) alleged to control Respondents that were not named as parties, were not served, were not joined and consequently were never before the court.[2] TEC's

[1] The findings consented to by TEC were, *inter alia*, that the Diocese is the owner of the state registered marks and that the Diocese withdrew from TEC. Temp. Inj. (Consent) at 2, 6.

[2] Count I sought declaratory and injunctive relief in TEC's favor against these individual non-parties over the control of the real and personal property of the Diocese and of the Trustees. The other claims against these individuals included federal Lanham Act and common law infringement claims (Counts II, III & IV), unfair trade practices (Count V), and unfair competition (VI). Counts VII-XLI made the same declaratory and injunctive relief allegations of control against 720 John, Jane, James and Andrew Does and John, Jane, Mary and Richard Roes who were alleged to be the current and former members of the respective vestries of each individual church non-profit religious corporation. TEC's Answer and Counterclaims to Second Am. Complaint at 39-98.

Answer and Counterclaims to Second Am. Complaint (Mar. 28, 2013). The declaratory judgment which Appellants assert TEC sought was against individuals never made parties. App. Brief at 3.

Similarly, none of TECSC's counterclaims involving TEC trademarks (federal trademark issues, the UTPA and unfair competition) were made against any Respondent. All were made against individuals alleged to control Respondents but who were never joined as parties. TEC and TECSC's motions to join the individuals were denied and those orders were not appealed.[3]

**C. The Trial**

The case was tried without a jury for three weeks in July 2014. Fifty nine witnesses testified and over 1, 200 exhibits were introduced producing a 2,523-page transcript of record. Goodstein Order, p. 5 (Feb. 3, 2015); Trial Tr. 1-2523. There were four issues tried: (1) Who had the right of corporate control over the Diocese and Parish churches under the neutral principles of state law standard (*All Saints*), (2) whether there existed an express or constructive trust over parish property under neutral principles of state law (*All Saints*), (3) whether TEC or the Diocese is the statutory beneficiary of those Trustees assets that are held for the benefit of a diocese, and (4) whether

[3] On May 5, 2013, Appellant TEC moved to join 23 individuals as parties alleging they controlled the Diocese and that they were necessary parties under Rule 19, SCRCP. Appellant TECSC joined in the motion. This motion was denied on September 27, 2013. Or. Denying Defs. Mot. to Join Additional Counterclaim Defs. (Sept. 27, 2013). TECSC moved to reconsider this order on October 20, 2013. The motion to reconsider was denied on December 31, 2013. Appellants did not appeal these orders. However, on November 25, 2013, TECSC moved to join four individuals as parties. This motion was denied on May 20, 2014 with the court finding that these four individuals were part of the 23 individuals the court had previously found were not necessary "because complete relief can be had between the existing parties," *id*. at 14, and finding that Appellants had not appealed that order. Appellants' motion to reconsider was denied on June 6, 2014. Appellant TECSC appealed those orders on June 23, 2014. On June 25, 2014, Respondents, Diocese and Trustees, moved to dismiss the appeal and for an expedited hearing. One of the bases was that Appellants' failure to appeal the September 27, 2013 order since these four parties were included in that order denying they were "necessary"; therefore they were precluded from again asserting their joinder was "necessary." The Court of Appeals dismissed the appeal on July 3, 2014. None of the denials of these joinder motions were part of the subsequent appeal to this Court.

Appellants had infringed on the marks (including names) of the Diocese and of certain parishes under two statutes: §§39-15-1105, *et. seq.* (service mark infringement) and §§16-17-310, 320 (improper use of names) including whether the prohibition against such infringement by the consent temporary injunction should be made permanent. Also tried were Appellants' defenses to the alleged infringement of Respondents' marks: non-ownership, fair use, authorization, and invalidity. Trial Tr. 1545.

The following facts were uncontested during the trial or on appeal:

- Respondent Diocese has been in existence since 1785 and is the owner of all its real and personal property including its intellectual property [the standard for determining the right to control the Diocese was the contested issue, not ownership], Goodstein Or. at 5;
- "The undisputed evidence is that all the real and personal property at issue was purchased, constructed, maintained and possessed exclusively by [Respondents]", *Id*. at 37;
- Respondent parishes are the owners of all their real and personal property including any intellectual property [the existence of a trust with TECSC as its beneficiary was the contested issue], *Id*. at 44;
- Respondent parishes were never members of TEC, *Id*. at 33;
- Respondent Trustees was never a member of TEC, *Id*. at 17, 33;
- If it had the authority, Respondent Diocese followed the proper procedures under state law to amend its governance documents and to withdraw its association from TEC [the contested issue was whether these acts were ultra vires because of the disputed standard for determining right to control], *Id*. at 11-14, 26-28, 33-34, 36;

- Respondent Diocese removed its version of the Dennis Canon from its Canons in 2010, two years before it withdrew from TEC in 2012, *Id*. at 10-11;
- If they had the authority, all Respondent parishes followed the proper procedures under state law to remove any agreement they had in their articles or bylaws to TEC rules before the Diocese withdrew from TEC [the contested issue was whether these acts were ultra vires because of the disputed standard for determining right to control], *Id*. at 33;
- The Dennis Canon does not apply to either Diocesan or Trustees real or personal property. *Id*. at 33; and
- Appellants used Respondents marks without permission between October 2012 and the entry of the consent temporary injunction in early 2013. *Id*. at 40-41, 44.

The following issues were not tried: who is the "true" Diocese;[4] if trusts existed, their revocability; the "minimal burden" issue[5] (whether a trust constitutionally could be created for a religious organization with less burdensome requirements than a similar trust for a secular organization), and any issue involving TEC's federal marks except whether Respondents' marks were derived from TEC's. Goodstein Or. at 42-43.

[4] The phrase "true Diocese" was never mentioned at trial except in the testimony of a witness who quoted counsel for TEC at a meeting before this action was commenced. Trial Tr. 198:5-9. The decision on corporate control determined its rightful leaders. *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 451, 685 S.E.2d 163, 175 (2009) ("who were the true officers of All Saints Parish, Waccamaw, Inc.").

[5] The circuit court (Dickson, J,) found that the issue was not argued to, nor ruled upon, by the trial court. Dickson Or. at 26, n. 28. This phrase is not in the parties' pleadings, the trial record, nor is it in Appellants' motion for reconsideration. It first appeared in Appellants' brief on appeal. App. 2015 Br. at 35, 38 (May 15, 2015). Respondents pointed out that the issue was never raised to nor tried by the circuit court and therefore could not be raised on appeal. Resp. 2015 Br., p. 52 & n. 94, (June 15, 2015). Appellants did not contest that statement in their reply.

### D. Judge Goodstein's Order

On February 3, 2015 Judge Goodstein issued an order making 84 findings of fact. Many were necessarily affirmed because they were both uncontested on appeal and because there was no majority on the standard of review for facts in the Collective Opinions.[6] These dealt with the parties histories, corporate and associational status, Respondents' historical existence and operation including amendments to corporate documents and withdrawal from TEC. Goodstein Or. at 5-23.

Characterizing the proof offered at trial, Judge Goodstein stated,

> The plaintiffs' evidence was primarily directed at establishing that they are the exclusive owners of their real, personal and intellectual property; that they took the necessary action, pursuant to South Carolina law and their governance documents properly to disassociate themselves from any relationship with defendants; and that the defendants infringed on their marks. The defendants' evidence was primarily directed at establishing that the plaintiffs lacked the authority to disassociate whether or not they complied with the procedural requirements of the Act [Non-Profit Act] or their governance documents. Alternatively, even if they successfully disassociated, the defendants contend that the plaintiffs' property is subject to an express or constructive trust in defendants' favor.

*Id.* at 24-25. The court then ruled on the four issues framed by the pleadings and the trial; (1) the corporate control of the Respondents: the Diocese, *id*. at 25-32, the Trustees, *id.* at 32-33 and the Parishes, *id.* at 33-34; (2) the existence of any beneficial interest of Respondents' real and personal property, *id.* at 34-37; (3) whether the intent of the Trustees legislative charter referred to two entities, the Diocese and TEC or simply to the Diocese, *id.* at 33 & n.13; and (4) the asserted infringement and improper use of Respondents' marks by Appellants under the two statutes at issue (infringement and improper use), *id.* at 37-44.

[6] *Infra* at 11.

Relying on *All Saints*[7] as the controlling precedent, Judge Goodstein ruled that the issue of corporate control was decided by whether Respondents properly followed the Nonprofit Corporation Act and their governance documents to withdraw and remove any provisions concerning their relationship with TEC.[8] As to Respondent Diocese, similarly to the parish in *All Saints* that successfully withdrew from the Diocese intact, the Diocese followed the proper procedures under the Non-Profit Act and under its governance documents to modify them and withdraw its association with TEC as it was constitutionally permitted to do.[9] As to the Trustees, since the Dennis Canon did not apply to it and it had never been a member of TEC, there could be no claim of corporate control over the Trustees. *Id.* at 33. Finally, as to the parishes, since they were admittedly not members of TEC, and had admittedly met the requirements under neutral principles of state law for modifying their documents, if the parish in *All Saints* could sever its relationship with the Diocese of which it had been a member, the parishes in this case could do so from TEC with whom there had never been any corporate or associational relationship. *Id.* at 33-34.

Importantly, with respect to the issue of express trusts, Judge Goodstein ruled that no such trust exited as to the Diocese or the Trustees because the Dennis Canon did not apply on its face

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[7] *All Saints*, 385 S.C. at 450-51, 685 S.E.2d at 175.

[8] "Corporate control is decided, just as in *All Saints*, by the determination of whether each [Respondent] followed its appropriate civil governance and legally adopted changes to those documents 'which effectively severed the Corporation's legal ties' to TEC. 385 S.C. at 449; 685 S.E.2d at 174." Goodstein Or. at 25.

[9] "Initially, while TEC and TECSC assert that they have rights with respect to Diocese property, they do not derive from the so-called 'Dennis Canon' because on its face this Canon does not apply to the property of a Diocese. Whatever rights the defendants might possess derive from their claims that corporate control is vested in TECSC and not the Diocese. Therefore the sole issue with respect to the Diocese is corporate control. If the Diocese legally withdrew from TEC, then those currently in union with it and its leadership control it." Goodstein Or. at 25-26. As its associational rights were constitutionally protected, so were it "rights to not associate." *Id.* at 31-32. (quoting *Disabato v. S. C. Ass'n of Sch. Administrators*, 404 S.C. 433, 445, 746 S.E.2d 329, 335 (2013)).

to those entities and because the Trustees had never been a member of TEC. *Id.* at 35. As to the parishes, Judge Goodstein stated that Appellants' claim was "that any parish churches governing documents, which voluntarily agreed to TEC's constitution and canons" created an express trust. *Id.* at 34. Judge Goodstein found that the Dennis Canon created by TEC, standing alone, could not create an express trust under *All Saints*. *Id.* at 35. She also found that the agreement to the Constitution and Canons which TEC argued created a trust was not a "legally cognizable form" of trust because there was no signed writing by the parishes declaring a trust in TEC's favor. *Id.* at 35-37. Judge Goodstein **did not**, however, make a parish-by-parish determination of whether any parish had acceded specifically or directly to the Dennis Canon.

With respect to the issue of a constructive trust, Judge Goodstein ruled there was no evidence of any unjust enrichment of the Respondent parishes raising an equitable duty to convey the property to TEC because "the undisputed evidence is that all the real and personal property at issue was purchased, constructed, maintained and possessed exclusively by [Respondents]". *Id.* at 36-37.

