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Oct 19 2023

SC Court of Appeals

The State of South Carolina
In The Court of Appeals

Appeal from Dorchester County
Hon. Heath P. Taylor, Circuit Court Judge

Appellate Case 2023-000720

Cases No. 2006-CP-18-01310
2006-CP-18-01311
2006-CP-18-01636

John Doe #53, John Doe 66, John Doe 66A, John Doe 67,
Jane Doe 1 and Jane Doe 2 and Rachel Roe, individually
and as representatives of a class of people similarly situated,
Plaintiffs,

Of whom class members Julie McDonald and
Richard McDonald are the

Appellants

v.

The Bishop of Charleston a corporation sole, and the Bishop of
The Diocese of Charleston, in his official capacity,

Respondents

And

David K. Haller, Lawrence E. Richter, Jr., and
Richter & Haller, LLC

Intervenors

Appellant's Reply Brief
As to Intervenors

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Reply Argument

First in Reply to Intervenors a few big picture points, then some specific argument.

With rare exception, class certification orders are interlocutory, and appealable only once a final order is entered. E.g., *Salmonsens v. CDG, Inc.*, 377 S.C. 442, 452, 661 S.E.2d 81, ___ (2008) (declining generally to review class action orders as interlocutory other than those that “prevent a judgment from which an appeal may be taken” or “discontinue the action.”) For this class action no final order was entered until 2023, a fifteen-year delay (counting from 2008) engineered by intervenors and the Diocese. Those parties were so intent on avoiding entry of a final order that they ignored a 2009 Supreme Court order that directed them to conclude the class action, neither asking the Supreme Court to extend its September 2009 deadline nor moving the circuit court for a final order when the court did not act. No action was fine with Intervenors and the Diocese.

The intervenors now seek to benefit from the delay they colluded to achieve, reflecting the strategy behind the delay: delay a final order as long as possible, then claim delay as a basis to avoid review of the conduct of the class action and the roughly \$900,000.00 improperly charged the class. Meaning the roughly \$900,000.00 charged the class without authority to do so and without proper disclosure of the \$2.5 million fee the court had already awarded for the same work.¹

Given the parties’ efforts to conceal it, the true collusive history of this class action and its abuses took some time to discover. It was not known in March, 2007 when the court held a

¹ And the contingency payment made to Intervenors that was never disclosed to Judge Goodstein.

hearing on the class settlement. The McDonalds learned only in 2019 of class counsel's misconduct in charging them fees and costs without authorization and without disclosing the court awarded \$2.5 million fee.

There is nothing inherently wrong with the idea of a class action, but there are many things wrong when class counsel uses a class action as a vehicle for serving their own interests *at the expense of the class*. Such as charging the class for costs which the court ordered to be reimbursed by the class fund. Meaning not by class members individually. Such as charging the class an additional fee that no order is even contended to have authorized and without having disclosed to class members that the court had already awarded \$2.5 million for a scope of work that included the class claims. July 30, 2007 order at p. 14.

This record should invite the appellate court to clarify a court's duty to protect a class, even when the protection is from class counsel. If the course of this class action is acceptable then the court should say so, and Judge Taylor should be affirmed. But if, (as we contend) some or all of the conduct should be rejected, then class counsel should be ordered to disgorge back to class members the overcharged sums.

Generally, the intervenors' brief misses entirely the object of this litigation, and this appeal, which is not (as they claim) to challenge the class action settlement. It is to challenge whether the intervenors faithfully implemented the orders issued approving the class action settlement. The record strongly suggests Intervenor did not implement those orders properly, instead going outside them and charging unauthorized sums of class members.

To date, the courts have worked overtime to avoid these issues. We contend SCRCPC 23 imposes a duty on the court to make that review, to protect the class given the credible evidence

in this record that the class action process has been abused, and only weak or no oversight has been given to both the collusive conduct and class counsel's misconduct.

