

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

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; St. Luke's)
Church, Hilton Head Island;)
St. Bartholomews Episcopal Church;)
St. Davids 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 St. Jude's Church Of)
Walterboro; 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)

Case No. 2013-CP-18-00013

**MEMORANDUM IN SUPPORT OF
MOTION FOR CLARIFICATION
AND FOR OTHER RELIEF**

Order at 20, 37.

- The Diocese and Parish churches successfully disassociated from TEC by following the procedures required for disassociation under South Carolina neutral principles of corporate law.
- There has never been a decision of the Supreme Court of South Carolina where each Justice filed a separate opinion.
- The four Justices who considered the Petition for Rehearing were evenly divided because a fifth Justice was not appointed to allow the Court to consider the issues created by these 5 separate opinions.
- Half of the rehearing Court (Justice Kittredge and Acting Justice Toal) stated the obvious: the Collective Opinions left “great uncertainty”, provided “little to no coherent guidance” and would require “more litigation involving these issues.”
- The same half stated the refusal to appoint a fifth justice so that the Court could resolve the uncertainty created by the Collective Opinions was “shocking”, “deeply troubling” and “raises constitutional implications as the Court has blocked a fair and meaningful review.”
- In opposing the Plaintiffs’ Petition for Certiorari with the United States Supreme Court, the Defendants contended that the Collective Opinions were a “poor vehicle for review” because the Collective Opinions:
 - are based on “an incomplete record”;
 - are based on a record which “contains significant ambiguities”; and
 - are “fractured not only in rationale but even on facts”.

Br. for Resp. in Opp., *The Protestant Episcopal Church in the Diocese of South*

Carolina, et. al. v. The Episcopal Church, et. al., 17-1136, p. 2, 23 (U.S. May 7, 2018).

- The Defendants told the United States Supreme Court that the South Carolina Supreme Court did not resolve the uncertainties or ambiguities in the Collective Opinions because they did not pass upon them. *Id.* at 20. (“[T]he state supreme court divided evenly (2-2) on the rehearing petition and as a result held it was denied. The court clearly did not ‘pass upon’ petitioners’ [arguments].”)

II. The Legal Framework of the Competing Motions

a. Jurisdiction

The jurisdiction of this Court 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*, ___ S.E.2d ___, 2018 WL 4101089 (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 this Court to determine what the Supreme Court ruled. Any ambiguity must be resolved by this 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) (“*Hamm II*”).

In *Hamm I*¹, the Supreme Court reversed a Southern Bell rate increase and remitted the case to the circuit court without instructing the circuit court that it should send the matter back to the Public Service Commission to determine refunds with interest. The circuit court held it was

¹ *Hamm v. Southern Bell Telephone and Telegraph, Co.*, 302 S.C. 132, 394 S.E.2d 311 (1990), *cert. denied* 498 U.S. 1109, 111 S.Ct. 1018, 112 L. Ed.2d 1099 (1991) (“*Hamm I*”).

without jurisdiction to do so because the Supreme Court had not remanded the case with such instructions. Rather, the circuit court held that only the Supreme Court could “clarify its own opinion”. *Hamm II*, 406 S.E.2d at 159. The *Hamm II* court held it was error for the circuit court not to take action that was “implicit as well as our intention”. *Id.* at 160. No remand was necessary because the circuit court was to interpret the Court’s decision “according to law” and the only reasonable interpretation, considering prior case law and what was implicit in the reversed and remitted decision, was that refunds needed to be computed with interest and ordered refunded. *Id.*

Here, there are an unprecedented 5 individual opinions which collectively are models of legal and factual ambiguity. Justice Kittredge and Acting Justice Toal say they create “great uncertainty” and provide “little to no guidance”. The Defendants say they are “fractured not only in rationale but also on facts”. Yet this Court must discern what is “action consistent” with the Collective Opinions. It has the jurisdiction to take whatever steps are necessary to determine and act on what is “consistent” whether explicit or implicit.