With respect to the Trustees statutory beneficiary, Judge Goodstein ruled that TEC's assertion that the statute refers to the Diocese and TEC was incorrect as the statute does not mention TEC and the Acts (1880 & 1902), when read as a whole show the "church" the legislature intended to benefit is the Diocese, not TEC. Therefore, she ruled that the Diocese was the statutory beneficiary of Trustees assets held for the benefit of a Diocese. *Id.* at 33 & n.13. The beneficiary of Camp St. Christopher's deed was not a separate issue which Appellants raised at trial; consequently, it is not mentioned by the court in its order.[10]

[10] Other than testimony about its operation by the Diocese, its ownership by the Trustees and its deed as an exhibit, there was no other testimony, exhibits or arguments made with respect to Camp St. Christopher. Trial Tr. 2400-04, Ex. DSC-30.

Finally, on the issue of Appellants' infringement on and improper use of Respondents' marks, the facts were undisputed including the Respondents' ownership of those marks and Appellants use of them without authorization. The consent temporary injunction against their use under the two statutes was made permanent. *Id.* at 37-46.

### E. Appellants' Appeal

Appellants raised the following issues in their brief on appeal although most were not in the Statement of Issues:[11]

- Because TEC was asserted to be a hierarchical religious organization [the circuit court ruled that issue irrelevant to the neutral principles issues under *All Saints* so that issue was not tried, but she allowed extensive evidence on the right to control], the trial court should have deferred to TEC (which Appellants argued *All Saints* permitted) in how its rules are applied to resolve property disputes between these religious organizations. App. 2015 Br. at 14-23. In the alternative, Appellants moved to argue against the precedent of *All Saints*, Mot. To Argue Against Precedent (Sept. 8, 2015), which this Court permitted, Or. (Sept. 9, 2015);[12]
- Applying the proper rules of deference, TECSC is the "true" diocese [issue was not tried] and "promises of allegiance" by parishes to comply with TEC rules created trusts which were irrevocable [revocability not ruled on by trial court], App. 2015 Br. at 23-39; '

[11] Most notably, and as found by Judge Dickson, the issue of "accession" "was not included in the statement of issues on appeal as required by Rule 208(b)(1)(B), SCACR. Dickson Or. at 26, n.28. Justice Hearn and A.J. Pleicones stated the issue of accession should not have been determined due to the "dearth of evidence on this issue in this voluminous record." 421 S.C. at 243, 806 S.E.2d at 99. *Infra* at 41-43.

[12] Appellants' stated their intent to argue against the precedent of *All Saints* during the trial. Trial Tr. 1780:6-17.

- Any greater requirement than what TEC did to make the Dennis Canon "legally cognizable" under state trust laws would require more than a minimal burden, [issue was not raised to, nor ruled upon by, the trial court], *id.* 35-38;
- Respondents' registered marks created confusion with TEC federal marks [issue was not joined or tried], *id*. 39-44;
- The statute creating the Trustees made TEC (and its "true" diocese, TECSC) the beneficiary of assets held for the benefit of a diocese, not the Diocese, *id.* 44-47; and
- Respondents amendments of their articles of incorporation were ultra vires because they lacked the authority to amend them under a deference rule. *Id*., 47-50.

### F. The Collective Opinions[13]

#### *i. Standard of Review for Facts*

In their brief to the United States Supreme Court, Appellants conceded that there was no majority on the appropriate standard of review.[14] However, the Collective Opinions (3-2) held that the circuit court's findings of fact are deferred to unless wholly unsupported by the evidence, Toal, A.J., Kittredge, J. and Beatty C.J.[15], as opposed to a *de novo* standard of review, Pleicones and A.J., Hearn, J.

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[13] After remittal, the Circuit Court (Dickson, J.) asked the parties to submit their analyses of the Collective Opinions showing were two or more Justices agreed on an issue and whether their agreement supports or does not support each side with page citations and quotations. Both parties did so. Plaintiffs' [Respondents] Analysis of Collective Opinions (Jan. 16, 2019); Defendants' [Appellants] Submission in Response to the Court's Request (Justices Opinion Review) (Jan. 22, 2019). Judge Dickson also asked for record information about the September 1979 vote on the Dennis Canon including whether any of Respondent parishes voted for it. Respondents supplied that information. Plts. Resp. to Ct. Inquiry on Dennis Canon, January 18, 2019.

[14] "[T]here is no majority opinion in the case on the standard of review that was appropriate under South Carolina law." Br. for Resp in Opp. To Pet. For Cert., 2018 WL 2129786 at *24 (May 7, 2018).

[15] **Toal, A.J**.: 421 S.C. at 268-70, 806 S.E.2d at 112-113; **Kittredge, J**., joins in A.J. Toal's opinion, 421 S.C. at 251, n. 31, 806 S.E.2d at 103, n.31; **Beatty, C.J**., does not state his opinion

*ii. Controlling Legal Rationale*

Chief Justice Beatty, Justice Kittredge, and Acting Justice Toal all agreed that the controlling legal rationale is the application of neutral principles of state law to the facts of this case as enunciated in *All Saints* and *Jones v. Wolf*, 443 U.S. 595 (1979).[16] Appellants agreed in their brief to the United States Supreme Court that "a majority of the court rejected [TEC's] argument that *Jones* requires deference to the Dennis Canon." (emphasis in original). Br for Resp. in Opposition, p. 17 (May 7, 2018).[17] Therefore, the law of this case applicable to the facts is neutral principles of state law, "strictly" applied (Beatty, C.J.).

*iii. Corporate Control of the Diocese and the Trustees' Beneficiary*

The circuit court ruled, adhering to *All Saints*, that the Diocese severed its relationship with TEC by successfully disassociating from TEC and that corporate control was with its current leadership. Goodstein Or. at 25-33. The Diocese and the Parishes took all the steps necessary under neutral principles of corporate and associational law to sever their relationship with TEC. *Id*. at

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directly on this issue but he rejects the analysis of Pleicones and Hearn, 421 S.C. at 248-249, 806 S.E.2d at 102, and affirms that the correct analysis is under *All Saints, id.*, which used the same standard as Toal and Kittredge for declaratory judgment actions determining title to real property. *see All Saints*, 385 S.C. at 442, 685 S.E.2d at 170.

[16] **Toal, A.J**., 412 S.C. at 276-77, 806 S.E.2d at 117; **Beatty, C.J**., 421 S.C. at 249, 251, 806 S.E.2d at 102, 103 ("strictly applying neutral principles of law, which I believe this property dispute mandate")

> …I believe the proper application of "neutral principles of law" as enunciated in *Jones v. Wolf*, demands that all thirty six local parishes retain ownership and control of their property…"

421 S.C. at 251, 806 S.E.2d at 103 (**Kittredge, J**.).

[17] "[A] majority (Chief Justice Beatty, and Justices Kittredge and Toal) concurred in Petitioner's view that South Carolina's "ordinary trust and property law" should apply to resolve the dispute, rejecting respondents' contention that, under *Jones*, the First Amendment required deference to the Dennis Canon." Br. for Resp. in Opposition at 8 (May 7, 2018).

25-34.[18] Appellants argued at trial that, under a deference standard, that Respondents lacked the authority to disassociate from TEC. The circuit court found as a fact that TEC had no rule in its documents prohibiting the withdrawal of a member diocese. *Id.* at 21(Findings of Fact 72, 31 & n. 11).

The Collective Opinion agree that the Diocese, specifically, Respondent "The Protestant Episcopal Church in the Diocese of South Carolina" disassociated from TEC.[19] The dispute on this issue is the intended meaning of Chief Justice Beatty's footnote 29.[20]

Appellants contend that this footnote, coupled with the rulings of Justice Hearn and Pleicones (based on a standard that is not the law of the case, who is the "true diocese" determined by deference to TEC), means that Chief Justice Beatty ruled that TECSC is the owner of all the Diocese's assets as well as the beneficiary of the trustee's assets. Respondents, gathering intent

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[18] Appellants agreed: "The parishes subsequently changed their governing documents to remove those pledges, *apparently following appropriate corporate procedures for making such changes*…." App. 2015 Br. at 8 (emphasis added) .

[19] **Pleicones, |A. J**., "The Respondents are the Protestant Episcopal Church in the Diocese of South Carolina ("Disassociated Diocese"). 421 S.C. at 215, 806 S.E.2d at 84. He also references the "Disassociated Diocese" eight times. 421 S.C. at 215, 217 (twice), 226, 228, 229, 230, 231, 806 S.E.2d at 84, 85 (twice), 90, 91 (twice), 92(twice); **Hearn, J.** joined in Acting Justice Pleicones's opinion; **Beatty, C.J**., 421 S.C. at 251, n. 29, 806 S.E.2d at 103, n. 29; **Toal, A.J**., "The Protestant Episcopal Church in the Diocese of South Carolina, a South Carolina Corporation (the disassociated diocese)" plus fifty three references to the "disassociated diocese" 421 S.C. at 262, 806 S.E.2d at109 (4), *Id*. at 203, 806 S.E.2d at 110 (3), 421 S.C. at 264, 806 S.E.2d at 110 (9), *Id*. at 265, 806 S.E.2d at 111(6), *Id.* at 266, 806 S.E.2d at 11(7), *Id*., n. 50, *Id.* at 267, 806 S.E.2d at 111 (5), *Id.*, 806, S.E.2d at 112 (4), *Id*. at 268, 806 S.E.2d at 112 (3), *Id.* at 269, 806 S.E.2d at 112, *Id*. at 281, 806 S.E.2d at 119, *Id*. at 283, 806 S.E.2d at 120 (2), *Id.* at 284, 806 S.E.2d at 121 (2), *Id*. at 286, 806 S.E.2d at 22, *Id*. at 287, 806 S.E.2d at 122 (2), *Id.* at 291, 806 S.E.2d at 124 (2), *Id*. at 291, 806 S.E.2d at 127, n.72.

[20] "Additionally, I would find 'The Trustees of the Protestant Episcopal Church' in the Diocese of South Carolina retain title to Camp St. Christopher as my decision in no way alters the clear language of the 1951 deed conveying ownership of this property. The conveyance of Camp St. Christopher was for the explicit purpose of furthering 'the welfare of the Protestant Episcopal Diocese of South Carolina.' In my view the disassociated diocese can make no claim to being the successor to the Protestant Episcopal Church in the Diocese of South Carolina." 421 S.C. at 251, n.29, 806 2d at 103, n. 29.

from the Chief Justice's entire opinion, contend that footnote 29 is, at best, limited to Camp St. Christopher (CSC) because (1) ownership by the Diocese of its property (real, personal and intellectual) was undisputed at trial and on appeal, (2) CSC is owned by the Trustees, not the Diocese (3) assuming the issue of CSC was properly before the Court, CSC is the only trustees' property discussed in the Collective Opinions, (4) A. J. Toal joined in by J. Kittredge agree that footnote 29 relates only to CSC (and the Chief Justice Beatty does not disagree that this is his intent), 421 S.C. at 291, n.72, 806 S.E.2d at 125, n.72, (5) J. Hearn and A.J. Pleicones agree that CSC in the only non-parish property at issue[21] and (6) any broader interpretation would not be the application of "strict" neutral principles of law which Chief Justice Beatty held his opinion requires.

*iv. Service Marks (S.C. Code §§39-15-1105 et. seq)*

The circuit court's finding of facts were undisputed: In October 2010, the Diocese applied to the Secretary of State to register five service marks pursuant to §§ 39-15-1105 *et. seq*. and in November 2010, the Secretary of State registers the following to the Diocese as owner: "The Diocese of South Carolina"; "The Episcopal Diocese of South Carolina"; "The Protestant Episcopal Church in the Diocese of South Carolina"; and the Diocese seals in color and black and white. Goodstein Or. at 12 (Findings of Fact 30). The Defendants used the names, marks and emblems of the Diocese intentionally and without permission between November 2012 and the fall of 2013. *Id.* at 15-16 (Findings 42, 43). The circuit court's conclusions were: "The Defendants admit the Diocese is the owner and registrant of the mark" *Id*. at 39. "There is no dispute that the Diocese has used the marks at various times throughout its history." *Id*. Appellants intentionally

[21] "The primary issue" is who "has the right to control the property at issue which consists of thirty-six parish churches and Camp St. Christopher on Seabrook Island." 421 S.C.at 232, 806 S.E.2d at 93.

and knowingly used the Diocese's marks "which was not contradicted by any witness for the Defendants." *Id.* at 39-44. "Plaintiffs' action also seeks declaratory and injunctive relief with respect to their names, service marks, styles, seals and emblems under two statutes: S.C. Code §§39-15-1105 et. seq. (Service Mark Infringement) and S.C. Code §§16-17-310 & 320 (Improper Use of Names, marks, styles and emblems)." *Id*. at 37. "Under both statutes, the Plaintiffs have established their entitlement to permanent injunctive relief." *Id*. at 43.