Despite the claims of Intervenors, the orders of July 30, 2007 and August 30, 2007 are very much the subject of this appeal. Not to change the class settlement but to evaluate the plain evidence that class counsel (a) manipulated the class action, (b) extensively abused the class action mechanism to pick a judge who gave little oversight to class counsel's conduct, and (c) failed to comply with the orders issued. A review made possible only by persistent efforts of third parties to overcome the deliberate and collusive delay strategy so as to finally get, only in 2023, a final order which could be appealed.²

Appellant makes these few specific points in Reply to intervenors.

1. No South Carolina authority supports the intervenors' "pixie dust" statement of the case.

As public filings show, the proceedings of this case began in Charleston County in 2005 (2005 complaints). A class settlement was reached in 2006 (2006 mediated class settlement agreement). Yet Intervenors continue to pretend (brief at 1) that the case began with 2006 filings

² Other litigation, involving various other client abuse victims, neither part of nor served by the class action, has been required to, among other things, exempt out-of-state class members from what would otherwise have been the preclusive effect of the class action to enable claims against the Diocese; to clarify the rights of those who opted out of the class action (and got better settlement terms by doing so); and to get the Supreme Court to agree that class members may challenge the adequacy of class counsel's representation. But despite the holding of *Doe v. Bishop*, 745 S.E.2d 494 (S.C. 2014), that parties are free to show Intervenors' inadequate representation, no court has yet permitted full discovery into that issue. The number of people affected by misconduct of Intervenors and the Diocese is considerable, and the chaos from the collusion and delay in this class action is ample reason for the issues in this appeal to finally be addressed, and ruled on. None of those collateral cases addressed the issues in this case, which arise within the class action. All of those other cases arose outside of the class action and before any of the unappealed class action orders became the law of the case.

in Dorchester County.³ Judge Taylor, too, accepted the pixie dust version (2023 order at 1). The Intervenor's pretense, that avoids the 2005 origin and the 2006 judge-shopping, implicitly concedes that nothing other than class counsel's personal connections to Judge Goodstein and the parties' collusion justified or explained any of:

(a) the overt and collusive judge-shopping that followed the June 2006 class settlement agreement (to move class settlement approval and oversight from Charleston County to the judge the parties wanted, Judge Goodstein, then sitting in Dorchester County), and

(b) the "look the other way" actions taken by Judge Goodstein (and, to date, appellate courts) as to the issues arising from the class action, and

(c) the colluding parties and Judge Goodstein all ignoring the order of the Supreme Court to conclude the class action in 2009 or seek an extension from the Supreme Court.

This is the Intervenor's "pixie dust" approach, which presumes the appellate court will simply ignore the record because Intervenor's are connected to a judge, and the (apparently unspoken) principle that a circuit judge must never be criticized, even by implication. And why shouldn't Intervenor's use pixie dust, since it has worked to date?

Intervenor's count on the appellate court ignoring the record and adopting these false factual pretenses:

³ E.g., Intervenor's contend, brief at 2, "Under Judge Goodstein's oversight, the parties reached a final settlement." In fact, the 2006 class settlement was reached before the parties went shopping for Judge Goodstein. Under SCRCF 23 that settlement should have been submitted for court approval in Charleston County, and but for the undisputed judge-shopping, would have been.

(d) that no class action complaint was filed in Charleston County in 2005 (even though the record includes the 2005 class complaint for Doe 53 and its “cloned” Dorchester County version)

and,

(e) that no mediated class settlement in June 2006 resolved that 2005 class action and two other individual cases filed in 2005 (even though the record contains the 2005 cases and the 2006 mediated class settlement agreement),

and

(f) that no judge-shopping took place after June 2006 to select Judge Goodstein for approval and oversight of the class action (even though the record contains no justification other than judge-shopping to explain how the class settlement moved from Charleston County to Dorchester County and how the Doe 53 class complaint in Charleston was “cloned” so it could be filed in Dorchester County),

and

(g) that the trial court made a careful review of the grotesquely inflated time records submitted February 14, 2007 (when the record shows the time records were accepted at face value, without comment of the overstated tie claims),

and

(h) that Judge Goodstein’s order of July 30, 2007 at p. 14 did not articulate the scope of work for what the \$2.5 million fee award covered (when it explicitly did),

and

- (i) that fees paid class counsel by the Diocese were disclosed to Judge Goodstein (when the contingency payment was never disclosed),
and
- (j) that Intervenors disclosed to the class their conflicts and the \$2.5 million fee already awarded (when the record contains no such disclosure),
and
- (k) that Intervenors disclosed to the class that the court had provided for costs to be paid from the class fund before charging them costs, (when the record contains no such disclosure),
and
- (l) that the 2009 order of the Supreme Court was not ignored (when the record shows no final order was entered until 2023, and no extension of time was ever submitted to the Supreme Court, as the Supreme Court ordered).

