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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 Final Brief

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Issue on Appeal

> Did the circuit court abuse discretion by refusing to review evidence that class counsel (a) charged class members fees and costs which no order authorized, and (b) failed to make proper disclosures to the class (if any charge was proper), given (c) the class action abuse in this record?

Standard of Review

The standard of review is abuse of discretion. Rule 23(d)(2), SCRCP authorizes the court to "make appropriate orders" in a class action and "at any time impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended." Specifically, the issue on appeal is whether the circuit court in 2023 abused discretion by failing to exercise its discretion in overseeing a class action settlement in light of allegations of class action abuse by colluding parties?

Introduction

The history of this class action is highly unorthodox, full of unusual actions claimed to reflect collusion and abuse of a class action. To date, courts have ignored that conduct, neither approving nor rejecting it, reflecting perhaps a third consideration: an unstated policy that the actions of lawyers with connections to a circuit judge are to never be reviewed.

It is useful for bench and bar to understand which, if any, of these tactics is permissible in a class action, which are abuses of class action practice, or if indeed some persons or circumstances are above review. This appeal presents an opportunity to clarify the circuit court's duty under Rule 23, SCRCP to protect class members and address the aspects of class action abuse in this record. Or to state overtly that actions taken by lawyers with social and professional connections to a circuit court judge get no review.

Statement of the Case

The start: a 2005 Charleston County Class Action. On May 12, 2005, an individual complaint was filed in Charleston County for a plaintiff identified as John Doe 66, alleging childhood sexual abuse against the Diocese of Charleston (referred to hereafter as the Diocese). (R.App. pp. 126 to 151, Complaint and R. App. pp. 152 to 181, the amended complaint in that case from June 2005, 2005-CP-10-2053).

In August 2005 another individual complaint against the Diocese for similar conduct was brought, by the same lawyers, on behalf of a plaintiff identified as John Doe 66A. (R. App. 182 to 197, Complaint, 2005-CP-10-3293). Neither complaint stated class allegations.

Class settlement discussions began. In October 2005, the same lawyers met with counsel for the Diocese and the Bishop of Charleston ("we met with the Bishop," the lawyers claimed, R. App. p. 309, redacted fee petition p. R022017, ¶ 17). The meeting was to explore a class settlement for "obtaining universal peace," for the Diocese, as the plaintiffs' lawyers put it (R. App. 1148 ¶ 1, October 17, 2005 letter, R000160). No class complaint was then pending.

The plaintiffs' lawyer was a "lifelong" member of the Diocese of Charleston. (R. App. 307 to 308, ¶ 14), an affiliation never disclosed to the class. "Universal peace" from sexual abuse claims served the interests of the Diocese, but served the interests of abuse victims only if all abuse victims were included and the victims were appropriately compensated.

A class action is filed. In December 2005 the same plaintiffs' lawyers filed in Charleston County a class action complaint, alleging a class of sexual abuse victims that included the individual plaintiffs John Doe 66 and John Doe 66A in that it alleged, "a class of other persons similarly situated as victims of priest sexual abuse in South Carolina," (R. App. pp. 198 to 212,

Complaint 2005-CP-10-4913, R. App. p. 205 ¶ 34). The plaintiff and putative class representative was designated as John Doe 53. R. App. 198.

At no point while that class action was pending in Charleston County was a motion filed for class certification or class settlement approval. The Doe 53 class complaint would later be duplicated exactly, and re-filed in Dorchester County, as part of the parties colluding to judge-shop (Compare, R. App. pp. 198 to 212 with R. App. pp. 239 to 253).

A class settlement is reached at mediation. The parties met again in early January 2006 to further discuss a class settlement (R. App. pp. 1151 to 1152, p. 1151 ¶ 1, January 17, 2006 letter from class counsel, R000095). Without a single motion having been argued or decided,[1] and without a single deposition having been taken in any of the three cases, within seven months of the class action complaint being filed, a class settlement was reached during a June 2006 mediation (R. App. pp. 1153 to 1156, handwritten class settlement, redacted for public filing, identifying at p. 1 (R. App. 1153) the three Charleston cases then pending that the agreement resolved, if it was approved). No other sexual abuse case brought by the lawyers who would be class counsel was then pending, in any judicial circuit.

Page 2 of the 2006 class settlement agreement, R. App. p. 1154 ¶ 1, reflects that the class settlement proposed two classes, defined as "actual victims of Diocese abuse," and "spousal &/or parent claims deriving from victims abused." At page 3, R. App. 1155 ¶ 5, four individuals were proposed to represent the classes. Also, on page 3, R. App. 1155 ¶ 6, the parties agreed that whether or not the court approved the class settlement, the individual claims of those four

[1] The Charleston County public court docket in the three Charleston cases reflects that each time the court scheduled a motion for hearing the parties requested, and got, a continuance.

designated individuals would be ended for a stated sum of $460,000. (That provision would be modified before the court was asked to approve it.) At page 3, R. App. p. 1155 ¶ 4, the parties agreed that class counsel would request a fee of between $950,000 and $2.5 million, "subject to Defendants' obtaining credit to secure the obligation." (That provision would also be modified before the parties sought court approval.)

The judge-shopping. Rule 23(c), SCRCP prohibits a class action being "dismissed or compromised without the approval of the court…." If it was approved, the 2006 mediated class settlement agreement would resolve the only cases then pending, meaning the two individual and one class action case pending in Charleston County for sexual abuse victims, and the claims of every other abuse victim in the class. The class settlement would also resolve claims of every spouse and parent of those victims, a class of persons for whom no case was then pending.

But that 2006 mediated class settlement was not submitted for court approval, as Rule 23(c), SCRCP requires.

Instead, the parties desired to judge-shop, motivated to move court approval and oversight of the June 2006 mediated class settlement agreement away from judges in Charleston County so that class settlement approval and oversight would take place before a judge in Dorchester County that the parties preferred, Judge Goodstein.

Judge Goodstein and her husband have a "long social history" and long professional ties with plaintiffs' counsel. (R. App. pp. 36 to 37, p. 36, Order of July 13, 2007 at p. 1), an affiliation never disclosed to class members.

To succeed in that judge-shopping necessarily required three things.

First, it required the parties to cooperate extensively in various collusive steps, set out below.

Second, it required that Judge Goodstein agree to be shopped-for. She had to agree to assert jurisdiction in Dorchester County over the class settlement agreement that was reached in a Charleston County class action and would resolve the other two pending Charleston County cases as well as the claims of parents and spouses of those victims and the claims of persons in their respective classes.

Third, at various points the parties apparently decided information be both withheld from, and misrepresented to, Judge Goodstein.

Each of those three elements necessary for the judge-shopping in fact took place, as detailed below. To date, those actions have been entirely ignored by different courts at every level of review, neither approved nor stated to be improper.

After reaching the 2006 mediated settlement, the parties spent some weeks sorting out how to proceed with the judge-shopping they had agreed to.[2] Eventually, the parties settled on a multi-step approach to judge-shopping.

First, they agreed to pretend that there had been no 2005 proceedings in Charleston County that was resolved by the 2006 mediated class settlement agreement, a pretense that continues.[3] The parties colluded so as to act as if they were starting anew. Two new class action

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[2] The time records submitted by class counsel as part of the fee petition (Att. 20) disclose judge-shopping ideas considered but not taken. E.g., R. App. p. 351 (Fee petition entries for 8/12/06 and 8/14/06), entries for a consent order changing venue.

[3] See, R. App. pp. 117 to 122 at p. 117 ¶ 1, Order of March 24, 2023, which identifies August 2006, not 2005, as the beginning of the class action.

cases for sexual abuse matters were filed August 15, 2006, in Dorchester County, as if then pending was neither the Charleston County class action case, nor the two individual cases, and as if the 2006 mediated class settlement agreement potentially resolving them had not been reached. None of the "new" class action complaints in Dorchester County mention either the 2006 class settlement agreement or the class action sexual abuse case in Charleston County filed in 2005.

The first of the new Dorchester County class complaints was assigned case number 2006-CP-18-1310 (R. App. pp. 213 to 220), alleged loss of consortium claims on behalf of three putative class representatives identified as the spouse of John Doe 53, the spouse of John Doe 66, and the mother of John Doe 53. These individuals were identified, respectively, as Jane Doe 1, Jane Doe 2, and Rachel Roe. (R. App. pp. 213 to 214 ¶¶ 1 to 3.)