The issue before this Court involved the service mark claim because the improper use claim was not appealed. Dickson Or. at 42, n.30.[22] A.J. Pleicones stated he would reverse the circuit court's order as to the service marks on an issue (confusion with TEC's federal marks) made against third parties never joined, and that he would reverse the injunction "granted to respondents on their service mark claim". 421 S.C. at 231, 806 S.E.2d at 92-93.[23] Justice Hearn joined in that opinion. 421 S.C. at 232, 806 S.E.2d at 93. Acting Justice Toal found the service marks validly registered and affirmed the claims for service mark infringement. 421 S.C. at 288, 806 S.E.2d at 123. Justice Kittredge joined in this opinion. 421 S.C. at 251, n. 31, 806 S.E.2d at 103, n. 31. Chief Justice Beatty expressed no opinion on the issue. 421 S.C. at 249, n. 28, 806 S.E.2d at 102, n.28.

[22] Respondents in the prior appeal noted this failure in its response to Appellants' brief. Resp. 2015 Br. at 55 ("Appellants fail to address Respondents' cause of action based on S.C. Code Ann. §16-17-310 "Improper Use of Names. The circuit court found that this statute provided additional grounds for injunctive relief. Appellants have simply ignored it."). The issue was then briefly addressed in Appellants Reply which did not preserve the issue. App. 2015 Reply Br. at 6 (June 25, 2015); Rule 208(b)(1)(B) & (E) SCACR; *Hunter v. Staples*, 335 S.C. 93, 13, 515 S.E.2d 261, 267 (Ct. App. 1999).

[23] Acting Justice Pleicones also stated he would cancel the marks but cancellation of the marks was neither pled, tried nor ruled on by Judge Goodstein. 421 S.C. at 231, 806 S.E.2d at 92. ("…therefore the Respondents' state marks must be cancelled. *See* S.C. Code Ann. §39-15-1145 (3)(f) (Suppl. 2016).").

Therefore, the service mark rulings and the permanent "service mark" injunction (§39-15-1105 *et. seq.*) were affirmed by an equally divided court. The "improper use of names" ruling and its injunction were not appealed. Dickson Or. 42, n.30.

*v. The Dennis Canon and Parish Property*

Two justices, Acting Justice Toal and Chief Justice Beatty, found that the Dennis Canon, "standing alone," does not create a legally cognizable trust under South Carolina neutral principles of trust law.[24] Justice Kittredge agreed if based solely on neutral principles but with a lessened standard (minimal burden, which was not raised to nor ruled on by the circuit court), a trust would have been created; nevertheless, it was revocable and it was revoked by the parishes. 421 S.C. at 255-257, 806 S.E. 2d at 105-106. Two other Justices, Acting Justice Pleicones and Justice Hearn found that parish agreement to TEC rules was effective to create a trust overruling *All Saints* to the extent it held differently.[25]

Chief Justice Beatty, under the legal principles of *All Saints*, which he held (disagreeing with Acting Justice Pleicones and Justice Hearn) set forth the correct legal standard: a trust was not created unless each parish unequivocally indicated an intent to create a trust by expressly

[24] **A. J. Toal**: "I would find that it does not satisfy the requirements for creating an express trust under South Carolina law" 421 S.C. at 280, 806 S.E.2d at 119. "[T]he parishes' accession to the National Church's rules does not constitute clear and convincing evidence that they intended to place their property in trust (either revocable or irrevocable) for the National Church." *Id.* at 281,806 S.E.2d at 119. **C. J. Beatty**: [L]ike Justice Toal, I would find that, standing alone, it's not sufficient to transfer title of property or create an express or constructive trust under South Carolina law." 421 S.C. at 250, 806 S.E.2d at 103; " [T]he Dennis Canon, by itself, does not have the force and effect to transfer ownership of property as it is not the "legally cognizable form" required by *Jones*." *Id*.

[25] "I would now overrule *All Saints* to the extent it held the Dennis Canon and the 1987 amendment to the Lower Diocese's Constitution were ineffective in creating trusts over property held by or for the benefit of any parish, mission or congregation in the Lower Diocese." 421 S.C. at 88, 806 S.E.2d at 223. Justice Hearn joined in this opinion. 421 S.C. at 93, 806 S.E.2d at 232.

agreeing **to the Dennis Canon** in a signed, written document.[26] Those parishes that "merely promised allegiance" to TEC cannot be deprived "of their ownership rights in their property." 421 S.C. at 250, 806 S.E. 2d at 103.[27] Chief Justice Beatty does not say which parishes agreed to the Dennis Canon and which did not; rather, he expressly "assumes" such an agreement ***must exist*** before a trust is created. *Id.* at 250-51. All the justices agreed that Chief Justice Beatty's intent was that such an agreement was only found with "specific" or "direct" accession to the Dennis Canon.[28]

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[26]

> Those parishes that did not expressly accede to the Dennis Canon should retain ownership of the disputed real and personal property.

421 S.C. at 249, 806 S.E.2d at 102.

> TEC argues that the parishes' accession to the Dennis Canon created the trust. **Assuming** that each parish acceded in writing, I would agree.

*Id.* at 250-51, 806 S.E.2d at 103. (emphasis added)

> In my view, the Dennis Canon had no effect until acceded to in writing by the individual parishes.

*Id.* at 250, 806 S.E.2d at 103.

> …the parishes that did not accede to the Dennis Canon cannot be divested of their property.

*Id.*

[27] TEC previously characterized the evidence on Parish agreement to the TEC rules (Constitution and Canons) which included the Dennis Canon after 1979 as "promises of allegiance." App. 2015 Br. at 34. Acting Justice Pleicones and Justice Hearn agreed that the Dennis Canon's binding nature on parishes was because of their "voluntary promises of allegiance" (Pleicones joined in by Hearn) found in their "documentation reaffirming their allegiance to the National Church" (Hearn joined by Pleicones). 421 S.C. at 223, 243, 806 S.E.2d at 88, 98. Chief Justice Beatty disagreed.

[28] **A.J. Pleicones joined in by Justice Hearn**: "Chief Justice Beatty, Justice Kittredge and Acting Justice Toal…impose a requirement that each local church **must specifically accede to the Dennis Canon** before it can be bound." 421 S.C. at 230, n.11, 806 S.E.2d at 92, n.11. (emphasis added). **Acting Justice Toal joined by Justice Kittredge and Chief Justice Beatty because of his ruling on these two parishes**: "The defendants contend that St. Matthias and St. Johns *in effect* 'acceded' to the Dennis Canon" because of deed language that was "tantamount to accession. However,

He concludes by stating, "However, I agree with the majority as to the disposition of the remaining parishes because their express accession to the Dennis Canon was sufficient to create an irrevocable trust." *Id. T*here was no evidence in the record before this Court on which parishes did and did not expressly agree to the Dennis Canon, only the argument of counsel.

### G. Petition for Rehearing

Respondents petitioned this Court for a rehearing which was not granted by a 2-2 vote because no justice was appointed to replace Justice Hearn who recused herself from further participation.[29] Among the issues raised in this petition were the following: (1) that the issues of minimal burden and revocability discussed in the Collective Opinions were never raised to nor ruled on by the circuit court. Petition for Rehearing, p. 22 (Sept. 1, 2017); that there was no record before this Court on the issue of which parishes agreed to the Dennis Canon. *Id.* at 26-31; that there was no record before this Court of any signed writings by the parishes, *Id.* at 20The issue of beneficial use of Camp St. Christopher was never raised to nor ruled upon by the trial court. *Id.* at 35.

### H. Judge Dickson's Order

Judge Dickson found that in order to "take any action consistent with an appellate court's ruling," he had to determine what that ruling was resolving and any ambiguities that were present. Dickson Or. at 7-8. After reviewing law-of-the-case principles, he found that the law of this case is the application of neutral principles of state law to resolve disputes over property and corporate

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neither of these churches ever *directly acceded to the local or the national version of the Dennis Canon*…" 421 S.C. at 265, n.49, 806 S.E.2d at 111, n.49. (emphasis added).

[29] "The Court need not address the recusal motion on a prospective basis, for Justice Hearn has elected, to her great credit, to recuse herself prospectively and not participate in the resolution of the rehearing petition." Or. Denying Rehearing (Nov. 17, 2017) (Kittredge, J., Acting Justice Toal, joining).

control between religious entities as expressed in *All Saints* and as "directed by the majority." *Id.* at 8-13. He then reviewed neutral principles of law involving express and constructive trusts in South Carolina. *Id.* at 13-16.[30]

On the issue of parish accession to the Dennis Canon, he found that Chief Justice Beatty did not identify by name or number the parishes that did or did not expressly accede to the Dennis Canon. *Id.* 21-22. He then found that due process required "a proper opportunity for argument" "based on a proper record" that the parishes acceded to the Dennis Canon. *Id* at 21. Finding no evidence in the record on appeal that the parish respondents acceded to the Dennis Canon because the argument of counsel is not evidence and because Appellants argued that parish accession consisted of "written promises to obey National Church rules," Judge Dickson reviewed the trial record as to each parish to determine "whether Plaintiffs expressly acceded to the 1979 Dennis Canon in writing." *Id.* at 23-39.

> This Court finds that no parish expressly acceded to the Dennis Canon. The Dennis Canon is not mentioned by name in any of the evidence and Defendants admitted that the Dennis Canon is not referenced in any of the deeds of parish property. Tr. of Hearing, July 21, 2019 at 38. As a result, there is no trust created in favor of the Defendants.

[30] He noted 4 undisputed facts from the record and the appeal: (1) title is in the name of all the Respondents, (2) all respondents property was "purchased, constructed, maintained and possessed exclusively by them, (3) the Respondent Diocese and the parishes churches "successfully disassociated from TEC by following the procedures required for disassociation under South Carolina neutral principles of state law", and (4) Camp St. Christopher is titled in the Trustees who have never been a member of the Diocese or of TEC and TEC has no voice in, or right of approval, of Trustees governance. Dickson Or. at 17.

*Id.* at 25.[31] He also found that absence of other facts necessary to create a trust: no signed writing, no agreement to the canons , and no use of the word accession or agreement. *Id.* [32]

On the issue of corporate control, he found it was undisputed that the Diocese and parishes followed the proper steps under neutral principles of corporate law to withdraw from TEC and, consistent with *All Saints*, corporate control did not change just because they withdrew. Since ownership of real and personal property by Respondents was undisputed, corporate control decided the rights to Diocesan property and, absent a trust, to parish property.

On the issue of intellectual property, Judge Dickson acknowledged that the federal court had ruled on federal issues but in so doing did not state that the federal court correctly decided the state law issues because he found that Appellant did not appeal the permanent injunction under the second statute, Improper Use of Marks, Styles and Emblems. *Id*. at 42, n.30. Judge Dickson found that Appellants "argument against its applicability for the first time in its reply brief" did not preserve the issue: "A reply brief may not be used by Appellant to raise the issue the first time. *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989)." He also found that Appellants never disputed that the Diocese was the owner of its intellectual property. *Id*. n.31.