As noted in Plaintiffs’ Unresolved Issues List, Attachment 1, Defendants take the position that the Collective Opinions are themselves a declaratory judgment. That is not the case for at least three reasons. First, the case was not brought in the Supreme Court’s original jurisdiction, so the Collective Opinions were those of a court reviewing the declaratory judgment issued by the circuit court and thus subject to the limitations of a reviewing court. Second, one of the Court’s rules is that it does not *sua sponte* raise and decide issues not properly before it. A South Carolina appellate court only decides an issue that is both presented to, and decided by, the trial court and then preserved for appellate review. *State v. Dunbar*, 356 S.C. 138, 142-43, 587 S.E.2d 691, 693 (2003) (issue not considered by the trial court cannot be considered *sua sponte* by an appellate court as the basis of its decision). Third, the Defendants recognize that the Collective Opinions are not

presently enforceable because they have not been recorded as judgments and because Defendants have invoked this court's jurisdiction to secure an enforceable order of judgment. However, if the Collective Opinions were a judgment, they are too uncertain for present enforcement.

A court cannot enforce that which is uncertain, whether a contract or a court order. The judgment of a court is construed like any other written instrument to determine the intent of the court. That intent is determined from all its parts, not from an isolated part. *City of North Myrtle Beach v. East Cherry Grove Realty Co., Inc.*, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012). If the judgment is "plain and unambiguous" then the effect of the judgment "must be declared in light of the literal meaning of the language used." *Id.* (quoting *Weil v. Weil*, 299 S.C. 84, 90, 383 S.E.2d 471, 474 (Ct.App. 1989)). If the judgment is ambiguous, the intent of the court is still the determinative factor, *Eddins v. Eddins*, 304 S.C. 133, 135, 403 S.E.2d 164 (Ct.App. 1991), construing the judgment to determine intent while disregarding superfluous language. *Jenson v. Conrad*, 292 S.C.169, 171, 355 S.E.2d 291, 293 (Ct.App. 1987) (dicta).

While the Collective Opinions do not create an executable judgment, this Court should take actions consistent with them if constitutionally appropriate. However, as Justice Kittridge and Acting Justice Toal stated, the Collective Opinions are greatly uncertain. Therefore, this Court must determine what actions would be consistent with them before it can take them. This too will require a determination of the Court's intent gathered from the Collective Opinions as a whole, not their isolated parts.

b. The Law of the Case

Defendants have stated the Collective Opinions are the "law of the case". Amended Petition for Relief at 4.

The law of the case posits that the decision of an appellate court on a legal issue is the law

of the case to be followed in subsequent proceedings. *Arizona v. California*, 460 U.S. 605, 618-19 (1983); *Flexor v. PHC-Jasper, Inc.*, 413 S.C. 561, 571-75, 776 S.E.2d 397, 403-05 (Ct. App. 2015) (“a decision on an issue of law made at one stage of the case becomes binding precedent to be followed in subsequent stages of the same litigation”). There must be an actual decision of the legal issue for it to become the law of the case. *Howe v. City of Akron*, 801 F.3d 718, 739-40 (6th Cir. 2015); *Accord, Flexon*, 413 S.C. at 571, 776 S.E.2d at 403. Implicitly decided issues fall within the doctrine, *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1241 (10th Cir. 2016), but ambiguous ones do not. *First Union Nat. Bank v. Pictet Overseas Trust Corp., Ltd.*, 477 F.3d 616, 619-21 (8th Cir. 2007). The law of the case is an “amorphous concept” that “directs a court’s discretion” but does not limit its power. If in the court’s discretion its prior decision “is clearly erroneous and would work a manifest injustice”, the doctrine does not limit the court’s power to alter the result. *Pepper v. United States*, 562 U.S. 476, 506-07 (2011); *Flexon*, 413 S.C. at 572, n.6, 776 S.E.2d at 403, n.6. If a legal ruling is the law of the case under these standards, whether it is to be applied to subsequent proceedings in the case is a product of the discretionary balancing between the need for finality and (1) substantially different evidence than that considered by the appellate court or (2) when the ruling was clearly erroneous and would work a manifest injustice.

III. Unresolved Issues in the Collective Opinions

As set forth in detail in both the Unresolved Issues List, Attachment 1, and Plaintiffs’ Petition for Rehearing, Attachment 2, the Collective Opinions are uncertain and ambiguous. They do not review the record as to each parish determining if Defendants proved the existence of an express trust in a signed writing. They do not resolve the issue regarding which entity is the beneficiary of the Trustee’s assets. They raise dispositive issues (revocability and minimal burden) not considered by, or ruled upon by the trial court, and then decide them adverse to

plaintiffs depriving plaintiffs of the right to be heard. Finally, having arrived at a differing result than the trial court on an incomplete record, they do not consider plaintiffs defenses to the TEC counterclaims that would have been considered had the trial court decided trusts existed.