The second of the new Dorchester County class complaints, also filed on August 15, 2006, was assigned case number 2006-CP-18-1311 (R. App. pp. 221 to 238). That class complaint alleged sexual abuse of an individual identified as John Doe 67, but in the Dorchester County class complaint (R. App. 228 to 229, ¶¶ 26 to 35) he was alleged to be the class representative for the identical class alleged in the pending Charleston County class complaint, 2005-CP-10-4913 (R. App. pp. 198 to 212), for which John Doe 53 was the class representative. R. App. p. 205 ¶ 34 to p. 206 ¶ 42).

Consider the import of the class action complaints for John Doe 67 in Dorchester County (R. App. pp. 221 to 238) and for John Doe 53 in Charleston County (R. App. pp. 198 to 212). At R. App. 228 ¶ 27, John Doe 67 was alleged to be "a representative of a class of other persons similarly situated as victims of priest sexual abuse in South Carolina," the identical class language alleged in the 2005 Charleston County class action in which John Doe 53 was alleged

to be the class representative (R. App. p. 205 ¶ 34). In the Charleston County filing, John Doe 67 was included as an absent member of the class in which John Doe 53 was alleged to be the class representative. By contrast, for the identical class, in the parallel and overlapping Dorchester County class complaint, John Doe 67 was alleged to be the class representative of the same class for which (a) John Doe 53 was already claimed to be class representative, and (b) making John Doe 53 an absent member of the class in which John Doe 67 was alleged to be the class representative while, simultaneously, John Doe 67 was an absent member of the class for which John Doe 53 was the representative. The same lawyers alleged that each of those abuse victims (Doe 67 and Doe 53) was to be the class representative of the same class, of which the other was an absent member. Additionally, each class complaint includes as absent class members Johns Doe 66 (R. App. pp. 126 to 181) and 66A (R. App. pp. 182 to 197), the other individual cases already pending in Charleston County. And, also simultaneously, each class complaint was already resolved by the 2006 mediated class settlement, if approved (R. App. pp. 1153 to 1156).

To the extent class counsel and class representatives assume fiduciary obligations to absent class members when a class action is alleged,[4] the overlapping class allegations and competing class representative allegations for the same alleged class and conflicting absent members created a conflict between and among John Doe 53, John Doe 67 and the other absent class members.

[4] "[A] plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class, including the obligation to inform them of proposed compromises of the group action." *Premium Investment Corp. v. Green*, 283 S.C. 464, ___, 324 S.E.2d 72, 76 (1984 S.C. App.),

Acting in concert, not as adversaries as to the judge-shopping plan, the Diocese made no motion to dismiss these newly filed Dorchester County class action cases due to either the prior pending actions (as Rule 12(b)(8), SCRCP authorizes), or the 2006 mediated class settlement agreement (as Rule 43(k), SCRCP authorizes). Instead, the Diocese cooperated by accepting service. (E.g., R. App. p. 1157, cover letter for acceptances of service),[5] apparently having no objection to paying their counsel to defend the same class allegations in two different forums, and for answering new complaints which had already been supposedly resolved by the 2006 mediated class settlement agreement that, even if not approved, settled the individual claims of John Doe 67 among the four individuals whose claims were resolved. (R. App. p. 1155 ¶6).

Acting in concert, not as adversaries, the parties began communicating with Judge Goodstein not later than August 21, 2006 (e.g., Att. 20, redacted fee petition at p.66). As of August, 2006 it is not known how much the parties disclosed to Judge Goodstein about her being the object of judge-shopping, or about the prior class actions or prior class settlement that preceded the Dorchester County class action filings, or about the overlapping (and conflicting) class allegations in the Charleston and Dorchester actions.

But not later than September 20, 2006, Judge Goodstein was informed that mediation in "these priest abuse cases" had been "completed in mid-June" (in other words, before either of the Dorchester County class actions filed in August 2006). (R. App. p. 1159 ¶ 2, letter of September

[5] The letter (R. App. p. 1157) correctly listed the caption and number of case 2006-CP-18-1310, but mixed a correct Doe 67 caption from Dorchester County with a case number from Charleston County. Instead of identifying the case as 2006-CP-18-1311, the letter correctly listed the Doe 67 caption from the Dorchester County filing but mistakenly listed the Charleston County case number already in use for the Doe 66A individual case, 2005-CP-10-3293. Pretending multiple cases don't exist can make it hard to keep details straight.

20, 2006 to Judge Goodstein). By that point, if not before, Judge Goodstein knew or should have known the parties were colluding. She was on notice that a class settlement agreement had been reached in June 2006, that there had been proceedings before August 2006 that resulted in that agreement, and, since none of those prior proceedings was in Dorchester County, that the parties were judge-shopping to move that agreement to her for review and approval.

There is no indication that information elicited any questions from Judge Goodstein.

The parties met again with Judge Goodstein on October 6, 2006 (R. App. p. 358, entries for 10/5/2006), and the final steps needed to complete the judge-shopping were agreed to among the parties, apparently also including Judge Goodstein. The parties agreed to "clone" the already settled class action case from Charleston County, 2005-CP-10-4913 (R. App. pp. 198 to 212), which alleged John Doe 53 was representative for absent class members (necessarily including Johns Doe 66, 66A and 67), and re-file that existing class complaint in Dorchester County in 2006 (R. App. pp. 239 to 253).

The Dorchester County version (R. App. pp. 239 to 253) is identical in every aspect but county name to the Charleston County version (R. App. pp. 198 to 2125).

The "cloned" class complaint was assigned case number 2006-CP-18-1636 (R. App. pp. 239 to 253 at p. 239), making the identical class action for John Doe 53 pending in two counties simultaneously.

At this point class counsel had alleged, and the Diocese had accepted:

(a) in Charleston County that John Doe 53 was the class representative for the class in which Johns Doe 66, 66A, and 67 were absent class members, and, simultaneously,

(b) in Dorchester County that John Doe 53 was the class representative for the identical class in which Johns Doe 66, 66A, and 67 were absent class members and, simultaneously,

(c) in Dorchester County, that John Doe 67 was the class representative for the identical class in which Johns Doe 53, 66 and 66A were absent class members and, simultaneously,

(d) that all the cases then pending (in Charleston and Dorchester County) were included in the 2006 mediated class settlement that would resolve them if that agreement was approved.

The Diocese accepted these various conflicting allegations, and again made no motion to dismiss despite either the prior pending 2005 class action (R. App. pp. 198 to 212), or the 2006 mediated class settlement (R. App. 1153 to 1156). To have done so would have defeated the purpose of the agreed-upon judge-shopping.

The same day that the "cloned" Doe 53 class complaint (R. App. pp. 239 to 253) was filed in Dorchester County (October 6, 2006), class counsel moved (R. App. pp. 254 to 258) in Dorchester County to certify the classes and approve the class settlement. At R. App. p. 256 ¶ 3.a, that motion proposes the class members be notified by nationwide publication via *USA Today*. (That nationwide notice to the class via *USA Today* was later removed, again by agreement of the parties and without comment or inquiry by Judge Goodstein.)

On October 17, 2006, Judge Goodstein assumed jurisdiction, declared the three Dorchester County cases complex, ordered them consolidated, and assigned them to herself (R. App. pp. 1 to 3 at p. 1, Order of October 17, 2006).

That left three cases pending in Charleston County.

The same day, class counsel wrote to the administrative judge in Charleston County (then Judge Jefferson) to submit "proposed consent orders to dismiss" without prejudice the three cases that had been filed in 2005 in Charleston and settled in 2006 (R. App. pp. 1161 to 1162, letter from class counsel to Judge Jefferson). Judge Jefferson was not told that a class settlement had been reached, or that class proceedings had begun in Dorchester County after the 2006 mediated class settlement, or that the existing class action for John Doe 53 in Charleston County had been "cloned" and duplicated by re-filing it in Dorchester County. (R. App. p. 1161).

The consent orders dismissing the Charleston cases without prejudice were entered in Charleston County, completing the judge-shopping process. (R. App. 4). The judicial approval mandated by Rule 23, SCRCP before a case was settled or dismissed had not taken place. The judge-shopping avoided that Rule 23, SCRCP obligation from happening in Charleston County.

At that point, all subsequent proceedings were in Dorchester County.