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[31] Judge Dickson relied on Court Exhibit 1, Plaintiffs submission to court concerning Dennis Canon and Exhibit 1 (TEC Response to Parishes 1st RFAs of 10/8/13) (Jan. 18, 2019), as well as Defendants' Response to Court's Request re Accession Proof in The Record. (Feb. 21, 2020).

[32] Examples of this failure of proof on the full record to prove accession to the Dennis Canon are these:

- St. Philip's Church: "Preaching and teaching the Gospel of our Lord and Savior, Jesus Christ, in accord with the Articles of Religion of [TEC]." Ex. SPH. 30, Dickson Or. at 27.
- St. Michael's Church: "Acknowledges the authority of the Diocese of South Carolina… and of [TEC]." Dickson Or. at 28.
- Christ St. Paul's Episcopal Church and the Church of the Resurrection, Surfside: "organized for the purpose of operating an Episcopal Church pursuant to the Constitution and Canons of [TEC]." *Id*. at 30, 33.
- Church of the Cross and Church of the Epiphany: "the support and maintenance of a church… according to the doctrine and practices of [TEC] and of the Diocese of South Carolina." *Id*. at 30, 31.

On the issue of Camp St. Christopher, Judge Dickson found that Chief Justice Beatty reaffirmed the authority of *All Saints*: "Under *All Saints*, a religious non-profit corporation who follows the correct step to sever its association with another entity does so with all its property interests intact. All Saints Parish Waccamaw withdrew from the Diocese and did not lose its rights to its property simply by disassociation." *Id*. at 40. Judge Dickson also found that changing the Diocese's status as the undisputed beneficiary before disassociation simply because of that disassociation would be inconsistent with *All Saints*. He further concluded that since the trial court did not consider the issue of Camp St. Christopher and this Court, 2-2, did not hear the issue presented in the petition for rehearing, due process required that the issue be heard. Lastly, he ruled that under neutral principles, withdrawal does not change the outcome on the issue of corporate control and hence, its status as beneficiary. *Id.* at 41.

**I. Federal Court Proceedings**

After the state court case had been filed and before answering, Appellants went to federal court in March 2013 and filed a separate lawsuit about both state and federal marks. *See vonRosenberg v. Lawrence*, No. 2:13-cv-587 (D.S.C.).[33] That case has its own long, twisted history, but only three points are relevant for this appeal.

First, after this Court's 2017 collective opinions, Appellants sought to amend their complaint to have the federal district court decide claims related to real and personal property after the Collective Opinions were issued. *See* Bishops vonRosenberg's and Adams Motion to Amend their Complaint to Join Parties and Claims, 2018 WL 7506131 (D.S.C. Mar. 1, 2018), ECF No.124; and TEC's Motion to Amend its Amended Complaint-In-Intervention to Join Parties and Claims (D.S.C. Mar. 1, 2018). ECF No. 125. The district court correctly refused to do so, noting that state

[33] They also removed this state court case to the federal court, but it was remanded.

court, "where these have been litigated for over five years," was "the better forum" to resolve issues regarding the Collective Opinions. Fed. Dist. Ct. Or. and Opinion, District Court at 10-11, 2018 WL 1790827 (Apr. 16, 2018). ECF 140.

Second, the district court again recognized that state law impacted the analysis of the state marks when deciding the cross-motions for summary judgment. The district court's analysis of state law, however, misinterpreted the Collective Opinions in multiple ways. For one, it misread the holding of this Court and wrongly concluded that TECSC is the entity that has always been associated with TEC. *See* Or. and Opinion, 412 F. Supp. 3d 612, 629-631, (D.S.C. Sept.19, 2019).[34] For another, it ignored the fact that *All Saints* is still good law and determines the ownership of private property and corporate control. *See id*. at 630. And for a third, it disregarded this Court's adoption of neutral principles of law and chose to apply the deference rule that this Court has expressly rejected. *See id.* at 630-31.

Third, in granting summary judgment for TEC and TECSC, the federal district court also entered an injunction prohibiting Respondent Diocese from using the state (as well as the federal marks). *See id.* at 667-68. To be able to enter this injunction without violating the Anti-Injunction Act, 28 U.S.C. § 2283, the federal district court said that the Collective Opinions reversed Judge Goodstein's injunction prohibiting TEC and TECSC from using the state marks. [35]

[34] Yet Appellants never made that claim at trial or to this court in their prior appeal. In fact they acknowledged the uncontested fact that it was the Diocese, not TECSC that has existed for centuries. "[T]he Diocese has been in existence since the late 1700s..." App 2015 Br. at 3. …[T]he Diocese…existed. as it had for centuries..." *Id.* at 4. "For over 200 years, membership in the Diocese required..." *Id.* at 6. Judge Goodstein found as a fact that TECSC "was first organized on or about January 26, 2013." Goodstein Or. at 10, 23 (Finding 23, 82). This factual finding was not appealed. The only "historical" Diocese on the undisputed facts and in the Collective opinions was Respondent Diocese.

[35] Contrary to Appellants' assertion, App. Br. at 2, n.2, the Diocese has not changed its corporate name. It has changed the name under which it does business to comply with an injunction issued

Fourth, the federal case is now on appeal in the U.S. Court of Appeals for the Fourth Circuit. Respondents here (who are the appellants in the Fourth Circuit) moved to hold the case in abeyance because "[w]hat the S.C. Supreme Court held in its 2017 opinions matters in [the federal] case because its decision on corporate governance affects the ownership of the state-marks issue and prior-use questions" and because it was a better use of judicial resources to let the S.C. Supreme Court finally resolve the state-law issues before the Fourth Circuit took up the appeal before it. *See* Mot. To Stay Case p. 4, *vonRosenberg v. Lawrence*, No. 19-2112 (4th Cir. Oct. 16, 2020). The Fourth Circuit granted that motion, and that appeal is currently held in abeyance pending a decision from this Court in this appeal. *See* Or., *vonRosenberg v. Lawrence*, No. 19-2112 (4th Cir. Oct. 27, 2020).

## IV. STANDARD OF REVIEW

Judge Dickson's factual findings in this action at law, as in *All Saints*, "will not be disturbed unless there is no evidence to support the court's finding." *All Saints*, 385 S.C. at 441, 685 S.E.2d at 170. As previously noted, Judge Goodstein's factual findings were not disturbed on appeal because there was either a 3-2 vote that the standard of review was that of *All Saints* or there was no agreement on the standard (2-2).

The application of the law of the case involves questions of law which are reviewed *de novo*.

by the federal district court which is being appealed. The federal court of appeals has stayed that appeal until this Court resolves the issues upon which the injunction is based.

## V. ARGUMENT

### A. The law of this case is that, under neutral principles of state law, an express trust can only be created if each parish church agreed in a signed, written document to the Dennis Canon and no parish did so.

Because the proceedings in the circuit court and in this second appeal are in the same case, all rely on the doctrine of the law of the case, as that doctrine is further explained by the courts. Appellants simply argue the law of this case is determined by the "result" which was, they claim, the "reversal" of the circuit court. The result they argue, not the reasoning, is the law of this case. App. Br. at 14-15.

There is no single majority opinion in the Collective opinions.[36] On various issues, three justices voted to ***affirm*** the trial court, Acting Justice Toal ("affirm the decision of the trial court"), Justice Kittredge ("affirm the trial court in result") and Chief Justice Beatty ("affirm in part and reverse in part the order of the circuit court"). On various issues, three justices voted to ***reverse*** the trial court, Justice Pleicones ("reverse the circuit court's order"), Justice Hearn ("concur with the lead opinion" and "reverse") and Chief Justice Beatty ("affirm in part and reverse in part the order of the circuit court"). Appellants agree it requires 3 votes to reverse the circuit court. The intersection of any 3 votes to reverse is the opinion of Chief Justice Beatty.

Appellants argue what this Court did was "express and unambiguous." App. Br. at 15. This "unambiguous" clarity which Appellants argue is present today is inconsistent with not only the opinions of two of the four justices who voted on the rehearing petition and Appellants' own arguments to the United States Supreme Court, but it is also inconsistent with Appellants'

[36] As Appellants described them to the United States Supreme Court, the Collective Opinions are "fractured not only in rationale but even on facts." *Br. of Resp. in Opp. to Pet. for Writ of Cert.*, 2018 WL 2129786 at 2. Appellants also asserted there are "different majorities deciding different issues, " *id*. at 8, and on some issues there is no majority at all, standard of review, *id.* at 23-24. Nor is there a majority on the service mark issue.

arguments to the circuit court after remittal. In all three of these separate venues, those who are either neutral in this dispute or who oppose Respondents' positions, made the same points: The Collective Opinions created unresolved issues which were not heard on rehearing, are "fractured," contain "significant ambiguities," "give rise to great uncertainty," and "give little to no coherent guidance".

After the issuance of the Collective Opinions, Respondents petitioned for rehearing. The issues raised and arguments made in the Petition for Rehearing, by a 2-2 vote, were not passed upon by the Court. In separate opinions issued on a recusal motion, Justice Kittredge, joined by Acting Justice Toal, noted that the absence of a fifth justice to allow full court consideration of these "matters of great importance" "raises constitutional implications as the Court has blocked a fair and meaningful merit review of the rehearing petition." Or. Denying Rehearing (Nov. 17, 2017). Acting Justice Toal concluded that the "Court's collective opinions in this matter give rise to great uncertainty in that we have given little to no coherent guidance in this case. Given our lack of agreement, I have no doubt that the court will see more litigation involving these issues…" *Id.*

Approximately six months later, Appellants argued to the United States Supreme Court that it should not grant Respondents' Petition for Certiorari because the Collective Opinions were "a poor vehicle for review." *Br. of Resp. in Opp. to Pet. for Writ of Cert.*, 2018 WL 2129786 at 23-26. Appellants state that this was because the Collective Opinions are based on an "incomplete record", which "contains significant ambiguities." *Id* at *2,*23. The Collective Opinions are "fractured not only in rationale but even on facts." *Id* at *2,*9. The absence "of a majority opinion on the standard of review" creates "ambiguities" making it "difficult to discern which of the trial court findings stand." *Id*. at 23-24. Finally, they pointed out that the matters (including the federal

constitutional issue) raised in the rehearing petition were not decided by this Court because of the 2-2 vote. *Id.* at *20.

Seven months after making those representations to the United States Supreme Court, during arguments made to the circuit court that led to the present appeal, counsel for Appellants argued the parties' situation, in view of the Collective Opinions and the opposing views about the meaning of those opinions, was a "predicament" which required the circuit court "to discern what they decided." That discernment would take "some careful reading to find the clarity." Tr. of Hearing, p. 41-42 (Nov. 19, 2018).

Most recently, the clarity of result Appellants argue is present was not "ministerially" unambiguous or this Court would have granted Appellants' Petition for Writ of Mandamus filed in 2019 seeking an order compelling the circuit court to execute on a judgment which they argued, as they do here, was "final" and "dispositive"; yet, this Court did not grant the petition. Or. Denying Writ of Mandamus (June 28, 2019). Nor did this Court grant a related petition (Writ of Prohibition) filed in 2020, this time to prohibit the circuit court from issuing a ruling that interpreted the Collective Opinions because he lacked the jurisdiction.

Today, Appellants argue, based on no facts of record, that a factual result majority (Pleicones, Hearn, and Beatty), using "fractured" legal rationales, reversed the circuit court on the accession of the parishes to the Dennis Canon and on the corporate control of the Diocese. But, Appellants' argument is directly controverted by the legal requirement articulated by Chief Justice Beatty, and by the facts of record.