The Court should, of course, emphatically reject the pixie dust that connected lawyers believe they get to use to claim false “facts.” The court should decide this appeal on the *actual* record and the *actual* facts and the *actual* issues. Not the record as viewed through Intervenors’ pixie dust. We can find no case supporting using pixie dust to justify ignoring what the court records plainly show.

2. Intervenors offer no authority for class counsel charging class members an additional fee or costs.

Glaringly absent from intervenors’ brief is any argument that any of Judge Goodstein’s orders authorized class counsel to charge class members the additional fees and costs were undisputedly charged and which we contend were unauthorized. Set out in the initial brief and the record are the fee provisions Judge Goodstein authorized, the scope of work the fee payment

was for, and that authorization to charge costs to the class funds. July 30, 2007 order at 14. Notwithstanding the blatant fraud in class counsel's time records, which Judge Goodstein ignored even as she embraced those records as support for the fee, the point of this appeal is not, as intervenors' claim (brief at 12), to "reopen the class settlement," or to contest the \$2.5 million fee. It is to get the court to protect the class from the predations of class counsel that occurred in 2008, when the court had apparently stopped all oversight, enabling class counsel to charge the class some \$900,000.00 and to demonstrate why the collusion among class counsel and the Diocese properly factors into the level of scrutiny to apply to class counsel which the court owes the class under SCRCP 23.

3. Issues are preserved for appeal.

Despite the Intervenor's contentions (brief at pp. 9 – 10), a motion was made for a post-award fairness hearing, accompanied by a demonstrable basis for that hearing. That motion was denied. A motion pursuant to SCRCP 59(e) was then submitted. That motion was denied. The issue and various arguments made in this appeal were made below and ruled against. The court's fiduciary obligations under SCRCP 23, the duties the court is claimed to have breached by failing to exercise its discretion, are explicitly argued. The Rule 59 motion explicitly covers the argument made in the brief in parts C and D.

This argument from Intervenor is more pixie dust.

4. Judge Goodstein was not, and could not have been, clairvoyant.

As the documents show, the unauthorized fees and costs charged the McDonalds were charged in 2008 (2008 settlement statements of the McDonalds). It was impossible for Judge Goodstein to have reviewed or to have included those fee and cost charges in her orders of July

30, 2007 or August 31, 2007, as Intervenors contend (brief at 11). It was impossible for the McDonalds to have raised Intervenors' misconduct until they were informed that Intervenors had received a \$2.5 million fee award that included the scope of work for the fee they were charged, a \$2.5 million fee never disclosed to them until 2019. Or that they were charged costs when the court's orders awarded costs to be paid from the settlement fund. Or for the McDonalds to have appealed any of the class action orders until a final order was entered, which Intervenors and the Diocese deliberately delayed for fifteen years, until persistent actions by third parties compelled a final order to be entered.

So yes, the McDonalds, "received their checks," (Intervenors brief at 16), but those checks were minus the improper fees and costs which had been deducted improperly by Intervenors.⁴ Judge Goodstein could not possibly have ruled on the issues raised by the McDonalds, or John Doe 66, as they arose after those orders.

Judge Taylor was not barred from reviewing whether Intervenors complied with Judge Goodstein's orders. Nothing about confronting and ruling on those issues would "overrule" Judge Goodstein, as contended by Intervenors (brief at 16 – 17). Judge Goodstein did not, and could not have, ruled in 2007 on the issues presented on this appeal which arose in 2008.