The Diocese paid an undisclosed contingency fee. As noted above, the 2006 mediated class settlement (R. App. pp. 1153 to 1156) at p. 1155 ¶¶ 5 and 6), resolved the individual claims of four persons[6] whether or not the class settlement was approved. On November 20, 2006, the Diocese sent two checks to class counsel (R. App. p. 1163, checks). One check was made out in the amount of $345,000.00, payable to class counsel's trust account, and the other, for $145,000.00 was payable to class counsel's firm (R. App. p. 1163, checks).[7] Class counsel

[6] The four persons apparently included John Doe 67. If so, he was not eligible to be a class representative, as was true for the others as well when this provision was expanded.

[7] The Diocese mistakenly sent $490,000 despite the agreement being $460,000. R. App. 1163.

described this as the "initial settlement disbursement" (R. App. p. 296, entry of 11/20/06), and as "atty fees from initial payment." (R. App. p. 370, entry of 12/7/06).

Adding new terms to the mediated class settlement. By January 2007, the handwritten 2006 mediated class settlement (R. App. pp. 1153 to 1156) had been typed up (R. App. pp. 264 to 286), with new provisions, and was submitted to the court along with a second motion (R. App. pp. 259 to 263) to certify classes and approve the class settlement.

The new provisions added between the 2006 mediation and the 2007 motion for approval, prioritized the fee to class counsel above recovery for class members, and changed the scope of the notice program for the class.

One term added to the agreement expanded from four to seven the number of individuals whose claims were released and settled whether or not the class settlement was approved (R. App. pp. 264 to 286 at p. 275 ¶ 4).[8] That increased the settlement amount for resolving individual claims from $460,000 to $550,000. (Compare R. App. at p. 1155 ¶ 6 to R. App. p. 275 ¶ 4).

Pertinent to this appeal, the $145,000 fee payment to class counsel (R. App. p. 1163, checks) was apparently never disclosed to Judge Goodstein, a concealment obviously done by agreement between class counsel and the Diocese. That payment is in neither (a) the 2008 accounting of how class funds were disbursed that was given to the court (R. App. pp. 1167 to 1174) or (b) the revised accounting submitted in 2009 (R. App. pp. 1179 to 1187).

[8] The expansion added to the claims settled regardless of class approval the three new "class representatives" from the "consortium class" from 2006-CP-18-1310, John Doe 67 apparently already being one of the four persons originally listed in the 2006 mediated class settlement. Their interests were thus different from every other class member.

Nearly 100% of the time and expenses submitted by class counsel in 2007 as part of the attorney fee request made in the class action (R. App. pp. 287 to 467 at pp. 314 to 381, redacted time records), was time for which class counsel had been paid this undisclosed contingency fee (R. App. 1163) for the work done for the four individuals whose claims were resolved (R. App. at p. 1155 ¶ 6; R. App. p. 275 ¶ 4), whether or not a class settlement was approved.

Moving to approve the class settlement and its new terms. In January, 2007 class counsel moved the court (R. App. pp. 259 to 286) to approve the new terms added (R. App. pp. 264 to 286) to the 2006 mediated class settlement (R. App. pp. 1153 to 1156). Page 265 of the Record on Appeal lists the three 2005 Charleston County case numbers as included in the class settlement, including the redundant Doe 53 class action, which is listed twice: on R. App. p. 264 (as case 2006-CP-18-1636) and on R. App. p. 265 (as case 2005-CP-10-4913).

As was true of the handwritten agreement in 2006 (R. App. at p. 1154 ¶ 1), the two settlement classes defined on p. 2 of the typed agreement (R. App. p. 265 ¶ 1) contain no geographic limitation. The state in which a claimant lived did not matter: neither the members of the "Primary Class" (R. App. p. 265 ¶ 1.A) nor those of the "Consortium Class" (R. App. p. 265 ¶ 1.B.) was restricted to South Carolina residents.

Each of the appellants, the McDonalds, was known to reside out of state and each was a member of the "Consortium Class."

The 2007 typed agreement (R. App. pp. 264 to 286) refers back to the 2006 mediation (R. App. at p. 266 ¶ 3), sets out (R. App. at p. 267 ¶ b.) an arbitration process to determine amounts class claimants may receive (provided they first waived all appeal rights, R. App. at p. 275 ¶ v.) and (at R. App. p. 268) stipulated a $20,000 payment for each of the "Consortium Class"

members. Each of the McDonalds was entitled to receive that $20,000 payment.[9] At R. App. p. 274 ¶ u.), the agreement provided that "all costs associated with management of the class shall be paid from the settlement fund," which included costs incurred by class counsel.[10] *Id*.

As to class counsel's fees, at R. App. pp. 275 to 276 ¶ 5, the agreement provided a type of "clear sailing" agreement, the Diocese agreeing to a range for a court-awarded attorney's fees to class counsel if the class settlement was approved. According to R. App. pp. 275 to 276 ¶ 5, that fee was to pay for the work done by "*plaintiffs'* counsel (past and future)" and "the work past and future *and* their role as class counsel." (Emphases added). Similarly, the order provided the fee was for "time spent" prior to the 2007 fairness hearing, "additional time expended, *and to be expended*, on the case since that time, and in *carrying out the terms of the settlement*." (R. App. at p. 51, emphasis added). In other words, both the settlement agreement and the order distinguished between class counsel's roles as plaintiffs' lawyers and as class counsel, and the fee was for both.

As noted above, class counsel submitted their fee petition in February 2007 (R. App. pp. 287 to 467, redacted), requesting a fee of $2.5 million. Nearly all of the time submitted in the fee petition was time spent on the four individual cases settled in the 2006 mediated class settlement. For that time, class counsel had already been paid a contingency fee not disclosed to the court. (R. App. p. 1163, the checks of November 2006).

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[9] As set forth below, neither received that payment, as fees and costs were deducted.

[10] The 2008 accounting and the revised 2009 accounting each reflected that the costs were paid to class counsel from the settlement fund, as agreed to in R. App. at p. 274 ¶ u., and as ordered. R. App. at p. 5 § 6. (Compare, R. App. pp. 1167 to 1174, 2008 Accounting; R. App. 1179 to 1187, 2009 Accounting and R. App. pp. 38 to 77, Order of July 30, 2007).

Among other things, the fee petition claimed:

- many days of counsel working more than 24 hours;[11]
- class counsel's conflicts of interest from his own "lifelong relationships" with priests and others of the Diocese (R. App. 308 ¶14);
- class counsel having "functioned in many capacities" for the Diocese in the Catholic church he attended (*Id.*);
- identical entries of 27 hours on the 30th of each month (including "February 30" in multiple years), always in the same pattern of 2 + 5 + 5 + 5 + 10 hours for identical monthly entries, (e.g., R. App. pp. 314, 315 to 316, 316, 317, 318);
- time claimed for motion hearings which never took place, (e.g., R. App. 320),
- time claimed for work on the cases in Charleston County, (e.g., R. App. pp. 314 to 347), and
- 0.5 hours for each email and each fax.[12]

Judge Goodstein's rulings. Not having been told that the vast majority of time submitted for the fee award (Att. 20, fee petition) was time for which class counsel had already been received a contingent fee and was mostly work done on Charleston cases, the court

[11] E.g., such days appear in R. App. at p. 324 (30 hrs), p. 329 (40 hrs), p. 330 (30 hrs), pp. 330 to 331 (40 hrs), p. 332 (60 hrs), p. 333 (80 hrs), p. 334 (90 hrs), p. 351 (30 hrs), p. 351 (35 hrs), pp. 354 to 356 (27.5 hrs), and pp. 356 to 357 (51.5 hrs).

[12] E.g., on 9/27/06 (R. App. 354 to 356) class counsel claimed a total of 27.5 hours for sending 55 emails, 0.5 hours each, all of which time was claimed to have been incurred at the exact same time.

approved a $2.5 million fee (R. App. at 51). That $2.5 million fee was paid to class counsel by wire on September 4, 2007 (R. App. at p. 1168). No inquiry was made into the days claiming more than 24 hours worked, or any of the other anomalies.

Class counsel charged additional fees. After receiving the undisclosed contingent fee payment, then the $2.5 million fee, class counsel proceeded to charge class members additional fees and costs.

The charges made to the McDonalds for fees and costs are reflected in R. App. 1164 to 1166, settlement statements.

No order provides for those additional charges, and those charges are at issue in this appeal. The circuit court made no examination of those additional charges. Nor were those additional charges disclosed to the court in either the 2008 (R. App. pp. 1167 to 1174) or the 2009 accountings (R. App. pp. 1179 to 1187). As noted above, both the settlement and the order authorizing the $2.5 fee appears to include within its scope the work done and to be done for individual class members.