On the accession issue, it is important to recognize that Judge Goodstein was reversed not because she misapplied neutral principles of law to the facts. Her statement of the correct legal principle is in agreement with *All Saints* being the legal standard of the majority of this Court as

expressed in the opinion of Chief Justice Beatty: a "legally cognizable form" of trust requires "a writing signed by each parish church as the owner of the property making a declaration of trust in TEC's favor." Goodstein Or. at 35. "To be valid, a trust of real property created by…declaration of trust must be proved by some writing signed by the party creating the trust." 421 S.C. at 250, 806 S.E.2d at 102-03 (Beatty, C.J.). The part of her order that was reversed was that she never considered whether each parish acceded specifically and directly in a signed written document to the Dennis Canon. That is the only unambiguous legal result when Chief Justice Beatty's entire opinion is considered. *City of North Myrtle Beach v. East Cherry Grove Realty Co., Inc.*, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012). ("Judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered not from an isolated part thereof, but from all parts of the judgment itself."). She could not have been reversed factually because the accession facts as to each parish were not before the Court.

Chief Justice Beatty repeatedly stated, being "guided by the neutral principles of law approach enunciated in *All Saints* and *Jones* and aptly discussed by former Chief Justice Toal", "*assuming* each parish acceded in writing" to the Dennis Canon, (which "had no effect until acceded to in writing"), a trust was created (emphasis added). "Those parishes that did not expressly accede to the Dennis Canon" "cannot be divested of their property." *Supra* n.26. The parties disagree on the application of that law of the case to the undisputed facts, which facts are today before the Court, but which were not in the appellate record upon which the Collective Opinions were based.

In their previous appeal, TEC argued to this Court that parishes agreed to the Constitution and Canons, "a larger set of information in which [after 1979] the Dennis Canon was included."[37] Dickson Or. at 23 & n.20. Yet, perforce, TEC must now equate accession to this large body of "rules" as the legal equivalent of accession to the Dennis Canon in order to achieve the factual "result" they assert the Collective Opinions reached. But that was neither the legal ruling nor the intent of Chief Justice Beatty gathered from his entire opinion.

Chief Justice Beatty relied on (and participated in) *All Saints*. There, All Saints Parish Waccamaw withdrew from the Diocese. That withdrawal, standing alone, had no legal effect on its property ownership. All Saints Parish Waccamaw's corporate articles provided that it agreed "to conduct religious services, and prosecute religious works under the forms and according to the canons and rules of the Protestant Episcopal Church." 385 S.C. at 439, 685 S.E.2d at 169, n.5. Those "canons and rules" contained the Dennis Canon, but accession to "canons and rules" was not the legal equivalent of accession to the Dennis Canon or *All Saints* would have been decided differently. Recognizing that (as well as preferring a deference standard), Acting Justice Pleicones and Justice Hearn would have overruled *All Saints*, Chief Justice Beatty did not.[38] All of the other justices agreed that the legal result of his ruling was that "each local church must specifically accede to the Dennis Canon before it can be bound" (Justice Pleicones joined in by Justice Hearn) or have "directly acceded to the local or national version of the Dennis Canon…." (Justice Toal joined in by Justice Kittredge).

[37] On the current record, Appellants argument is factually incorrect because many parishes did not "accede" to anything, did not sign anything or what they "acceded" to was not the Constitution or Canons of TEC. Dickson Or. at 25-26, *infra* at 31.

[38] In fact, he expressly disagreed with A.J. Pleicones and J. Hearn's "analysis." 421 S.C. at 248-49, 806 S.E.2d at 102.

Judge Dickson then applied this law of this case (i.e., accession requires a parish signed writing agreeing to the Dennis Canon) to the facts that were not in the record on appeal before this Court. Dickson Or. 20, 22-23. Appellants go to great lengths to convince this Court that it is powerless to consider anything other than one sentence in Chief Justice Beatty's opinion which they argue expresses the "result" on the accession issue. At best, that single sentence, construed as Appellants construe it, is factually ambiguous when considered with the legal reasoning that produced it.[39] Further, it should be noted that it was Appellants' burden to include matters in the record on appeal sufficient to permit this Court to conduct an intelligent review and grant them relief. *Wilson v. American Casualty Co.*, 252 S.C. 393, 166 S.E.2d 797 (1969). That, in itself, is testimony to the "incomplete record" containing "significant ambiguities" upon which Appellants told the United States Supreme Court this Court's decision was based. *Br. of Resp. in Opp. To Pet. for Cert.*, 2018 WL 2129786 at *2,*23. Simply put, the circuit court applied the law of the case established by the "legal standard" majority to the complete record. On that record no parish

[39] Appellants' assertion that the circuit court or this Court cannot consult the reasoning of its opinion to determine the scope of its mandate is erroneous. *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895) ("The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended…"). This is particularly so when, as Appellant claims, there was simply a reversal and the appellate court is silent on how the lower court is to proceed on remittal. "Interpretation … entails more than examining the language of the court's judgment in a vacuum." *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998) In that circumstance ("the Court reverses the judgment of the District Court"), determining "the scope of the mandate requires a careful reading of the appellate Court's opinion which serves as a statement of the reasons on which the judgment rests." *Shakespeare Co. v. Silstar Corp. of America*, 905 F. Supp. 997, 1002 (D.S.C. 1995) (Shedd, J.) ("The opinion must be read as a whole including any concurring and dissenting opinions and in light of the facts of the case under discussion. Different sections of an opinion should be read as consistent with each other and parts thereof should not be read out of context. Any observations, commentary or mere dicta touching upon issues not formally before the Court do not constitute binding interpretations." (citations omitted).

created an express trust under neutral principles of South Carolina trust law because they did not agree in a signed, written document to the Dennis Canon.[40]

As to the corporate control of the Diocese, this Court did not reverse Judge Goodstein. The single sentence in footnote 29, at best, related only to Camp St. Christopher when read together with Chief Justice Beatty's entire opinion, the undisputed facts before the Court and the opinions of other members of the Court. "The Protestant Episcopal Church in the Diocese of South Carolina" disassociated from TEC as it was constitutionally entitled to do. Goodstein Or. at 32. This Court affirmed the withdrawal because that entity is definitionally the "Disassociated Diocese". *Supra* at 13 & n.19. It disassociated, like the *All Saints* parish, with its property interests (real, personal and intellectual) intact. Appellants argued they had the right to control the Diocese under a deference standard, not that the Diocese did not own its property or that the Diocese lost its corporate identity upon withdrawal.[41] The ownership of those property interests was undisputed at trial, ruled on by Judge Goodstein and was not appealed. The only issue is the scope of footnote 29. For Appellants' construction to make any sense, Chief Justice Beatty would have given a reason why, under neutral principles of state corporate law, the Respondent Diocese's

[40] Nor did Chief Justice Beatty apply a "minimal burden" standard to the accession facts because (1) they were not before the Court, (2) the application of that standard was never presented to nor ruled on by the circuit court, (3) he never mentions nor implies a lesser standard for creating a trust than what would be required of any secular entity, and (4) he applied neutral principles "strictly" as had *All Saint*s upon which he relied.

*All Saints* is often cited as a leading example of the strict application of neutral principles of state law: "church property disputes are resolved just like other property disputes with other voluntary associations." Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Disputes*, 58 Ariz. L. Rev. 307, 325-27 (2016) ("A good example of the strict approach is *All Saints*…." *Id.* at 325 (citation omitted)).

[41] To the contrary, in their 2015 brief to this Court they argued that the Disassociated Diocese after its disassociation was the same one that had existed for centuries before its disassociation. "the Diocese has been in existence since the late 1700s…." App. 2015 Br. at 3. … "[T]he Diocese…existed as it had for centuries…." *Id.* at 4. "For over 200 years, membership in the Diocese required…." *Id.* at 6.

constitutionally permitted disassociation results in a loss of corporate identity, but he did not because there is none. Read in its entirety, footnote 29 relates only to Camp St. Christopher and an interpretation of its deed. It is undisputed that the Trustees own this property. The opinions of the remainder of the Court agree that this sentence relates only to Camp St. Christopher and not to any other property owned by the Trustees. *Supra* at 13 & n.20.

### B. Appellants' argue a factual result that would be clearly erroneous and manifestly unjust.

Appellants seek to perpetuate a result based on facts that were not included in the previous record on appeal and which depend on issues they either lost on appeal or issues that were not tried or were not appealed. They previously have argued that the previous appellate record was "incomplete" which produced a "fractured" result, legally and factually. Today, the facts determined by Judge Dickson from the ***complete record*** have not been appealed, nor complained about by Appellants. Hence, applying the factual result they argue this Court reached in 2017 would be clearly erroneous and manifestly unjust.

Appellants have known all along that the factual truth is that many parishes did not agree to TEC's constitution and canons, many did not sign any "accession" document, and some did not "accede" to anything, much less the Dennis Canon with a signed writing. Dickson Or. at 25 & n. 25, 26, 27. Yet, they remain silent. Appellants do not want this Court to look at the actual facts or at the evidence  The majority of Appellants' arguments are directed at keeping this Court from considering the complete record and the reasoning underlying the Collective Opinions. The implication of these arguments is that if the truth is otherwise, it is nevertheless held hostage to the

doctrine of the law of the case. That, however, is ***not*** the doctrine of the law of the case. The law of the case doctrine is not a tool to perpetuate error or promote injustice.[42]

Plainly stated, "when a court decides upon a *rule of law*, that decision should continue to govern the same issues in subsequent stages of the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983) (emphasis added).[43] The law of the case is a "rule of practice [which] promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988). However, "unlike the more precise requirements of res judicata, law of the case is an amorphous concept." *Arizona*, 460 U.S. at 618. It "merely expresses the practice of courts generally" but it is "not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.).[44]

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[42] The law of the case "must not be utilized to accomplish an obvious injustice…." *Cochran v. M & M Transp. Co.*, 110 F.2d 519, 512 (1st Cir. 1940) (citing *Messenger v. Anderson*, 225 U.S. 436 (1912)). "[T]he law of the case does demand obsequiousness right or wrong." *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News*, 632 F.2d 680, 683 (7th Cir. 1980). The law of the case doctrine "…is not a rule to perpetuate error and does not require a court to enter an erroneous judgment because the logic of an earlier erroneous ruling would require it." 1B *Moore's Federal Practice* ¶ 0.404 [1] at 126 (2d. ed. 1984) *quoted in Taveira v. Solomon*, 528 A. 2d 1105, 1108 (R.I. 1987)

[43] The mandate rule "is simply a specific application of the law of the case doctrine and, as such, is a discretionary-guiding rule subject to an occasional exception in the interests of justice," *United States v. Bell*, 988 F.2d 247,251 (1st Cir. 1993).

[44] *Higgins v. California Prune & Apricot Grower*, 3 F.2d 896, 898 (2d Cir. 1924). ("it is now well settled that the 'law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its good sense."); *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116 (3d Cir.1997) ("the law of the case doctrine does not restrict a court's power but rather governs its exercise of discretion."); *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (**6th Cir.** 1997), (the "law of the case" doctrine is "directed to a court's common sense" and is not an "inexorable command."); *Millers' Mut. Fire Ins. Ass'n of Illinois v. Bell*, 99 F.2d 289, 292 (**8th Cir.** 1938). (The law of the case "does not have the effect of placing the issues, the evidence, or even the applicable rules of law, in a strait-jacket."); *United States v. Alexander*, 106 F.3d 874, 876 (**9th Cir.** 1997).("The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion."); *Searle v. Allstate Life Ins. Co.*, 696 P.2d 1308, 1314 (Cal. 1985); ("Where there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before.").

Simply stated, it is a "discretionary appellate doctrine." *State v. Hewins*, 409 S.C. 93, 113 n.5, 760 S.E.2d 814, 824 n. 5 (2014) (Beatty, J.); *accord*, *Arizona*, 460 U.S. at 618 (The law of the case "directs a court's discretion, it does not limit the tribunal's power."); *Atkins v. Wilson*, 417 S.C. 3, 17 n. 12, 788 S.E.2d 228, 235 n.12 (Ct. App. 2016) ("Law of the case…operates as a discretionary rule of practice and not one of law"; "So long as the same case remains alive, there is power to alter or revoke earlier rulings." (citations omitted)); *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571-75 n.6, 776 S.E.2d 397, 403-05 n.6 (Ct. App. 2015). The law of the case applies to a "rule of law" actually decided. It does not apply to dicta and appellate statements about an unpreserved issue or dicta. *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). In addition, as relied upon by Judge Dickson, quoting *Flexon*, there are three circumstances when a prior legal ruling in the same case must be reconsidered: when (1) the evidence is substantially different, (2) controlling authority has changed, or (3) the decision was clearly erroneous and would work a manifest injustice. *Flexon*, 413 S.C. at 573, 776 S.E.2d at 404.

