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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 Reply Brief
As to The Bishop of Charleston

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Reply Argument

In Reply to The Bishop of Charleston, referred to in this brief as the Diocese, appellants make these few points.

1. **Excepting the final portion of the brief devoted to Mr. Sires, the brief of the Diocese has nothing to do with the issues on appeal**.

This is the version of pixie dust being employed by the Diocese: claim the appeal is about something other than what it is.

The Diocese devotes its argument to the false premise that the appeal is a collateral attack on the class settlement that seeks to "reopen"[1] or "rework[…][2] or "upend"[3] or "challenge the very terms,"[4] or that by the appeal the McDonalds are "objecting"[5] to the class settlement or is the McDonalds' effort to "rewrite"[6] the settlement agreement. None of that is correct, although we agree the collusion in the record of this class action is deeply problematic, and it is patently obvious that (a) the parties withheld information from Judge Goodstein and (b) Judge Goodstein gave little scrutiny to the issues involving class counsel's fee other than to award as much as possible as quickly as possible.

This appeal, though, is not about changing the orders of the class action but enforcing those orders. Which Judge Taylor has erred in failing to exercise his discretion to do.

Failing to properly examine evidence of collusion can be an abuse of discretion, *Sharp Farms v. Speaks*, 917 F.3d 276, 292 (4th Cir. 2019) (district court abused discretion when it failed

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[1] Diocese brief at 4.
[2] Diocese brief at 5.
[3] Diocese brief at 5.
[4] Diocese brief at 7.
[5] Diocese brief at 7.
[6] Diocese brief at 7.

to examine the record of class counsel's collusion). This appeal seeks to protect the class, as SCRCP 23 requires the court do "at any time." In this instance, protecting the class from the unlawful predations of class counsel, who (the record shows) have gone outside the authority of the orders granted by of Judge Goodstein and improperly charged class members.

As the settlement statements of the McDonalds show, R. App. pp. 1164 to 1166, class counsel charged class members for fees and costs that were not authorized to be charged, for work for which class counsel had already been paid by the court's fee award. And class counsel charged for costs which were ordered to be paid from the class fund, not the individual class members. Nor did class counsel disclose to the McDonalds before charging unauthorized fees and costs that the court had already awarded a $2.5 million for work which included services being provided to the McDonalds and to other class members.

This appeal is about *enforcing* the orders of the class settlement. Not about *changing* any of those orders. Which is where Judge Taylor erred.

The appeal seeks, as the underlying motion sought, not to alter the class settlement agreement but to compare the orders of the class action against the actual performance of class counsel in 2008 to implement the court's 2007 orders. The record plainly shows class counsel's action were not authorized by the court's orders, in a context of extensive collusion in the conduct of the class action. But class counsel's connections to Judge Goodstein have, to date, caused all courts to avoid comment on that lack of compliance by refusing to rule, as Judge Taylor has refused to rule, either to approve or disapprove of the conduct of class counsel and the Diocese with which class counsel colluded.

Since the Diocese and class counsel ignore, but do not deny, any of the actual history of the class action as reflected in the record, it appears undeniable on this record:

- that the class action was filed in 2005;
- that the class action proceeding itself was collusive;
- that without significant discovery and without a single motion having been decided, the class action was resolved, as documents show, by mediated agreement in June 2006;
- that after that June 2006 agreement the parties colluded to ignore SCRCP 23 and went judge-shopping for class oversight and approval;
- that the parties colluded in shopping for Judge Goodstein;
- that Judge Goodstein agreed to be shopped-for;
- that the parties colluded to withhold from Judge Goodstein that class counsel had been paid a contingency fee;
- that the parties colluded to permit class counsel to submit blatantly fraudulent time records, without objection, to Judge Goodstein as part of the fee petition, which fraudulent time records were accepted without any judicial scrutiny whatever; and
- that after Judge Goodstein approved the settlement and authorized a $2.5 million fee class counsel went beyond the court's orders to charge class members fees and costs (a) that no order authorized, (b) for work already paid for, and (c) which class counsel did not disclose to the class;
- that the total charged class members without authorization appears to be approximately $900,000;[7]

[7] All of which is held in trust, *Premium Investment Corp. v. Green*, 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"), and which should be assessed and disgorged. That assessment is

- that the parties colluded by submitting to Judge Goodstein "accountings," one in 2008 (R. App. pp. 1167 to 1174) and another in 2009 (R. App. pp. 1179 to 1187), neither of which reflected either all payments made to class counsel or the charges actually made by class counsel to class members;
- that all parties colluded to ignore a 2009 order of the Supreme Court to close the class action, R. App. pp. 84 to 85, (deliberately preventing this appeal until 2023); and
- that no judge has reviewed class counsel's actual implementation of the class action orders,

which we contend is an abuse of discretion, given this record and the amount at issue in this appeal.