No party has contended that any order authorized those charges which, for the class, are estimated to exceed $900,000. The 20% fee charged to each of the McDonalds (and presumably every other class member), is reflected in their settlement statements (R. App. 1164 to 1166). An additional 10% fee was charged by class counsel for those class members represented by separate counsel, splitting the 20% overcharge). None of that was disclosed to Judge Goodstein.

By January 2007, when the 2006 mediated agreement was typed up (R. App. pp. 264 to 286), the parties had added two other provisions relevant to the issues in this appeal. First, the parties added ¶ 6.B, starting at R. App. 276, a provision which overtly elevated class counsel's

fee over the payments to be made to class members. Once the fee was determined, the recovery to class members were subordinated to the fee and recovery to class members was to be reduced *pro rata* to pay the fee, if needed. (R. App. at p. 276 ¶ B.). That term created an economic incentive for class counsel to minimize recovery for class members so as to minimize the extent of any *pro rata* reduction. The conditions for reducing payments to class members were never met. Class counsel reduced payments to class members anyway, by charging the additional fees and costs no order authorized.

Second, the parties added ¶ 6.C. (R. App. at p. 277), a reverter clause for what the present text of Rule 23(e), SCRCP refers to as "residual funds." That clause returned to the Diocese any funds which remained after the attorney fee and class member claims were paid. The provision created an economic incentive for both class counsel and the Diocese to minimize recovery to class members.[13]

False statements to the court. Another example of the difficulty for keeping things straight when judge-shopping by pretending the Charleston cases never existed, both the original motion for class settlement approval (R. App. pp. 254 to 258 at p. 255), and the amended motion (R. App. pp. 259 to 286 at p. 260) state that the class action cases began in 2006 with "June 30, 2006" filings by John Doe 67, Jane Doe 1, Jane Doe 2 and Rachel Roe. The assertion in each motion is simply false, as no filings occurred on June 30, 2006.

[13] Some courts have held such provisions to reflect presumptive unfairness for a class action. E.g., *Briseno v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34 (D. Me. 2005). No South Carolina case appears to have addressed either.

The Charleston County filings (R. App. pp. 126 to 151; 152 to 181; 182 to 197; 198 to 212) occurred in 2005. The mediated class settlement (R. App. 1153 to 1156) was reached June 14, 2006, not June 30. The first Dorchester County filings (as the file-stamps at R. App. at pp. 213 and 221 show) were made on August 15, 2006. No case was filed June 30, 2006.

The amended motion for class settlement approval, filed January 17, 2007 (R. App. pp. 259 to 286), claims, falsely (at R. App. p. 260), that Johns Doe 53, 66 and 66A "were subsequently added to the case," when in fact the cases for those Charleston plaintiffs were the first filed and were the basis of the 2006 class settlement.[14] The Dorchester County cases were the ones "added." Telling the truth would expose pretense on which the judge-shopping rested.

Persistently misrepresenting how the class settlement reached the court for approval obscures both the judge-shopping done after the 2006 mediated class settlement and that the parties had evaded the mandatory provisions in Rule 23, SCRCP for judicial approval of a class settlement before settlement or dismissal.

That mis-stated history was accepted by the trial court in the order of March 24, 2023 recounting the procedural history:

> *On August 15, 2006, the first two* of the three above-captioned class actions were commenced on behalf of victims who were allegedly sexually abused by members of the Catholic church in their capacity as agents of the Bishop of Charleston, a Corporation Sole ("the Diocese"). (Complaints filed in C/A Nos. 2006-CP-18-1310 and 2006-CP-18-1311.) *The third suit was commenced on October 6, 2006*. (Complaint filed in C/A NO. 2006-CP-18-1636.)

[14] And, as noted above, the allegations in 2005-CP-10-4913 were that John Doe 53 was the class representative for a class which included Johns Doe 66, 66A, and 67.

R. App. at p. 117, emphases added. The reference to 2006-CP-18-1636 is, of course, a reference to the "cloned" class action for John Doe 53, the case filed in 2005 in Charleston County and duplicated for re-filing in Dorchester County. The motion to alter or amend (R. App. pp. 616 to 636) in this respect and others was denied. (R. App. pp. 123 to 125, order denying motion).

Changes to the notice program for the class settlement. Also of note, unlike the original 2006 motion for class settlement approval (R. App. pp. 254 to 258 at p. 256), the 2007 amended motion (R. App. 259 to 286 at p. 261) omitted the nationwide notice originally proposed for class members through the national publication, *USA Today*.[15] No equivalent national publication replaced that nationwide notice. Nationwide notice was simply dropped, even though the class definitions had no geographic limit. By agreement, the "best notice practicable" was not used, even though it is required by *Hospitality Mgmt. Assocs. v. Shell Oil Co.*, 356 S.C. 644, 654, 591 S.E.2d 611, 616 (2004), quoting (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, ___ (1985).

Preliminary approval for the class settlement. On January 23, 2007 Judge Goodstein granted the motion to certify the classes and ordered "the proposed settlement agreement is preliminarily approved *subject to the objection period and Fairness Hearing* as set out in this order" (Order of January 23, 2007, R. App. pp. 5 to 34 at p. 5, emphasis added). As reflected in R. App. at p. 7 n. 2, the Diocese took no position on class certification. As preliminary approval was subject to the fairness hearing to be held, the January approval did not begin the claims

[15] As was related to Judge Taylor in 2023, during a 2014 hearing in a related matter class counsel represented to the court that they will testify that the nationwide notice was removed at the request of his "adversary," the Bishop. R. App. at p. 1139, Transcript of hearing.

process. The fairness hearing was set for March 9, 2007, and notice of that hearing was ordered to run once a week for six weeks. (R. App. p. 12). No notice was ordered for the class or to objectors of the connections between class counsel and Judge Goodstein.

Once written objections had been received, class counsel on March 1, 2007 proposed certain modifications to the settlement agreement to accommodate certain of the objections (R. App. pp. 477 to 482). The fairness hearing was held March 9, 2007 (R. App. pp. 637 to 821). Judge Goodstein took under advisement the issues from the objections raised at the Fairness Hearing.

On July 13, 2007 Judge Goodstein issued two consent orders between class counsel and the Diocese: one related to a motion to compel (R. App. p. 35, Order on Motion to Compel), and another order summarizing (but not by any publication to the class) her "long social history" and professional connections to class counsel (R. App. pp. 36 to 37, Order on Waiver Disclosures).

On July 30, 2007, Judge Goodstein issued an order concerning the fairness hearing and the objections raised during that hearing (R. App. pp. 38 to 77). She approved minor modifications to the settlement in light of objections (R. App. pp. 47 to 49) but without explanation reduced from six weeks to three weeks (R. App. at p. 49) the notice period for the claims process, to begin in ten days (*Id*.). Nationwide notice was not ordered. That the proposed notice was reduced in scope and time elicited no questions or explanation from Judge Goodstein.

On August 30, 2007, objectors to the class settlement reached a separate settlement with the Diocese (R. App. pp. 82-83), apart from the class action, which class counsel "or his clients" agreed to partially fund with a $100,000 payment (R. App. at p. 83). The next day, Judge Goodstein incorporated that agreement into an order (R. App. pp. 78 to 83) that authorized the

class settlement to proceed with notice and claims. Neither the court nor the class members were informed that the settlement terms for the objectors were better than those for the class members. Nor did the court inquire as to the terms for objectors.

Nor did any publication to the class disclose the $2.5 million fee award to class counsel, or the conflicts class counsel had from his lifelong association with the Diocese and his friendships with many priests.

The claims period ended. In December 2007 the period for class members to make claims ended. The McDonalds participated in the claims process and each received a gross payment of $20,000, reduced by charges for a 20% fee and costs (R. App. 1164 to 1166).

In February 2008 the arbitrations took place for the "Primary Class" claimants. Awards were made by the arbiter. With no court oversight or approval, when distributions were made to any class member class counsel charged and collected the additional charges reflected by the fee and cost charges to the McDonalds (and other class members, R. App. 1164 to 1166)). The residual funds reverted to the Diocese. R. App. at p. 1186.

Post-award proceedings. On March 10, 2008 the accounting at R. App. pp. 1167 to 1174 was submitted by counsel to Judge Goodstein, but was never acted upon. It was neither approved nor denied.