⁴ Intervenors contend (brief at 16), that other attorneys charging a client a fee is somehow significant, ignoring that only Intervenors were awarded a fee by the court, through an order which described the scope of work covered by that fee. Intervenors have not appealed that order and made no motion to modify it. It is now the law of the case and binds Intervenors. To charge class members additional sums for work included in the scope of work described for that \$2.5 million fee award requires, at minimum, a full disclosure to the class of sums already paid or awarded. It is not even contended that any such disclosure was made to the McDonalds or any other class member.

No court has reviewed the new evidence that in 2008, Intervenors went beyond the authority given them to charge fees and costs and took it upon themselves to charge fees and costs not authorized by any order, Intervenors apparently counting on no court reviewing their conduct.

5. There is no magic number of “Fairness hearings.” Protecting a class takes as many as it takes.

The Intervenors contend (e.g., brief at 14) there were multiple “fairness hearings.” While there were multiple hearings, only one hearing, the March 2007 hearing, was publicized and objectors invited to appear and state objections. (E.g., Order of January 23, 2007). After that, hearings such as the July 13, 2007 hearing cited by Intervenors, brief at 14, involved only the Intervenors and the Diocese, not even all parties that had appeared at the March hearing. Under SCRCP 23, the court should hold as many hearings as it needs to protect the class. The court has discretion to examine whatever circumstances require the class be protected, but errs as a matter of law when it fails to exercise the discretion to meet the duties that SCRCP 23 imposes on the court.

On this record it is plain that between the mediated class settlement in June 2006 and 2008, when the McDonalds were billed unauthorized fees and costs, Intervenors had placed their own interests ahead of the class. To protect the class, the court should allow limited discovery on the roughly \$900,000.00 charged class members improperly and order those funds disgorged back to the class.

6. Many cases recognize the principle that a court failing to exercise discretion is an abuse of discretion.

In their brief at p. 10, Intervenors seem to imply that civil cases do not recognize the principle that failing to exercise discretion is an abuse of discretion. Actually, there are many civil cases which recognize the principle, which applies to a circuit court presiding over either civil or criminal proceedings. E.g.,

Moreover, there is no evidence in this record that indicates the Master exercised his discretion. In fact, the only evidence is that the Master mistakenly believed he had no discretion. The failure to exercise discretion is an abuse of discretion. *See Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 155, 399 S.E. 2d 439, 441 (1990) (“It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.” (quoting *State v. Smith*, 276 S.C. 494, 498, 280 S.E. 2d 200, 202 (1981)); *CEL Prods., LLC v. Rozelle*, 357 S.C. 125, 130, 591 S.E. 2d 643, 645 (Ct.App.2004) (“When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred.”); *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E. 2d 213, 216 (Ct.App.1997) (“A failure to exercise discretion amounts to an abuse of that discretion.”)).

Arrow Bonding Co. v. Warren, 399 S.C. 603, 610 (S.C. 2012).

See also, *Jamison v. Ford Motor Co.*, 373 S.C. 248, 270, 644 S.E. 2d 755, 767 (Ct. App. 2007) (“In deciding what sanction to impose for failure to disclose evidence during the discovery process, the [circuit] court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice.” (internal quotation marks omitted)); *id.* (“A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion.”).

This is not an unusual legal principle.

Conclusion

Judge Taylor had a duty under SCRCP 23 to protect the class, even from Intervenors. The record includes ample reasons to justify the court compelling Intervenors and the Diocese to explain the judge-shopping, the modifications to the class settlement that served Intervenors’

interest at the expense of the class; and the unauthorized charges by Intervenors made of class members without proper disclosure of the court's fee award or their conflicts.

The case should be remanded for examination of each of the ways in which Intervenors breached their duties to the class members, with appropriate direction to reach the issues and to protect the class, including appointing a new lawyer to represent the class given the inherent conflict now present.

Or, to the extent that the conduct in this record is permissible, then the court should plainly state that lawyers may conduct class actions in this manner, serve their own interests first, and affirm Judge Taylor.

We contend the case should be remanded for further proceedings with direction appropriate to protecting the members of the class from Intervenors.

Respectfully submitted,



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Proof of Service

I hereby affirm that I have served a copy of the enclosed

Appellant's Reply Brief as to Intervenors

by causing a copy of each document to be sent electronically, via email, to counsel and to Mr.

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Done October 19, 2023.

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