These three exceptions to the discretionary application of a rule of law previously determined in the same case are recognized by the United States Supreme Court, every federal circuit, and every state that has directly considered the issue.[45] Appellants apparently believe that

[45] *Arizona v. California*, 460 U.S. 605, 618, n. 8 (1983); *Agostini v. Felton*, 521 U.S. 203, 236 (1997); *Naser Jewelers, Inc. v. City of Concord, N.H.*, 538 F.3d 17, 20 (1st Cir. 2008); *Higgins v. Cal. Prune & Apricot Grower*, 3 F.2d 896, 898 (2d Cir. 1924); *In re City of Philadelphia Litig.*, 158 F.3d 711, 718 (3d Cir. 1998); *United States v. Lentz*, 524 F.3d 501, 528 (4th Cir. 2008); *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967); *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997); *Payne for Hicks v. Churchich*, 161 F.3d 1030, 1037 n.8 (7th Cir. 1998); *Millers' Mut. Fire Ins. Ass'n of Ill. v. Bell*, 99 F.2d 289, 292 (8th Cir. 1938); *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997); *Fish v. Schwab*, 957 F.3d 1105, 1139-40 (10th Cir. 2020); *Klay v. All Defendants*, 389 F.3d 1191, 1197-98 (11th Cir. 2004); *Toro Co. v. White Consol. Indus., Inc.*, 383 F.3d 1326, 1336 (Fed. Cir. 2004); *S.E.C. v. Bilzerian*, No. 11-5337, 2012 WL 1922465, at *1 (D.C. Cir. May 11, 2012); *Moody v. Lodge*, 433 P.3d 1173, 1178 (Alaska 2018); *Pierson v. City of Topeka*, 424 P.3d 549, 556 (Kan. Ct. App. 2018); *Gay v. Hartford Underwriters Ins. Co.*, 904 P.2d 83, 88 (Okla. 1995); *Folsom v. Cty. of Spokane*, 759 P.2d 1196, 1200-01 (Wash.

this Court does not, or would not, agree with the virtually universal application of these exceptions since they argue, ironically, that this "*nil ultra*" Court lacks the power to review its decision. Appellants rely exclusively on the 1969 decision of *Huggins v. Winn-Dixie Greenville, Inc,* 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969): "**This Court is precluded from reviewing its own law of the case**." App. Br. at 20. Of course the law of the case, is "not a limit to [a court's] power," *Messenger* 225 U.S. at 444, but it is a "discretionary appellate doctrine," *Hewins,* 409 S.C. at 113 n.5, 760 S.E.2d at 824 n. 5. Not only do Appellants miscite *Huggins,* but they also do not inform the Court of its other decisions which are consistent with the federal and state court decisions noted above.

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1988); *Searle v. Allstate Life Ins. Co.*, 696 P.2d 1308, 1314 (Cal. 1985); *Logsdon v. Duncan*, 316 S.W.2d 488, 491 (Mo. 1958); *Commonwealth v. Koehler*, 229 A.3d 915, 938-39 (Pa. 2020); *BTU W. Res., Inc. v. Berenergy Corp.*, 442 P.3d 50, 57-58 (Wyo. 2019); *Doyle v. Doyle*, 549 S.W.3d 450, 455 (Ky. 2018); *Kitras v. Town of Aquinnah*, 49 N.E.3d 198, 210 (Mass. 2016); *Total Recycling Servs. of Ct., Inc. v. Connecticut Oil Recycling Servs., LLC*, 63 A.3d 896, 902 (Conn. 2013); *McLaughlin v. Schenk*, 299 P.3d 1139, 1144-45 (Utah 2013); *Gray's Disposal Co. v. Metro. Gov't of Nashville*, 318 S.W.3d 342, 348 (Tenn. 2010); *State v. Langley*, 958 So.2d 1160, 1163-64 (La. 2007); *State v. Owen*, 696 So.2d 715, 720 (Fla. 1997); *People of City of Aurora, by & on Behalf of State v. Allen*, 885 P.2d 207, 212 (Colo. 1994); *Stokes v. Am. Airlines, Inc.*, 790 A.2d 699, 702-03 (Md. Ct. Spec. App. 2002); *Lynn v. Lynn*, 617 A.2d 963, 970 (D.C. 1992); *Morse v. Morse*, 213 A.2d 581, 583 (D.C. 1965); *Lurie v. Wolin*, 86 N.E.3d 1185, 1192 (Ill. Ct. App. 2017); *Flexon v. PHC-Jasper, Inc.*, 413 S.C. at 573-75, 776 S.E.2d at 404-05; *Collins v. Indart-Etienne*, 72 N.Y.S.3d 332, 349 (N.Y. Sup. Ct. 2018); *Cordova v. Larsen*, 94 P.3d 830, 834 (N.M. Ct. App. 2004); *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 55 (Del. Super. Ct. 1995); *Turner v. Nw. Arkansas Neurosurgery Clinic, P.A.*, 210 S.W.3d 126, 133 (Ark. Ct. App. 2005); *Bergkamp v. Martin*, 759 P.2d 941, 942-43 (Idaho Ct. App. 1988); *State v. Larrivee*, 481 A.2d 782, 783 (Me. 1984); *Lee v. Thompson*, 167 So.3d 170, 177 (Miss. 2014); *Carlson v. N. Pac. Ry. Co.*, 281 P. 913, 914 (Mont. 1929); *Harris v. Cent. Power Co.*, 197 N.W. 383, 383-84 (Neb. 1924); *Polidori v. Kordys, Puzio & Di Tomasso, AIA*, 549 A.2d 1254, 1257-58 (N.J. App. Div. 1988); *Watson v. Ford Motor Co.*, 2007 WL 4216975, ¶¶ 42-43 (Ohio 6th Dist. Ct. App. 2007); *Taveira v. Solomon*, 528 A.2d 1105, 1108 (R.I. 1987); *Kneebinding, Inc. v. Howell*, 201 A.3d 326, 341 (Vt. 2018); *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 591 S.E.2d 728, 738 (W. Va. 2003); *Radwill v. Manor Care of Westmont, IL, LLC*, 986 N.E.2d 765, 769 (Ill. Ct. App. 2013); *Hsu v. Cty. of Clark*, 173 P.3d 724, 729-30 (Nev. 2007); *McCrea v. Cubilla Condo. Corp., N.V.*, 769 S.W.2d 261, 263 (Tex. App. 1988).

Appellants' application of *Huggins* is inconsistent with other decisions of this Court since 1969. In the 1987 decision of *Barth v. Barth*, 293 S.C. 305, 308, 360 S.E.2d 309, 310 (1987), this Court stated an appellate court could reexamine its previous opinion in the same case if it was "convinced that the first decision was wrong." More recently, this Court in a 2000 per curiam decision inferred that *Barth* corrected *Huggins. Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 174 n.3, 525 S.E.2d 869, 872 n.3 (2000) ("*Charleston Lumber III*").[46] Finally, this Court has for many years recognized that the law of the case does not apply where the facts are substantially different in the second appeal. *See e.g., Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957); *Cohen v. Standard Acc. Ins. Co.* 17 S.C. 230, 234, 203 S.E.2d 263 (1941) ("if the facts are different… a prior decision is not conclusive upon questions presented on the subsequent appeal.")

Furthermore, it is apparent that *Huggins* applied a *res judicata* principle to a law of the case issue.[47] The "internal quote," omitted from Appellants' *Huggins'* quotation, is "See cases collected in West's South Carolina Digest, Appeal and Error, [key] 1097 and [key] 1099". *Huggins*, 252 S.C. at 357, 166 S.E.2d at 299. The cases collected there involve both the doctrines of law of the case ***and*** res judicata. As this Court stated in *Charleston Lumber III*, in reversing the Court of Appeals decision in *Charleston Lumber II*,[48] res judicata does not apply when the subsequent proceeding is in the same case; it only applies to proceedings between the same parties in a

[46] "Arguably, *Charleston Lumber II* could have considered whether *Charleston Lumber I* was correct in reversing the grant of summary judgment, but it did not do so." *Charleston Lumber III*, 338 S.C. at 174 n.3, 525 S.E. 2d at 872 n.3. This Court then compared the quotes from *Barth* with those from *Huggins*.

[47] The section Appellants quote infers as much: "The questions therein decided are res judicata..." *Id.*

[48] *Charleston Lumber Co. v. Miller Housing Corp.*, 329 S.C. 414, 496 S.E.2d 637 (Ct. App. 1998) ("*Charleston Lumber II*").

different case. *Charleston Lumber Co. III*, 338 S.C. at 175 n.4, 525 S.E.2d at 872 n.4.[49] The doctrine of res judicata does not allow the same court *in a different action* to correct its previous decision (it may however overrule it). The law of the case doctrine does not have that prohibition. *Arizona*, 460 U.S. at 617-18. As Justice Holmes recognized in 1912, the law of the case is not a hindrance to making a wrong decision "right." *Messenger*, 225 U.S. at 443-44.

***i. The "result" Appellants argue the Collective Opinions reached depends on issues that were either decided against them by this Court or were not preserved in their first appeal.***

The circuit court (Dickson, J.) necessarily considered preservation of error rules because they are component parts of the law-of-the-case doctrine. Dickson Or. 6-7. If the party asserting the law of the case doctrine did not preserve the issue by (1) raising it in the circuit court or the circuit court did not rule on it, or (2) make it an issue in their statement of issues or did not raise the issue in their initial brief, then the law of the case doctrine works against it (not for it) in a subsequent appeal. Issues not "raised to and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142-43, 587 S.E.2d 691, 693 (2003). "No point will be considered which is not set forth in the statement of issues on appeal." *Id.* at 142, 587 S.E. 2d at 694 (citations omitted); *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case"); *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance"). Issues not

[49] The Court of Appeals in *Charleston Lumber II*, (which was the same case before the appellate court a second time) relying on *Huggins*, mixed the two doctrines. 329 S.C. 414, 419-20, 496 S.E.2d 637, 639-640. This Court corrected that misunderstanding in its n.4 explanation and in its reversal of *Charleston Lumber II*. *Charleston Lumber III*, 338 S.C. at 175, 525 S.E.2d at 872.

considered by the trial court cannot be considered by an appellate court as the basis of its decision. *Dunbar*, 356 S.C. at 142, 587 S.E. 2d at 694 ("An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved.") [50]

### *1. This Court did not reverse Judge Goodstein's entire order*

For at least three reasons, the Collective Opinions did not reverse Judge Goodstein's order in its entirety, as Appellants here maintain. First, Chief Justice Beatty, the acknowledged "centrist," 421 S.C. at 248, 806 S.E.2d at 102 (Beatty, C.J.), expressly "disagree[d] with the analysis and much of the result reached by" Justices Pleicones and Hearn, *id.* at 248-49, 806 S.E.2d at 102. If the swing vote on the Court disagreed with "much of the result" of two other Justices, there is no way there were three votes for what those two other Justices said the outcome should be. In other words, only Justices Pleicones and Hearn would have reversed Judge Goodstein's entire order which is clear from the actual words they used. *Supra* at 23-31. The other three justices did not vote to reverse the entire order, so the entire order was not reversed. *See* S.C. Const. art. V, § 2 ("the concurrence of three of the Justices shall be necessary for a reversal of the judgment below"); S.C. Code Ann. § 14-3-360 (same).