On April 28, 2008, class counsel paid $100,000.00 from the firm's trust account to the Diocese to help fund the better settlement with objectors to the class action (R. App. pp. 1175 to 1176, redacted). That payment also does not appear on the accountings for the class action, and it has not been disclosed for whom that $100,000 payment was made (clients or counsel) and in what proportion by each if it was a shared payment.

In 2009 a revised accounting (R. App. pp. 1179 to 1187) was submitted by counsel to Judge Goodstein (R. App. pp. 1188 to 1190 Att. 33, transmittal letter and proposed order), and also was never acted upon, neither approved nor denied, even though Judge Goodstein had issued other orders up to 2009, as the docket reflects.

Neither the 2008 accounting nor the 2009 accounting shows the additional 20% fees charged by class counsel of the McDonalds (or other class members); or the additional 10% fee charged by class counsel for each of those class members who engaged other lawyers (those lawyers, who received no court-awarded fee, receiving the other 10%). As noted above, neither accounting shows the contingency fee payment made by the Diocese to class counsel in 2006. Neither accounting shows the $100,000 contributed to fund settlements for objectors.

In that regard each accounting misrepresents and understates the fee paid to class counsel. The exact fees cannot be determined from what was disclosed to the court or documents subsequently produced to date. Additional, targeted discovery is needed.

On March 19, 2009 the South Carolina Supreme Court declined to assert its original jurisdiction in a related case brought over concerns arising from the conduct of the class action. (R. App. pp. 84 to 85). That 2008 pleading identified many of the issues related in this Statement. The Supreme Court's 2009 order (R. App. pp. 84 - 85) neither approved nor disapproved of the unusual actions in the class action, but criticized the lawyer who attempted to call the court's attention to the issues. Pertinent to this appeal, the Supreme Court ordered that the class action be closed in six months (R. App. at p. 84), working out to a deadline of September 19, 2009. That order required that any extension to that six-month deadline could be granted only by the Supreme Court. *Id*.

On April 15, 2009, counsel for the Diocese proposed to Judge Goodstein a consent order of dismissal, signed by counsel (R. App. 1188 to 1190). Despite the Supreme Court order directing that the class action be closed, Judge Goodstein took no action on that consent order of dismissal. Despite the September 19, 2009 deadline, and the directive that any extension could come only from the Supreme Court, the parties were content for Judge Goodstein to take no action. Neither class counsel nor then-counsel for the Diocese sought from the Supreme Court any extension of the September 19, 2009 deadline. The Supreme Court's deadline was simply ignored.

At that point filings in the class action stopped for three years until April 2012, when class counsel moved to enforce the class settlement and sought to clarify the geographic scope of the class action (R. App. pp. 523 to 524).

On January 24, 2013 Judge Goodstein acted, but did so by issuing an order by which she recused herself "from hearing any further matters" in the class action (R. App. pp. 105 to 106). No reason for the recusal was stated.

On April 30, 2013, the Supreme Court assigned Judge Kinard to the class action (R. App. pp. 107 to 108). The April 2012 pending motion by class counsel was not sent to Judge Kinard. Instead, as Judge Dickson explains in his orders on that motion (R. App. pp. 109 to 113 at p. 112 n. 1), despite the order assigning Judge Kinard to the class action, class counsel's 2012 motion had come to Judge Dickson as Resident Judge after Judge Goodstein recused herself.

On June 17, 2013, Judge Dickson entered an order in the class action permitting certain information to be shared with an insurer (R. App. pp. 109 to 110), and on December 17, 2013

Judge Dickson entered another order (R. App. pp. 111 to 113), which found (R. App at p. 113) the class members were not limited to only South Carolina residents, as class counsel had sought.

It does not appear Judge Kinard issued any order during his tenure as judge assigned to the class action. He passed away in May 2015.

In January 2014 the South Carolina Supreme Court decided *Doe v. Bishop*, 407 S.C. 128, 754 S.E. 2d 494 (2014) (R. App. pp. 1329 to 1332, a related case from Charleston County concerning adequacy of class counsel's representation of certain out-of-state class members who, because they lived out of state, had received no notice of the 2006 mediated class settlement. The appeal was from an order which had dismissed their complaint, but the Supreme Court reversed and remanded the case to permit further proceedings.[16]

To replace Judge Kinard, on June 12, 2015 the South Carolina Supreme Court appointed Judge Nicholson to the class action (R. App. pp. 114 to 115). In proceedings after remand in *Doe v. Bishop*, Judge Nicholson would not permit any deposition of class counsel, despite the holding of *Doe v. Bishop*.

On May 11, 2016, John Doe 66 (acting *pro se*) moved in the class action for a post-award fairness hearing, seeking review of class counsel's conduct (R. App. pp. 525 to 530). No action was taken in response to that motion for over six years.

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[16] *Doe v. Bishop*, 407 S.C. 128, ___, 754 S.E.2d 494, 501 (S.C. 2014):

> Should appellants establish on remand that they were denied due process owing to lack of notice or because of inadequate representation in the class action proceedings, and that the statute of limitations was tolled, they may proceed to further prosecution of their claims.

In 2020, Judge Nicholson retired, having issued orders in a number of related cases (including cases remanded by *Doe v. Bishop*, (e.g., R. App. pp. 1207 to 1227) but apparently no orders as to the class action.

In August 2022 the McDonalds joined the John Doe 66 motion from 2016 for post-award fairness hearing (R. App. pp. 531 to 569). The McDonalds moved the court to review class counsel's conduct in light of the existing court orders, given the extensive collusion, judge-shopping, information withheld from the court, misrepresentations to the court, and the apparently unauthorized charges made by class counsel of the McDonalds and (apparently) of every other class member, contending the fees and costs charged by class counsel did not comply with Judge Goodstein's orders.

By order of November 10, 2022, the South Carolina Supreme Court vested Judge Taylor with exclusive jurisdiction to "hear and dispose of" the class action (R. App. p. 116). Judge Taylor held a hearing (R. App. pp. 1094 to 1147, transcript of hearing) and by order of March 24, 2023 (R. App. pp. 117 to 122), denied the request to review whether class counsel complied with the orders of Judge Goodstein. By order of April 5, 2023 (R. App. pp. 123 to 125, Judge Taylor denied the McDonalds' April 3, 2023 Motion to Alter or Amend (R. App. pp. 616 to 636). Those orders by Judge Taylor are the immediate orders from which this appeal is taken.

Judge Taylor declined to review whether class counsel properly implemented Judge Goodstein's orders, finding (at R. App. pp. 120 to 121) that there was no authority to make such

a review[17] and that doing so would "effectively overrule Judge Goodstein's order." R. App. at p. 121.

As noted above, a motion to alter or amend (R. App. 616 to 636) was made raising twelve specific issues with the March order, which was denied by a form order (R. App. pp. 123 to 125).

This appeal followed.

Argument

> The circuit court abused discretion by refusing to review evidence that class counsel (a) charged class members fees and costs which no order authorized, or (b) failed to make proper disclosures to class members (if any charge was authorized), given (c) the class action abuse in this record.

"[A] court's failure to exercise its discretion is itself an abuse of discretion. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015).

Judge Taylor's rationale for declining to review whether class counsel properly implemented Judge Goodstein's orders or made proper disclosures to class members rests on two rationales, each of which we contend was an error of law. First, at R. App. pp. 120 and 121, that there was no authority to enable him to make such a review, and second, that doing so would "effectively overrule Judge Goodstein's order." R. App. at 121.

Judge Taylor's order does not explain how assessing the extent of compliance or non-compliance with Judge Goodstein's orders, an exercise in enforcing Judge Goodstein's orders, would "effectively overrule" Judge Goodstein. The motion calls for examining and ruling on matters on which Judge Goodstein had never previously ruled. Nor is the rationale explainable.

[17] The court order states that the parties cited no authority for a post-award fairness hearing, but the transcript of hearing (January 27, 2023) shows that counsel for the McDonalds contended that Rule 23(d)(2), SCRCP provided that authority. (R. App. pp. 1102, 1107, 1141, 1142, 1145).

Judge Taylor's conclusion is an error of law for each of four independent reasons.

A. **Rules 23(c) and 23(d)(2), SCRCP each impose on the court not just permission but a *duty* to protect class members — including to protect the class from class counsel**. Rule 23(c), SCRCP prohibits a class action from being "dismissed or compromised without approval of the court." At each stage — compromise or dismissal — the court is to provide notice of the proposed dismissal or compromise to all members of the class. Rule 23(d)(2), SCRCP is even more pointed in describing the court's duty as being to "fairly and adequately protect the interests of the persons on whose behalf the action is brought."[18]

South Carolina describes the court's obligation under Rule 23(d)(2), SCRCP as "the broad power" to protect the interests of the class. *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 458 (S.C. 2008); *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992).