Class counsel "may not abandon the fiduciary role they assumed at will or by agreement with the appellant, if prejudice to the members of the class they claimed to represent would result *or if they have improperly used the class action procedure for their personal aggrandizement*." *Shelton v. Pargo*, 582 F.2d 1298, 1305 (4th Cir. 1978) (emphasis added). On this record, Judge Taylor has abused discretion in failing to protect the class from class counsel.

2. **This appeal is to enforce, not change, the class action orders**.

In its second proposed issue on appeal (Diocese Brief at 1), the Diocese states, "settlement funds have been distributed pursuant to the terms of the Court's preliminary and final

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the main point of the motion and of this appeal, the associated point being to reject the grotesque abuses of class action practice this record contains. Both of those objectives can be fully met without disturbing the class settlement agreement. The collusive conduct of this class action is important context for reviewing class counsel's misconduct in charging improper fees and costs, in all of which the Diocese was a willing participant, as reflected by the information withheld in the accountings given Judge Goodstein. R. App. pp. 1167 to 1174; 1179 to 1187.

orders approving the settlement." The Diocese thus presumes precisely what the record shows did ***not*** occur: funds were ***not*** distributed pursuant to the orders. Funds were improperly diverted from class members to class counsel.

The Diocese did its part in funding the collusive settlement as ordered by the court, even as the Diocese colluded with class counsel to judge-shop and withhold information from Judge Goodstein. The undisputable record reflects that class counsel was not content with the $2.5 million fee Judge Goodstein awarded and the orders which described what that fee was for, and went beyond the orders to divert funds away from class members and into their own pockets. Which no order authorized, and none of which was disclosed to Judge Goodstein in either the 2008 or 2009 accountings.

3. **"At any time" in SCRCP 23 means what it says, and obligates the court to protect the class "at any time" before a final order**.

In this record, the parties colluded in many ways, including to ignore a direct order of the Supreme Court to end the class action in 2009 (R. App. pp. 84 to 85. A final order was forced on the parties only in 2023, and then only by action of John Doe 66 and the McDonalds. We contend that delay was deliberate, to (a) prevent any appeal, and (b) to argue, as the Diocese joins class counsel in doing, that the delay they colluded to cause is a ground to reject the appeal.

This appellate court obviously needs to clarify that the court's duty under SCRCP 23 to protect the class extends, as we contend, through a final order, and should include making sure that parties are not colluding, are not withholding information from the court, and that the parties have actually complied with the court's orders.

4. **2007 deadlines can't stop review of 2008 misconduct**.

At page 7 of its brief the Diocese argues that the McDonalds missed a "February 22, 2007" deadline to object to the "terms of the settlement." But the McDonalds do not seek to change the "terms of the settlement." That is not their objection. They are trying to *enforce* the terms of the settlement, and are objecting that in 2008 class counsel charged them fees and costs which the 2007 orders did not authorize class counsel to charge. Class counsel had already been paid for the fees charged the McDonalds and other class members, and the 2007 orders provided that the costs charged the McDonalds were to be paid by the class fund, not by class members.

No 2007 deadline can restrict the McDonalds from challenging improper action taken by class counsel in 2008 and discovered in 2019. Without any final order the parties had colluded to ignore the Supreme Court order to avoid, the court remains involved, as the 2022 order assigning Judge Taylor reflects. Only after a final order can the class action orders be appealed. *Salmonsen v. CDG, Inc.*, 377 S.C. 442, 452, 661 S.E.2d 81, ___ (2008) (class action orders are interlocutory unless they "prevent a judgment from which an appeal may be taken" or "discontinue the action.")

To prevent this appeal from ever being enabled is why the parties ignored the Supreme Court's order and evaded a final order ever being entered until Judge Taylor's order in 2023.

CONCLUSION

It is true this appeal concerns misconduct by parties who were connected to a circuit judge. The record reflects that judge entirely ignored certain conduct, and that the parties withheld information from that judge. If such connections mean no scrutiny can be made then the court should articulate for bench and bar the nature and limits of connections which entitle

parties and counsel to ignore court orders, and to prevent review of parties who ignore court orders.

However, if, as we contend, "connections" no matter how extensive do not entitle parties to ignore court orders, then the court should reverse Judge Taylor and remand this appeal with instructions to him to (a) permit discovery so as to assess (1) the degree to which class counsel overcharged the class members fees and costs, and (2) the extent of information withheld from the court, (b) order improperly charged fees and costs to be disgorged to each class member improperly charged by class counsel, and (c) for the parties to submit a full and accurate accounting of the disbursements made to class members and to class counsel, to include all information withheld from the court in the 2008 and 2009 accountings.

To the extent that the conduct in this record by class counsel and the colluding Diocese is permissible, then the court should affirm Judge Taylor, and plainly state for bench and bar 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, as set forth above.

Respectfully submitted,

s/ Gregg Meyers

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