Second, Judge Goodstein entered a permanent injunction regarding the use of the state marks under S.C. Code Ann. § 39-15-1105 *et seq.* ("Service Marks"), *and* S.C. Code Ann. § 16-

[50] Consistent with their primary thrust of keeping issues from being completely considered, Appellants argue that because the Court considered these issues in 2017 they were preserved. That is circular. An unpreserved issue does not become preserved because an appellate court considers it. If that was the law, *Dunbar*, *supra*, would have been wrongly decided. Appellants' argument also ignores the fact that the consideration of unpreserved issues was an issue in the rehearing petition, the merits of which were not heard, 2-2. The merits are now before the Court.

17-310 and 320 ("Improper Use of names").[51] One ground was appealed, the other was not. On the appealed ground, the Court split 2-2. Justices Pleicones and Hearn voted to reverse the service mark infringement and the injunction, while Justices Toal and Kittredge voted to affirm the service mark infringement and the injunction. Justice Beatty, meanwhile, "express[ed] no opinion concerning the rights to the service marks as I believe this determination should remain with the federal court." *Protestant Episcopal Church*, 421 S.C. at 248 n.28, 806 S.E.2d at 102 n.28 (Beatty, C.J.). Because Chief Justice Beatty did not vote to affirm or reverse, the Court was evenly divided.

An evenly divided Court means "the judgment of the court below is affirmed." *Elliott v. Flynn Bros.*, 184 S.C. 391, 192 S.E. 400, 402 (1937). With only two votes to reverse, the judgment below could not have been reversed. *See* S.C. Const. art. V, § 2; S.C. Code Ann. § 14-3-360; *State v. Campbell*, 242 S.C. 64, 70-71, 129 S.E.2d 902, 905 (1963) (finding when "two of the Justices were of the opinion that the lower Court erred in the admission of the aforesaid decree, such did not have the effect of reversing the ruling of the Trial Judge"); *Hutchinson v. Turner*, 88 S.C. 318, 70 S.E. 806 (1911).

Third, as previously noted, on the standard of review, based on in either a 3-2 ruling (includes the logical intent of Chief Justice Beatty's opinion) or a 2-2 ruling (excluding Chief Justice Beatty), the trial court findings of fact were affirmed. *See supra* at 11.

[51] The presence of any Lanham Act claims in the federal court by Appellants does not divest this Court of jurisdiction to decide the ownership of the state marks. In fact, this Court has the duty to resolve the state ownership issues which it did by affirming the circuit court's injunction. Moreover, the state court injunction was entered first, so (as Respondents have argued in the pending Fourth Circuit appeal), the Anti-Injunction Act, 28 U.S.C. § 2283, bars a conflicting federal injunction.

### *2. This Court could not have reversed Judge Goodstein's entire order given what issues Appellants actually (1) raised at trial and ruled upon by the court and (2) were appealed and argued in the first appeal.*

Generally, there are at least four steps to preserving and presenting error for appellate review. The first two happen at the trial court, and the second two involve the appellate court. First, the party must raise the issue to the trial court. *Talley v. S.C. Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) Second, the circuit judge must rule on the issue raised. *Gentry v. Milliken & Co.*, 307 S.C. 235, 238, 414 S.E.2d 180, 182 (Ct. App. 1992). Third, the notice of appeal must be timely served. Rule 203(b)(1), (d)(1)(B), SCACR. Finally, all issues raised in the appeal must in the statement of issues and be argued in the appellate initial brief. Rule 208(b)(1)(E), SCACR; *State v. Stone*, 290 S.C. 380, 383, 350 S.E.2d 517, 518 (1986); *Continental Ins. Co. v. Shives*, 328 S.C. 470, 492 S.E.2d 808 (Ct. App. 1997).

Appellants did not preserve issues they now contend were decided in their favor: minimal burden, irrevocability, cancellation of the state marks based on confusion with TEC's marks, the intended beneficiary of the Camp St. Christopher deed, the ownership of Respondent Diocese's property (real, personal and intellectual) and the second ground of the permanent injunction.

#### *a. Appellants did not raise these issues at trial and they were not ruled on by the trial court*

As previously noted, the issue of minimal burden and the irrevocability of a trust if created were not raised to nor ruled upon by the circuit court. *Supra* at 18. As to the state marks, Appellants never pled a defense of confusion as a basis to cancel Respondent Diocese's marks, nor did the trial court rule on that issue.

Appellant TEC asserted no defenses other than failure to state a claim and lack of authority, and it asserted no claims or defenses related to the federal marks against Respondents. *See* Answer

and Counterclaims of TEC to Second Amended Complaint at 38-39. Instead, TEC asserted counterclaims against unnamed individual defendants they later sought to join but whose joinder was denied. *See Id*. at pp. 38–96. TEC never appealed the order denying that motion. *See* Or. Denying Def. Mot. to Join Additional Counterclaim Defs. (Sept. 27, 2013).

Appellant TECSC, asserted four defenses (non-ownership of trademarks, fair use, authorization, and invalidity) against Respondents two causes of action against them for infringement and improper use of Respondents marks and names. *See* Answer and Counterclaims of TECSC to Second Amended Complaint for Declaratory and Injunctive Relief, p. 54 (Mar. 28, 2013). TECSC argued Respondent Diocese's name was derived from the marks of TEC. *See* Trial Tr. p. 344:14-20; 1521:22-1522:23; 1545:15-1546:13. [52]

This issue of cancellation was not pled nor tried. In fact, there is no reference to cancelling Respondent Diocese's marks anywhere in the trial transcript. The one time "cancel" appears in the 2,523-page trial transcript was in reference to the potential scope of Appellants' expert Leslie Lott testimony. *See* Trial Tr. p. 1524.

TECSC tried to raise a confusion defense, *see* Trial Tr. 1546:19-25, 1555:24-1556:5, 1559:10-14, 1559:15-1567:25, 2158:15-2162:19, 2308:5-2309:2, but it had not been pled and the issue was not tried either by express or implied consent. *See Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 624–25, 819 S.E.2d 154, 158–59 (Ct. App. 2018). The only attempt to raise the issue

[52] The trial court found Respondent Diocese's marks existed prior to TEC and "TEC derived its name from those of the preexisting 'Protestant Episcopal Churches' which formed it including that of the Diocese and its preexisting 'Protestant Episcopal' parishes." Goodstein Or., p. 43. For example, the circuit court heard evidence of prior use of "Protestant Episcopal Church" by the Moravian Church as early as 1749. *See* Trial Tr. p. 2343-47. Appellants did not contest this finding in the previous appeal.

by TEC was not consented to by Respondents because it had never been pled. Trial Tr. p. 338-344. The testimony objected to was allowed on TEC's defense of invalidity. Trial Tr. 344.

Likewise, the terms of the deed to Camp St. Christopher were never discussed at trial. The issue of the terms of the individual trusts was not raised. Trial Tr. 54, 60-61, 93-95, 276-82. Nor did they raise, on appeal, any issues regarding the terms of trusts managed by the Respondent Trustees. App. 2015 Br. 44-47 and App. 2015 Reply Br. 3-4. The ownership of the Respondent Diocese's property was uncontested at trial, see *supra* p. 8,13, only the corporate control of the Diocese was at issue. *See Supra*, p. 4.

Finally, Judge Dickson recognized the clerical error found in the Collective Opinions regarding The Vestries and Churchwardens of The Parish of St. Andrew ("Old St. Andrews"). He found that Old St. Andrews was not included on the Appellants' list of parishes (only included 28 on the list included in the record on appeal) that was referenced in their 2015 initial brief. Since they were not included on that list, he found that Appellants "admitted in the Record on Appeal that it did not accede to the Dennis Canon" and "[t]here is no trust." Dickson Or. at 24 & n.23.

***b. These issues were not raised in the 2015 Statement of the Issues or in Appellants' opening brief***

Appellants did not raise certain issues in their opening brief or in the statement of the issues. First, Appellants asked "[w]hether the trial court erred in holding that the question of (1) whether this dispute is ecclesiastical at its core, and (2) whether The Episcopal Church is a hierarchical church were irrelevant under South Carolina law, and, as a result, in excluding relevant evidence and failing to enforce that Church's internal governance." App. 2015 Br. at 1. This is the argument of the correct legal standard to determine corporate control. This first statement of issue is supported by their motion to argue against the precedence of *All Saints* and instead have this Court apply a deference rule. *See* Mot. to Argue Against Precedent. Their initial brief dedicated 25 pages

of their argument to this issue. *See* App. 2015 Br. at 14–39. This Court rejected the argument, holding that *All Saints* is still good law. 421 S.C. at 249, 806 S.E.2d at 102 (Beatty, C.J.) (noting that he was "guided by the neutral principles of law enunciated in *All Saints*").

Second, Appellants asked "[w]hether the trial court erred in its application of civil law by: (1) concluding that state trademarks trump earlier-registered federal trademarks with which they conflict and cause confusion; (2) incorrectly interpreting the language of a statutory trust that describes the beneficiary as being affiliated with The Episcopal Church; and (3) concluding that South Carolina law permits a corporation to amend its corporate articles in direct contravention of those articles." App. 2015 Br. at 1. None of these issues was preserved or properly raised in Appellants' opening brief in the first appeal.

As just discussed, the cancellation argument was neither pled nor tried. Thus, the fact that Appellants raised this issue in their opening brief in the first appeal does not preserve the untried issue.[53] *See* App. 2015 Br. at 40-44. So too with the terms of the deed involving Camp St. Christopher. The terms of the Camp's trust were not raised at trial and it was not raised in Appellants' initial brief. *Id*. at 44-47.

[53] As an aside, Appellants' discussion of this issue misstated the evidence at trial. The circuit court held that any confusion came from *Appellants'* misuse of Respondents' marks prior to the entry of the TRO not from the Respondents' use of the Appellant TEC's federal marks. Goodstein Or. at 43–44. Notably, even after entry of the permanent injunction, Appellants continued to use the name of Respondent Diocese on its checking account, purported to make modifications to Respondent Diocese's Constitution and Canons, and forwarded web searches for Respondent Diocese to TECSC's website.

Along the same lines, Appellants' attempt to show instances of confusion with the parishes from the circuit court actually involved parishes actively promoting their affiliation with the Respondent Diocese rather than Appellants. *See* App. 2015 Br. 42. These three instances were not confusion at all, but clarification of their affiliation.

Finally, Appellants pointed to testimony from an employee of Respondent Diocese to show confusion between the two diocesan entities. *See* App. 2015 Br. 43. Again, the confusion here was created by TECSC's use of Respondent Diocese's name and marks after the TRO was entered.

Finally, neither the statement of issues nor the initial brief addressed the second—and independent—ground for the permanent injunction based on S.C. Code Ann. § 16-17-310. *See* App. 2015 Br. 55-56. Failing to appeal an additional ground for a trial court's ruling means the trial court's ruling will be affirmed. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (discussing the "two issue rule"). When Appellants did finally address section 16-17-310, it was in their reply brief. *See* App. 2015 Reply Br. at 6. But of course, a party may not raise an issue for the first time in a reply brief. *See Simmons v. SC STRONG*, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 635 n.2 (Ct. App. 2013).

***3. The law of the case doctrine cannot be used to on issues the Appellants failed to preserve for appeal***

Appellants failed to preserve issues on minimal burden, irrevocability, cancellation of the state marks based on confusion with TEC's marks, the intended beneficiary of the Camp St. Christopher deed, the ownership of Respondent Diocese's property (real, personal and intellectual), and the second ground of the permanent injunction. Appellants cannot now argue these issues were decided in their favor by the Collective Opinions when they failed to preserve these issues during trial and in the first appeal.