The Federal Rules of Civil Procedure, which provide "guidance" for construing the South Carolina Rules, *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016), are similar. Both Rule 23, SCRCP and Fed. R. Civ. P. 23 impose fiduciary duties on parties and counsel starting when a class action is alleged. E.g., *Shelton v. Pargo*, 582 F.2d 1298, 1306 (4th Cir. 1978) (fiduciary duties on class representative and counsel, corresponding "special

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[18] Rule 23(d)(2), SCRCP states, in pertinent part (emphases added):

> (d) Orders in the Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:
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> > (2) The court may *at any time* impose such terms as shall *fairly and adequately protect the interest* of the persons on whose behalf the action is brought or defended. * * * It may order that notice be given in such manner as it may direct of a proposed settlement, of entry of judgment, or *any other proceedings* in the action including notice to the absent persons that they may come in and present claims and defenses if they so desire.

responsibility" on court to "checkmate any abuse of the class action procedure."); *Premium Investment Corp. v Green*, 283 S.C. 464, ___, 324 S.E.2d 72, 76 (Ct. App. 1984) ("a plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class, including the obligation to inform them of proposed compromises of the group action"); *In re Green*, 291 S.C. 523, ___, 354 S.E.2d 557, 558 (S.C. 1987) (finding class counsel "breached a fiduciary duty" in resolving an individual plaintiff's claim without court approval after pleading a class action.)

Rule 23, SCRCP imposes on the court, as Fed. R. Civ. P. 23 imposes on the court, a duty to protect the interests of the class. As shown by *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (S.C. 1987), that duty includes protecting the class from class counsel. Nothing in Rule 23, SCRCP has changed that obligation.

The Fourth Circuit has long described that duty as a "special responsibility" to protect the interests of the class members that applies to class members both before and after certification. E.g., *Shelton v. Pargo*, 582 F.2d 1298, 1306 (4th Cir. 1978) (discussing the court's obligations pre- and post-certification). The duties imposed by Rule 23, SCRCP as to class settlements are similar to those imposed by the corresponding federal rule, but no South Carolina case we could find has yet articulated or discussed at any length this obligation from the plain text of Rule 23, SCRCP. That vacuum has been filled by the class action abuses tolerated in this record.

Using the language of Rule 23(d)(2), SCRCP, this class settlement overtly prioritized class *counsel*, not the class *members*, as "the persons on whose behalf the action is brought." Class counsel's highest priority in the class settlement was plainly and explicitly the fee paid to class counsel: the class settlement agreement (R. App. p. 276, ¶ 6.B.) prioritized that payment as

having priority over class member recovery, that recovery explicitly stated to be secondary to the class counsel fee.

The revisions made to the class notice program are consistent with class counsel's mislaid priorities which the court failed to protect. The notice program first proposed (R. App. p. 256 ¶ 3.a.) was revised (R. App. p. 261 ¶ 3.a.) to reduce its geographic scope from national to statewide. (R. App. p. 49). Class counsel has explained, on the record in a related case, that this change to disadvantage all out of state class members was made at the request of his "adversary," the Bishop.[19] When the court approved the class settlement, (R. App. pp. 38 to 77, at p. 49), not only was the reduced geographic scope approved, but the court *sua sponte* further reduced the period of notice, reducing it from six weeks to three weeks, with no objection from the parties. (R. App. at p. 49). These changes to notice were not explained, or inquired into by the court, or resisted by class counsel.

Each change disadvantaged the class but served the financial interests of class counsel and the Diocese. Class counsel was served by the changes making it less likely there might be "too many" class claimants, which in turn reduced the likelihood that the grotesque *pro rata* reduction provision in the settlement would be needed — the provision whereby class member recovery would be reduced *pro rata* if the class fund was insufficient to pay both the attorney fee and the class claims. The interests of the Diocese were served by making it more likely that there

[19] January 27, 2023 hearing transcript, R. App. at p. 1139. Counsel for the Bishop disagreed that the Bishop made that requested change to the notice program, but obviously the reduced scope of the notice program was consented to when the settlement agreement was submitted for approval. (R. App. p. 261 ¶ 3.a., Amended Motion to Approve Settlement and R. App. pp. 264 to 286, the proposed class settlement).

would be a residual fund refunded to the Diocese, as turned out to be the case. (2008 and 2009 accountings, R. App. 1167 to 1174; R. App. 1179 to 1187, respectively).

Judge Goodstein approved the attorney fee first, before notice of the approved settlement had gone to potential class members, before the class members had been identified, before any claims had been made, and before any actual class recovery was realized. The fee was calculated on a *hypothetical* recovery for the class (falsely stated to be $12 million)[20] (R. App. 38 to 77 at p. 51, July 30, 2007 order approving settlement and fees). As opposed to comparing the attorney fee request to the *actual* recovery for the class (which would turn out to be less than the $7,615,000 claimed, R. App. at p. 1184, as that sum included the unauthorized charges not paid class members). The $2.5 million fee awarded — not even considering the additional $900,000+ fee charged class members but not authorized by any order (and not included in any of the accountings), was 55% of the initial settlement fund of $4.54 million, and 32% of the actual funds ultimately distributed. Including the additional, conservatively estimated $900,000+ unauthorized fee, the actual fee was not less than 75% of the initial settlement fund and 45% of the actual class recovery. Including the undisclosed contingent fee payment from November 2006, the actual recovery is an even higher percentage of each comparative measure. And all of

[20] $12 million was the potential settlement fund, but could never be the class recovery. (a) The settlement approved established only a $4.540 million class fund, other funds up to $12 million being contingent on claims made (R. App. at p. 52). (b) the fees and costs came from the fund, so under no circumstance would $12 million be recovered for the class. Until all claims were paid the actual class recovery was unknown, which is the best reason not to pay class counsel first, and certainly no reason to make the fee the highest priority of the settlement.

the requested fee rested on blatantly fraudulent time records,[21] claiming time for which a contingency payment had already been made.

Deliberately ignoring the Supreme Court's 2009 order (R. App. pp. 84-85) and refusing to enter a final order in the class action in 2009 was a strategy, necessarily agreed to by the parties colluding in the class settlement. The strategy was calculated to insulate from direct appellate review (a) the class action abuses in this record, (b) the $2.5 million fee awarded to lawyers connected to Judge Goodstein based on fraudulent records and (c) that the parties had withheld information from Judge Goodstein.

To date, that strategy has worked well. Repeatedly, circuit judges and the appellate courts have elected to take no action when informed of aspects of the class action abuse in this record, but never because the behaviors are held to be appropriate. The courts look the other way, neither affirming nor rejecting the class action abuses. Judge Taylor's order also looks the other way as to the abuse issues, joining that list. If the conduct is permissible, the court should approve it.

The South Carolina Supreme Court alone has had not fewer than five opportunities to either affirm or reject the misconduct in this record, [22] each time electing to take no substantive

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[21] It is apparently tolerated in South Carolina for lawyers to claim working more than 24 hours in a day. In states with higher standards for lawyer conduct, it causes disbarment or suspension. E.g., *Lawyer Disciplinary Board v. Tyson*, No. 20-1027 (W.Va. November 3, 2022) (disbarment); *Lawyer Disciplinary Bd. v. Grindo*, 842 S.E.2d 683 (W. Va. 2020) (2 year suspension); *Iowa Supreme Court Attorney Disciplinary Bd. v. Meyer*, 944 N.W.2d 61 (Iowa 2020) (one year suspension); *Iowa Supreme Court Attorney Disciplinary Bd. v. Mathahs*, 918 N.W.2d 487 (Iowa 2018) (60 day suspension); *In re Disciplinary Proceedings Against Awen*, 211 Wis. 2d 172 (Wis. 1997) (90 day suspension); *Disciplinary Proceedings Against Kravat*, 193 Wis. 2d 152 (Wis. 1995) (disbarred); *People v. Walker*, 832 P.2d 935 (Colo. 1992) (90 day suspension).

[22] These five opportunities include a 2008 petition in the court's original jurisdiction (declined by order of March 19, 2009, Doe. v. Richter, R. App. pp. 84-85); *Ex Parte Doe*, 393 S.C. 147, 711

action or make any substantive comment about the abuses alleged: inaction which suggests to the public that South Carolina tolerates misconduct when it is committed by lawyers with connections to a circuit judge.[23] What message does inaction imply to the public after allegations of abuse or misconduct are made by those connected to a circuit judge? That those with connections enjoy special latitude and the actions will not be reviewed.