A. The Collective Opinions do not decide whether each Parish church created an express trust based on the record before the Court

The trial court held that no express trust was created relying on *All Saints Parish, Waccamaw v. Protestant Episcopal Church*, 385 S.C. 428, 685 S.E.2d 163 (2009). Final Order at 36. Defendants argued on appeal that “29 of the 36 parishes made express promises in their governing documents to comply with the National Church’s rules” which allegedly created express trusts. Brief of Appellants at 38. The only record in support of this assertion were five pages from a post-trial submission to the trial court in which Defendant’s counsel summarized documents. Attachment 3. Statements of counsel regarding the contents of documents are not evidence and cannot be considered. *Am. Motorists Ins. Co. v. Murphy*, 253 S.C. 346, 349, 170 S.E.2d 663, 665 (1969); *Hobbs v. Beard*, 43 S.C. 370, 21 S.E. 305, 308 (1895). The documents summarized, some inaccurately, by the Defendants’ counsel were not in the record on appeal and therefore could not have been considered by the Supreme Court. Rule 210(h), SCACR. (“the appellate court will not consider any fact which does not appear in the Record on Appeal.”). The inadequacy of the record to consider the issue of accession seems obvious given the Defendants’ representations to the United States Supreme Court, (an “incomplete record” containing “significant ambiguities”) and given what Justice Hearn, joined by Acting Justice Pleicones, stated.

Justice Hearn, joined by Acting Justice Pleicones, vigorously took issue with the Court’s ability to consider the issue of whether 7 or 8 parishes agreed (“acceded”) to the Dennis Canon because of the “dearth of evidence on [the accession] issue in this voluminous record.” 421 S.C. 211, 243, 806 S.E.2d 82, 99. Nonetheless Chief Justice Beatty, Justice Kittredge and Acting Justice

Toal, found a lack of accession by the 7 or 8 churches, not based on the record but based on Defendants' admission. The five-page argument of counsel omitted seven parishes from its list of those that "expressly accepted the national church's governance." The Court's finding for the 7 or 8 parish churches was because of this admission. The Court could not have made a finding based on the records relating to the other parishes because there was no record before the Court.

B. To create an express trust under *All Saints*, it is the law of the case that there must be an express agreement in a signed writing by each parish church to the Dennis Canon.

The majority of the court (Chief Justice Beatty, Justice Kittredge & Acting Justice Toal) held that neutral principles of state law, as applied in *All Saints*, is the proper legal standard to be used when resolving disputes between religious organizations over property and corporate control. Chief Justice Beatty repeatedly stated what was required under neutral principles to create an express trust. There must be evidence of an express agreement to the Dennis Canon in a writing signed by the individual church:

These 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.

Chief Justice Beatty did not apply this legal requirement to any specific parish nor did he review any of the parish specific documents because none were in the record on appeal. Moreover, the post-trial argument of counsel about express trusts which was in the record, (which could not be relied upon by the Court) does not state that any parish expressly agreed in a signed writing to the Dennis Canon. It states that some parishes “expressly accepted” either the “National Church’s governance” or the “Diocese’s governance.” Justice Beatty however stated that “merely promised allegiance ...without more... cannot deprive [parishes] of their ownership rights in their property.” *Id.* Three examples from Defendants’ summary demonstrate the latent uncertainty surrounding Defendants’ assertions.

1. St. Philips Church

There is nothing in either the five-page argument of Defendants’ counsel nor in the record that remotely approaches an express agreement in a signed writing to the Dennis Canon by St. Philips Church. First, Defendants’ argument references 1987 Articles of Restatement as “describing the purpose of the parish corporation as being ‘in accord with the Articles of Religion of the Protestant Episcopal Church in the United States of America...’.” The 1987 Articles of Restatement were not part of the record on appeal. There was no evidence which could be considered under Rule 210(h) and there was none considered by the trial court because it did no parish by parish review. Finally, not only were the referenced “Articles of Religion” not part of the record on appeal, they were never introduced into evidence at trial and were therefore not part of the trial record. The Articles of Religion contain no mention of the Dennis Canon or any other Canon of The Episcopal Church—they represent nothing more than a summary of theological and doctrinal beliefs. Defendants’ counsels five-page summary does not contend that there is an express agreement to the Dennis Canon on the part of St. Philip’s Church since none exists. There

is a complete lack of evidence of an express agreement by St. Philips Church in a signed writing to the Dennis Canon.