***ii. The "result" Appellants contend was reached by the Collective Opinions as to the existence of an express trust, the Diocese's withdrawal & ownership of its real, personal and intellectual property and the beneficiary of Camp St. Christopher is clearly erroneous and manifestly unjust.***

As previously noted, this Court and the Court of Appeals as well as many other courts in this nation, have long recognized that the discretionary application of the doctrine of the law of the case should not be used if : (1)the facts are substantially different in the second appeal or (2) if the decision was clearly erroneous and manifestly unjust. *See supra*, n. 47. Both are present here.

The record before the Court now is different on the Respondent parish accession issue because there was no evidence before this Court in the prior appeal, only the argument of counsel. The application of appellant's "result" arguments under the present record is clearly erroneous and manifestly unjust.

The undisputed facts in the record now before the Court with respect to Respondent Parishes are as follows:

- Respondent parishes have always been the sole titled owners, possessors, constructors and maintainers of their real and personal property, many for centuries and a few for more than 300 years.
- Respondent parishes have never been members of TEC.
- Respondent parishes did not vote on the addition of the Dennis Canon in 1979 to TEC's canons.
- In 2010, two years before the Diocese withdrew from TEC, Respondent parishes voted by over 90% to remove the Diocesan version of the Dennis Canon which had been added to those canons in 1987.
- Any agreement or accession to any TEC "rule," constitution or canon was removed by Respondent parishes following the procedures required under their governance documents and state corporate law before the Diocese withdrew from TEC in 2012.
- No Respondent parish at any time acceded to the Dennis Canon.[54]
- Prior to the amendment of their documents, some Respondent parishes acceded to TEC's Constitution and Canons.
- Prior to the amendment of their documents, some Respondent parishes acceded to documents that were not TEC's Constitution and Canons and that did not contain or mention the Dennis Canon.
- The written documents of some Respondent parishes, claimed to be accessions to TEC "rules", are unsigned.

[54] Appellants did not contest the assertion made by Respondents to this Court that "it is uncontested that no parish expressly agreed to the Dennis Canon." Intervenors' Return To Pet. For Writ of Mandamus at 12 (Apr. 11, 2019).

As found by Judge Dickson, no trusts were created following neutral principles of South Carolina trust law. No parish expressly agreed to the Dennis Canon in a signed writing. Agreement to the Constitution and Canons of TEC did not create a trust in *All Saints* and it still does not. Unsigned written documents, agreements to things that do not mention the Dennis Canon and the failure to "accede" to anything does not create a trust. The "result" Appellants claim they are entitled to enforce requires this Court to condone clear error and manifest injustice.

The undisputed facts in the record now before the Court with respect to Respondents Diocese Trustees are as follows:

- Respondent Diocese was created by some of Respondents parishes in 1785 and it, in turn, together with six other state churches created TEC in 1789.

- Respondent Diocese removed any accession to TEC Constitution and Canons and the Dennis Canon from its canons in 2010 by respective votes of 86% and 91% of parishes

- Respondent Diocese withdrew from TEC in 2012 and continued to operate as it had for centuries as the "Protestant Episcopal Church in the Diocese of South Carolina" securing a consent temporary injunction in 2013 from TEC not to use that name.

- Respondent Diocese was the owner of all its real, personal and intellectual property both before and after its withdrawal and this was undisputed at trial and on appeal.

- Respondent Diocese is the undisputed state registrant of its names and marks.

- The Trustees own no real, personal or intellectual property of the Diocese. They own some property which is held for the use of the Diocese. Camp St. Christopher is one of those properties.

- There was no claim pled or tried by Appellants that the Respondent Diocese or any Respondent Parish infringed any of TEC's federal marks.

- A permanent injunction was entered against the use by Appellants of any of the Diocese names and marks on two grounds: Infringement of Service Marks and Improper Use of Names. Appellants appealed the service mark ground but not the improper use ground. This Court affirmed the infringement and the injunction as to the service marks by an equally divided court, 2-2.

- This Court affirmed the withdrawal of Respondent Diocese as "The Protestant Episcopal Church in the Diocese of South Carolina" because that is the defined name of the "Disassociated Diocese" in the Collective Opinions.

It would be clearly erroneous and manifestly unjust to rule as Appellants claim this court has ruled based solely on the last sentence in footnote 29 of Chief Justice Beatty's opinion that the Diocese is not who it claims to be and is not the owner of its real, personal and intellectual property.

The Respondent Diocese withdrew from TEC. That is undisputed. It was undisputed that it owned all its property before its disassociation and that it was who it had been since 1785, the non-profit religious corporation named "The Protestant Episcopal Church in the Diocese of South Carolina" that this Court called the "Disassociated Diocese." Two Justices views (under a rejected legal standard) that Respondent Diocese was not the "true Diocese," do not prevail. It would be clearly erroneous and a manifest injustice for this Court, in the exercise of its discretion, to hold that the Respondent Diocese's constitutionally approved disassociation deprived it of its real, personal and intellectual property when no neutral principle of state corporate or associational law supports that result. This is all the more so because its property ownership was undisputed at trial and on appeal, and because both the unappealed injunction and the appealed injunction affirmed by an evenly divided court are based on the Diocese's ownership of its intellectual property and the undisputed fact that the Dennis Canon does not apply to Respondent Diocese's property.

The last sentence of footnote 29 related to Camp St. Christopher and the interpretation of its deed represents an issue that was not tried. Therefore, resolving the issue of Camp St. Christopher beneficiary based on the interpretation of its deed would also be clearly erroneous and manifestly unjust.

### C. The Circuit Court had jurisdiction and was constitutionally required to hear and rule on issues argued by Appellants in the prior appeal, but which were never presented to or ruled on by the circuit court yet were considered by some members of this Court in the Collective Opinions and on which Respondents were not heard because of the Court's 2-2 rehearing denial.

The Circuit Court's jurisdiction to hear and determine matters after a case is remitted is "well established. For instance, … the circuit court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court's ruling." *Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 531, 818 S.E.2d 758, 764 (2018) (citing *Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (Ct. App. 2001) *and Mullen v. Myrtle Beach Yacht and Golf Club*, 313 S.C. 412, 415, 436 S.E.2d 248, 250 (1993)). The "enforcement of a judgment" or taking "any action consistent with an appellate court's ruling", requires the Circuit Court to determine what the Supreme Court ruled. Any ambiguity must be resolved by the Circuit Court which not only has the jurisdiction to do so, but also the obligation to determine the intention of the Supreme Court, even if ambiguous and even if there is no remand. *Hamm v. S. Bell Tel. & Tel. Co.*, 305 S.C. 1, 406 S.E.2d 157 (1991).

Appellants due process arguments, App. Br. at 30-34, are: (1) it is not a denial of due process to have a rehearing petition considered by fewer than five justices, (2) Respondents "received a ruling on the Petition for Rehearing", *id.* at 30, (3) due process was given at all stages of this case including the Petition for Rehearing, and (4) "Respondents got what they asked for by their Motion to Recuse – a ruling on the Petition for Rehearing without Justice Hearn's participation" *Id.* at 33.[55]

[55] Respondents did not ask for that result, they asked for the appointment of a fifth justice. Mtn. to Recuse at 24.

It is indisputable that the merits of the Petition for Rehearing were not heard or decided.[56] It is indisputable that the documents which Appellants argued created an express trust by Respondents parishes were not in the record on appeal, and that the issues of minimal burden and trust irrevocability were never raised to nor ruled upon by the circuit court yet were considered, at least in part, in the Collective Opinions.

These were material issues about which Respondents were never heard because Appellants did not ask the trial court to consider them and because rehearing the merits of the issues was not considered. Judge Dickson therefore properly heard those issues. That a rehearing is discretionary or that the Court was deadlocked on whether to hear and rule on these issues does eliminate the "constitutional guarantee"[57] that before Respondents could be deprived of their property as a result of any of these issues, they had to be heard at "a meaningful time and in a meaningful manner"

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[56] Issues presented to an evenly divided court are not "decided." In most circumstances, as is the case here on the service mark issue, the decision of a lower court is affirmed because it cannot be reversed. However, such an affirmance, is not a decision on the issues presented to the appellate court. As stated by Chief Justice Marshall as early as 1826, in a case where the Supreme Court was evenly divided after oral argument, "the principles of law which have been argued cannot be settled, but the judgment is affirmed, the court being divided in opinion upon it." *Etting v. Bank of United States*, 24 U.S. 59, 78 (1826); *accord*, *Durant v. Essex Co.*, 74. U.S. 107, 112 (1869) (" if the judges are divided…no order can be made."); *Ohio ex. Rel. Eaton v. Price*, 364 U.S. 263, 264 (1960) (the order being reviewed is affirmed "ex necessitate, by an equally divided court" with no expression of opinion "for such an expression is unnecessary where nothing is settled."); *Neil v. Biggers*, 409 U.S. 188, 192 (1972) (*referencing* the "thoughtful opinion" of the Second Circuit in *United States ex rel. Radich v. Criminal Ct. of City of New York*, 459 F.2d 745, 750 (2d Cir. 1972) ("Because of the very fact of its equal division, however, the Court has been unable to reach a decision on the merits and there has therefore been no adjudication of them by it.")); s*ee also* Dickson Or. at 23 n. 22. Here, Appellants are arguing they achieved a reversal of the circuit could via appeal, when they failed to supply a sufficient record, and when they failed to garner 3 votes in their favor to reverse via the procedures adopted by this Court for Petitions for Rehearing and for motions to supplement the record on appeal. This case, with its separate Collective Opinions, incomplete record, and unaddressed issues, would stand for manifest injustice if Appellants were correct and Respondents have no meaningful opportunity to be heard or to have the true facts considered.

[57] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985)

and the issue had to be resolved by some court. That is what Judge Dickson did because the constitution required it. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

## VI. CONCLUSION

For centuries Respondent Parishes have possessed their church properties including their many church buildings built and maintained exclusively by the parishioners who worship there. Many of these parishes predate the United States. Some of them created the Respondent Diocese in 1785. In turn, Respondent Diocese created TEC in 1789. All Respondents predate TECSC, most by centuries. In September 1979, at a convention of its members, none of whom were parish churches, TEC created a canon (Dennis Canon) which occupied a single paragraph on page 40 in a 270 page set of canons.[58] In 2012 Respondent Diocese withdrew from TEC. TECSC was "first organized on or about January 26, 2013." Goodstein Or. at 23.

The factual and legal complexities of this dispute over property between religious organizations should not hinder an answer to two fundamentally straightforward neutral questions of law that lawyers and judges face every day. First, was there a written, signed express agreement by each of Respondent parishes directly to the terms of a trust they did not draft? No there was not. Second, does the exercise of the constitutional right to withdraw from an association deprive a religious organization of its identity and property rights when a similar withdrawal by a secular organization would not? In the absence of a consensual agreement to that effect, the question answers itself: No it does not. There was no contrary agreement because the Dennis Canon does not apply to the Respondent Diocese or Trustees' property. In 2017, this Court did not rule otherwise because Respondent Diocese's ownership of its property was uncontested and therefore,

[58] TEC 2006 Constitution and Canons, Ex. D-24.

not tried or appealed. Moreover, Respondent Diocese's ownership of its intellectual property was also affirmed on the service mark injunction issue by a 2-2 vote, and on the other ground of the injunction because it was not appealed. Footnote 29 was about the construction of the deed to Camp St. Christopher. That issue was not tried.

The discretionary application of the law of the case does not a compel different outcome. That is so because a factual result based on an incomplete record and on legal and factual issues that were neither tried nor appealed would be clearly erroneous and manifestly unjust.

It is respectfully submitted that the circuit court order should be affirmed.

s/C. Alan Runyan
C. Alan Runyan
Andrew S. Platte
Runyan & Platte, LLC
2015 Boundary St; Ste. 239
Beaufort, SC 29902

s/C. Mitchell Brown
C. Mitchell Brown
Nelson, Mullins, Riley
& Scarborough
1320 Main Street, 17th Fl
Columbia, SC 29201

***ATTORNEYS FOR RESPONDENTS***
Dated: February 12, 2021