For example, in recent months the disgraceful history of events and revelations involving Alex Murdaugh unfortunately suggested strongly to the public this very tolerance: that a connected lawyer's years of manipulations and financial crimes would be overlooked, as Murdaugh's were overlooked, until he tried to expand "looking the other way for the connected" to include a 2021 double murder. Only at that point were Murdaugh's years of misconduct examined, and rejected. The public has begun to draw its own conclusions from such events. In 2023 a jury in Charleston County concluded that it was defamatory to say that the South Carolina Supreme Court had *not* retaliated against a former lawyer because that lawyer had brought these

S.E.2d 892 (2011)(R. App. pp. 1204 to 1206); the February 21, 2013 hearing in *In re Flowers*, 402 S.C. 385, 741 S.E.2d 759 (2013); the April 4, 2013 oral argument of *Doe v. Bishop*, 754 S.E.2d 494 (S.C. 2014); and the 2020 petition in the court's original jurisdiction, filed by John Doe 305 and the McDonalds, *John Doe 305 et al. v. The Bishop of Charleston et al.*, Appeal 2020-001415 (R. App. pp. 1228 to 1328), which was declined by order of the Supreme Court dated April 19, 2021 (R. App. pp. 1333 to 1334). Yet there has been no ruling on the issues.

[23] For example, during the April 4, 2013 oral argument in *Doe v. Bishop*, Justice Kittredge observed that the allegations of class action misconduct were "serious." Some of those "serious" allegations were discussed during the colloquy with counsel. Yet no action was taken by the Court to enforce or pursue those allegations, presumably because there were not three votes to do so. To date full discovery has never been permitted to pursue the holding in *Doe v. Bishop* that claims may be made against class counsel for lack of notice or inadequate representation. 754 S.E.2d 494 (S.C. 2014). With three new Justices on the court, and the new information that the interim has exposed, the present Court may see things differently for this appeal.

class manipulations to the attention of the Supreme Court, inescapably implying that the jury agreed that after a former lawyer raised with the Supreme Court the misconduct in this class action he was then retaliated against — *by the Supreme Court*.[24] Yet the misconduct claimed in the class action goes unexamined. Every judge or panel has refused to examine it, either to say, in whole or in part, it is acceptable or that it is unacceptable, even prospectively.

Repeated inaction by the Court to either affirm or reject the record of class action abuse by lawyers connected with a circuit judge has had negative public consequences, and at least 12 members of the public concluded the Supreme Court itself, at least as constituted in 2013, was part of that problem.

John Doe 66, a class representative, filed a *pro se* motion in 2016 (R. App. pp. 525 to 530) asking the court to evaluate the conduct of class counsel. Furthering what we contend is an inaccurate public impression: that a policy exists to permit no review for acts taken by judges responding to connected lawyers, for *six years* his motion was simply ignored.

Even without a double murder in this record, the McDonalds do not believe that misconduct is, in fact, tolerated just because it involves lawyers connected to a circuit judge or those colluding with them. Yes, the courts have a history to date of not acting on these allegations. But claims made by a class representative and class members themselves, should finally be taken seriously and ordered to be examined. We urge the court — so as to discourage both such misconduct and the public perception that such behavior is tolerated among the

[24] Verdict for the plaintiff in *Flowers v. Player*, 2019-CP-10-3000 (2023).

connected — to explicitly and in detail reject each of the class action abuses presented in this record. Or, if the conduct is acceptable, to so inform bench, bar and the public.

That is why the McDonalds in 2022 joined the 2016 motion John Doe 66 had filed *pro se*, and joined him in seeking to compel a hearing for issues that have been otherwise ignored to date (R. App. pp. 531 to 569); and it is why in this brief the McDonalds again lay out for examination the class action abuses in this record.

To the extent these acts by the colluding parties in the class settlement are not regarded as "abuses" and are all okay, in whole or in part, the Court should say that. If the abuses are regarded as abuses, then the Court should say *that*,[25] and remand for additional proceedings.

The orders by Judge Taylor on appeal in this case yet again do nothing to confront any of the class action abuses in this record. Nor does the March 2023 order even acknowledge the undisputable 2005 origin of the class action and the judge-shopping that moved it to Dorchester County, let alone to inquire into the evidence presented by the McDonalds that the fee and costs charges made against them were improper. The March 2023 order again pretends the class action began in 2006 (R. App. at p. 117), despite the unarguable record. (R. App. pp. 126 to 212, the 2005 Charleston County Complaints). All of the collusion and judge-shopping to get the class settlement to Dorchester County is elided over in Judge Taylor's order, constituting yet another

[25] Meaning the Court should examine, and reject or affirm, the collusion in the settlement, the priority of placing the attorney fee over class recovery and assessing the fee before actual results are known, the reduced notice program, the judge-shopping, the "cloned" class action, the payment by class counsel from his trust account to support better settlement terms for objectors, the undisclosed contingency fee payment made to class counsel by the Diocese, the time records submitted for time already covered by that contingent fee payment, the blatant fraud in the time records, and the lack of disclosure in the accounting of all payments charged and received and made by class counsel.

instance of judicial inaction, which implies that the conduct of lawyers connected to judges enjoys special latitude and simply will not be reviewed. As if personal connection to a judge eliminates all scrutiny.

Judge Taylor's failure to exercise discretion is an abuse of discretion.

At minimum, the McDonalds should be permitted on remand to pursue the overcharges against them, and the roughly $900,000 overcharged the class members by class counsel. No order authorizes those charges or is even contended to authorize those charges. The case should be remanded with instructions to examine, at minimum, and in light of the alleged class action abuses, each alleged act by class counsel of abuse and overcharging the class, with direction to permit discovery to establish the extent of the abuse and overcharges made of class members. And specifically, to include leave to depose class counsel, and to seek a full and *accurate* accounting, which to date has not been permitted.

Otherwise, this appeal will do nothing more than add to the list of instances where the courts look the other way when faced with this record of class action abuse reinforcing for the public that connected lawyers get different treatment.

Any class action benefit that is received after class counsel breaches his or her fiduciary duty to the class is a benefit held in trust. *Premium Investment Corp. v. Green*, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (S.C. App. 1984) ("If the class representative or class counsel breaches the fiduciary duties he assumes and receives and retains benefits flowing from the breach, he holds what he receives upon a constructive trust for the class.")

The case should be remanded and at minimum examination of these issues should be permitted. The court should not ratify the overall strategy of parties who colluded to avoid

appellate review by delaying (for sixteen years) a final order being entered. The requirement in Rule 23, SCRCP that the court must protect the interests of the class by an order entered "at any time" requires no less if Rule 23, SCRCP is to be taken seriously and effectuated properly. Yes, the lawyers who engaged in the misconduct include those connected to Judge Goodstein. That does not suspend the duties of Rule 23(d)(2), SCRCP, although to date that has been the effect. "Connected" status should not work an exemption from proper professional conduct, or appellate review, and "connected" status should not be seen by the public to work an exemption from proper professional conduct. "Connected" status should be explicitly and overtly rejected as any criteria permitting either class action abuse or a shield to appellate review.

We contend that if a proper review is made, some $900,000 or more will be ordered disgorged to class members, including a portion to each of the McDonalds, and possibly including a disgorgement to John Doe 66. An accounting that fully discloses, rather than conceals, all payments made by class counsel, to class counsel, and on behalf of the class, should reveal those sums. An accounting that does not fraudulently conceal such payments, as each of the 2008 and 2009 accountings did, should be ordered on remand.

Judge Taylor abused his discretion by failing to exercise his discretion to protect class members from class counsel. That duty is owed by the court as among the obligations imposed by Rule 23, SCRCP. When Rule 23, SCRCP authorizes the court to protect class members "at any time," we contend it means what it says, and the court should articulate that obligation as serious and ongoing, no matter what delay strategies colluding parties apply to try to evade an independent and impartial application of Rule 23, SCRCP.