2. St. Michael's Church

According to Defendants' counsel, in 1989 Bylaws St. Michael's Church, "acknowledges the authority of ... The Diocese of South Carolina ...and of the National Church." These Bylaws were not in the record on appeal and therefore there was no evidence on this issue before the Supreme Court.² Defendants five-page argument does not contend there is an express agreement to the Dennis Canon in a signed writing by St. Michael's Church. And, Chief Justice Beatty stated promises of allegiance do not create a trust. 421 S.C. at 251, 806 S.E.2d at 103.

3. Church of the Good Shepherd

According to Defendants' counsel, Good Shepherd amended its corporate articles in 2001 "describing the parish corporation as 'organized pursuant to the Canons of the Protestant Episcopal Church in the Diocese of South Carolina'." These corporate articles were not in the record on appeal and therefore there was no evidence on this issue before the Court. Defendants' argument in its five-page summary is that Good Shepherd is organized pursuant to the Canons of the Diocese, not TEC. However, the Court rejected the argument that organization pursuant to the Canons of the Diocese "now in force or as hereafter may be amended" was evidence of an express trust in favor of TEC when it found that St. Matthias did not "directly" accede "to the local or national version of the Dennis Canon." 421 S.C. at 265 n. 49; 806 S.E.2d at 111, n. 49.

The law of this case is that in order to have an express trust under South Carolina neutral principles of law, a court must find, as to each parish church, the existence of a signed writing in

² The parishes urged the court on Rehearing to consider such documents and the Court was empowered to order them up from the trial court record into the record but of the Supreme Court, but the Court failed to act on this request due to a 2 to 2 vote.

which the church expressly agrees to the Dennis Canon. The trial court did not make any findings as to each parish church on this issue. The Defendants did not include in the record on appeal any of the documents they argued in their five-page summary created express trusts. Examples of some of those summarized documents show that they do not create an express trust. In order for this Court to enforce the legal ruling on the creation of express trusts, it must consider, as to each parish, whether such a trust was created.

a. Due Process and Property Deprivation

Article I, Section 3 of South Carolina’s Constitution provides that “no person ... shall be deprived of ... property without due process of law ...” The 5th Amendment to the United States Constitution contains a similar guarantee.

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *South Carolina Department of Social Services v. Witsor*, 352 S.C.445, 452, 574 S.E.2d 730, 734 (2002). “Substantive rights - life, liberty and property – cannot be deprived except pursuant to constitutionally adequate procedures.” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493 (1985). This is a “constitutional guarantee.” *Id.* The Due Process Clause’s “root requirement” is that there be “an opportunity for a hearing *before* [an owner] is deprived of any significant property interest.” *Id.* at 542, 105 S.Ct. at 1493.

b. The South Carolina Supreme Court’s Procedural Due Process Rules

Some of the Supreme Court’s procedural rules are rules of due process. It will not consider issues that have not been presented to, and ruled upon by a lower court and which have not been preserved for review. It will not consider facts which are not included in the record on appeal.

These rules are intended to make sure that only those issues on which a party has had

meaningful notice and a meaningful opportunity to be heard, and on which the trial court has ruled, are matters which the Supreme Court will consider. *Sua sponte* decisions on matters not presented to and ruled on by the trial court deprive a party of the “root requirement” which must occur before a decision is made – the opportunity to be heard. Similarly, basing a decision on matters not in the record deprives a party of that same opportunity for it is a decision based on facts that are not before it.

Both sides to this dispute agree that the Supreme Court did not consider the issues raised in the Petition for Rehearing, yet many of these issues are based on facts not in the record (accession issues) or were the product of *sua sponte* decisions because they were not presented to or ruled upon by the trial court (revocability, minimal burden).

Justice Kittredge and Acting Justice Toal expressly recognized that the Supreme Court’s decision by a 2-2 vote not to consider those issues “raises constitutional implications as the Court has blocked a fair and meaningful review.” The United States Supreme Court has also held that such action is a denial of procedural due process.

Justice Brandeis, writing for a unanimous Supreme Court, considered the issue of the procedural due process due a litigant when an appellate court deprives it of its property. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451 (1930). There the Supreme Court of Missouri overruled a previous decision construing a state statute on which the plaintiff had relied and in so doing, deprived the plaintiff of the remedy the previous construction had afforded. The plaintiff petitioned for a rehearing which was denied without opinion. Justice Brandeis stated the Court’s concern was not the plaintiffs’ rights on the merits, but “whether the plaintiff has been accorded due process in the primary sense – whether it has had an opportunity to present its case and be heard in its support.” *Id.* at 680, 50 S.Ct. at 454. Reversing the Missouri

Supreme Court, the Court held that “whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.” *Id.* at 682, 50 S.Ct. at 454-455. *Accord, Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S. Ct. 1697, 1703 (1964) (Due process includes a “standard of state decisional consistency”).

To continue that “blocking” by refusing to consider the new issues raised by the Collective Opinions as Defendants would have the Court do, would be a continuation of the denial of procedural due process.³

C. The Beneficiary of the Trustee’s Diocesan Assets

The Collective Opinions are ambiguous on whether the Plaintiff Protestant Episcopal Church in the Diocese of South Carolina (the “Diocese”) or the Defendant, Episcopal Church in South Carolina is the proper beneficiary of the Trustee’s assets. This is discussed on pages 12-14 of Attachment 1, the Unresolved Issues List. Chief Justice Beatty only speaks to this issue in footnote 29. This footnote must be construed in light of his legal ruling that the *All Saints* decision furnished the guiding principles (“aptly discussed by former Chief Justice Toal”). 421 S.C. at 249, 806. S.E.2d at 102. Justice Hearn’s and Acting Justice Pleicones’ views that the “true diocese” is determined by TEC was not accepted by Chief Justice Beatty because he rejected their analysis and reaffirmed *All Saints*. *All Saints* rejected the idea that TEC could determine the “true parish” looking instead to neutral principles of corporate law to determine corporate control.

If Chief Justice Beatty’s opinion is not limited to Camp St. Christopher, then he fails to state a legal reason which is both a violation of Rule 220 (b), SCACR and the requirements of due process. Due process requires that a court state the reason for its decision. *Compare Goldberg v.*

³ Justice Brandeis noted that if a remedy were still available after the petition for rehearing was denied, there would be no denial of due process. *Id.* n. 9

Kelly, 397 US. 254, 271 (1970) (“The decision maker should state the reason for his determination and indicate the evidence he relied on...”) *with* Rule 220(b) SCACR (“in every decision rendered by an Appellate Court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court, **must be stated in writing and must, with the reason for the court’s decision, be processed in the record of the case.**”) (emphasis added) *and* S.C. Code §18-9-210 (“when a judgment or decree is reversed or affirmed by the Supreme Court every point made and distinctly stated in the cause and fairly arising upon the record of the case shall be considered and decided and **the reason thereof shall be concisely and briefly stated in writing** and preserved in the record of the case ...”) (emphasis added).

CONCLUSION

The Collective Opinions, read as a whole to determine their intent, are more factually than legally ambiguous. The legal majority reaffirms *All Saints* as the law of this state on these issues. Chief Justice Beatty and Acting Justice Toal assert that these neutral principles of state law should be strictly applied. Using a different legal standard, Justice Hearn and Acting Justice Pleicones would have awarded everything belonging to any parish, the Diocese and the Trustees to TEC. As noted in the Unresolved Issues List, Attachment 1 at 11-14, the intersection of these two diametrically opposed legal standards is in Chief Justice Beatty’s opinion. His statement of the law applicable to create an express trust under these facts was not equivocal: there must be a signed writing by each individual parish church expressly agreeing to the Dennis Canon. Without that, no trust was created despite any pledges of allegiance to TEC.

The record which the Supreme Court’s rules permit it to rely upon is silent on this issue. One could stop there but Chief Justice Beatty did not. He believed the assertions of TEC’s counsel as adopted by Justice Hearn, that the “reaffirmation to the National Church” included the legal

principles he required. The law of the case only compels adherence by this Court to the law found to exist by an appellate court, not to factual issues particularly where they are at odds with the trial record. The application of that law to a nonexistent record based solely on the arguments of counsel is clearly erroneous and a manifest injustice.

September 24, 2018

Respectfully submitted,

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