B. **Judge Taylor evaluating if class counsel complied with Judge Goodstein's orders cannot "effectively overrule" her orders, as she made no ruling on those issues**. The other reason Judge Taylor refused to exercise discretion was that it would "effectively overrule" Judge Goodstein. R. App. pp. 117 to 122 at p. 121, Order of March 24, 2023. That conclusion is an error of law, as Judge Goodstein has never ruled on the issue now presented — whether the additional fees and costs charged class members by class counsel, charges never disclosed to Judge Goodstein — were authorized by any of her orders. E.g., *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, ___ (2008) (rejecting argument that subsequent judge's ruling "effectively overruled" prior judge's order because first judge "never ruled on" the issue.)

Class counsel is claimed to have exceeded the authority given by Judge Goodstein. The orders do not appear to authorize those charges, and no such authority is claimed. The McDonalds' settlement statements (R. App. pp. 1164 to 1166) support the allegation that additional charges were made. Judge Taylor has concluded he is powerless to examine the allegations to see if Judge Goodstein's orders need to be enforced or modified, even though the motion requesting that action is supported by Rule 23, SCRCP and documents which reflect the unauthorized charges, and even though some $900,000 is estimated to be at issue as to the class. Judge Taylor concluded he had no authority to examine Judge Goodstein's orders because he finds he is limited by the orders having been created in the first place. This is an error of law.

Imagine a hypothetical class action similar to this record, with a hypothetical Judge Goodstein but without any allegations of colluding parties or class action abuse. No judge-shopping. No long social or professional connections between class counsel and our hypothetical Judge Goodstein. Imagine further that after discovery and various rulings on motions the parties

reached a class settlement (unlike this record, which had no motions ruled upon prior to the class settlement), without collusive terms and reflecting arm's length agreement with genuinely opposing parties (unlike this record). Imagine the hypothetical Judge Goodstein approved such a class settlement. Imagine also a similar class settlement structure, where the hypothetical Judge Goodstein decides the fee award to class counsel ahead of the claims period, ahead of any actual class recovery, and ahead of any distribution to the class members (none of which should be permitted). Imagine further that like the actual Judge Goodstein, the hypothetical Judge Goodstein orders that class counsel be paid first, with the class claims to be determined and paid only after the payment for fees and costs.

Then imagine a hypothetical escrow agent for those class funds who, instead of paying the class members, sends 100% of the class fund to class counsel, distributing no money at all to class members. And imagine further that class counsel decides to keeps all of the funds, other than the funds class counsel elects to share by kickback with the escrow agent and the defendant, so only class members are motivated to complain. Finally, imagine that class members who have received no payment at all file a motion asking for a post-settlement fairness hearing, to pursue allegations that class counsel overcharged them and failed to comply with the hypothetical Judge Goodstein's orders by underpaying them at the rate not of more than 20%, but of 100%.

Under Judge Taylor's rationale, despite Rule 23, SCRCP, the court would have "no authority" to even inquire into whether class counsel exceeded the authority afforded by the court's orders, or complied with those orders. No authority to demand an accounting. No authority to consider other actions to enforce the orders, such as a Rule to Show Cause. Under Judge Taylor's rationale, because our hypothetical Judge Goodstein had approved the settlement,

any inquiry and subsequent order to determine if the orders had been followed would "effectively overrule" Judge Goodstein. The concept is an error of law. And bizarre.

Orders can be enforced only by being reviewed. No order has even been contended to authorize the additional charges made to class members. As to the additional fee, we set out in the statement of the case the language of the orders which supports the $2.5 million fee payment as compensating class counsel's work done for the class but also the work done for "plaintiffs," and work "to be done," to complete the class settlement. As to the costs, the court-approved agreement (R. App. pp. 264 to 286 at p. 274 ¶ u.) states that all costs were to be "paid from the settlement fund." There is a reason why the accountings conceal these charges.

Those considerations are separate and apart from, and in addition to, class counsel charging the McDonalds without disclosing their conflicts, or the contingent fee payment that had been concealed from the court, or that class counsel had already been paid $2.5 million by order of the court despite the plainly fraudulent time records used to support the fee award. Those issues apply if any fee or costs charged to class members was proper. We contend no such charges are appropriate, given the language of the orders of the actual, not the hypothetical, Judge Goodstein.

In short, even if the court is comfortable tolerating, as we contend it should not be, class counsel using connections to Judge Goodstein to play fast and loose with what class counsel and the Diocese disclose to, or conceal from, or misrepresent to, Judge Goodstein; and even if the court is comfortable, as we contend it should not be, permitting social and professional connections between class counsel and Judge Goodstein to eliminate any effective judicial scrutiny of class counsel's conduct (as appears to have been the case to date), a motion asking to

examine if class counsel exceeded the approval from Judge Goodstein's orders is not a request to "overrule" any of her orders, but to enforce those orders. To compel them to be complied with.

Is compliance with a court order to be optional for lawyers connected to a judge? As to the ignored 2009 order of the Supreme Court that seems to have been the case. We contend complying with court orders is not optional, has never been optional, and that it was an error of law for Judge Taylor to refuse to examine the issues associated with the allegations and evidence the McDonalds have that Judge Goodstein's orders were not complied with, and they and other class members were overcharged.

Rule 23(d)(3), SCRCP also authorizes the court "at any time to impose additional conditions on the representative parties" if the court believes "the representation appears to the court inadequate fairly to protect the interests of absent persons." These are fairly described as serious, possibly even fiduciary, obligations *of the court*. The rule explicitly assigns the court a role in protecting the interests of the class, even if that protection is needed to prevent class counsel from harming the interest of the class by, for example, charging class members in excess of $900,000 in unauthorized fees and costs. Particularly when the fee awarded was itself a gross overpayment given the fraudulent time records used and the undisclosed contingency fee payment which accounted for nearly all of the time submitted in the fee request.

Judge Taylor should be reversed, and the inquiry into class counsel's conduct should be ordered on remand. A full and accurate accounting should be made of *all* funds, and then any funds overcharged class members should be disgorged.

Only a review after a *full* and *honest* accounting can determine if the court's orders were followed. To reach that, targeted discovery and another hearing should be ordered. [26]

C. **The order appointing Judge Taylor grants him the authority**. The Supreme Court appointed Judge Taylor to "decide all matters pertaining to this case." R. App. p. 116, Order of November 10, 2022). The order does not exempt from his authority Judge Goodstein's orders, or reviewing class counsel's conduct to see if it complied with Judge Goodstein's orders. Nor does it exempt from his authority any issue on the ground that class counsel was connected to Judge Goodstein.

D. **Judge Dickson's 2013 rulings show that Judge Taylor had authority**. Judge Taylor's rationale that he had no authority to act fails to explain or account for how it is that Judge Dickson in 2013 was able to rule (R. App. pp. 111 to 113) on the motion class counsel filed in 2012 (R. App. pp. 523 to 524) seeking to interpret Judge Goodstein's orders. (R. App. pp. 111 to 113, December 17, 2013 Order at p. 111). Under Judge Taylor's rationale, no ruling to "interpret" any of Judge Goodstein's orders was possible, further reflecting Judge Taylor's error in failing to exercise discretion.

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[26] E.g., E.g., *Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34 (D. Me. 2005) (three fairness hearings held before the court rejected a proposed settlement due to clear sailing and reverter provisions); *Carlin v. Dairy America, Inc.*, 380 F. Supp. 3d 998 (E.D. Cal. 2019) (class settlement after nine years of litigation preliminarily approved in 2018, then following notice to the class, objections and claims received, a final review in 2019 considered and approved disbursements and an attorney's fee in light of actual performance of class counsel); *N.R. v. Raytheon Co.*, Civil Action 1:20-cv-10153-RGS (D. Mass. Sep. 21, 2022) (final fairness hearing set in 2023 after 2022 approval of notice and claims are processed so attorney fee request will be considered in light of actual class recovery); *1988 Tr. for Allen Children v. Banner Life Ins. Co.*, 28 F.4th 513, 523-24 (4th Cir. 2022) (February 2020 fairness hearing adjourned to allow an objector to do discovery, then resumed in May 2020).

Conclusion

Judge Taylor abused his discretion in failing to exercise his discretion. The case should be remanded for examination of each of the ways in which class counsel breached their fiduciary duties to the class members, with appropriate direction to reach the issues and to protect the class from class counsel, 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 — conduct that we contend is abuse of a class action — is instead permissible, then for the benefit of bench, bar and the public the court should plainly state that lawyers may conduct class actions in this manner, to serve their own interests first, and affirm Judge Taylor without comment, permitting the public to reach the inescapable conclusion that indeed, South Carolina law refuses appellate review for conduct by lawyers connected to a circuit judge. As has been the case to date.

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

Respectfully submitted,

s/ Gregg Meyers

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