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SC Court of Appeals

The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. William C. McMaster III, Circuit Court Judge

Appeal 2026-000191

Case Nos. 2022-CP-10-04031
2019-CP-10-05892
2018-CP-10-05802

John Doe 305, Julie McDonald, and Richard McDonald, Appellants,

v.

Lawrence E. Richter, Jr., David K. Haller, Richter and Haller, LLC, and
The Bishop of Charleston a corporation Sole, Defendants

AND

Jane Doe 304, Appellant,

v.

Lawrence E. Richter, Jr., David K. Haller, Richter and Haller, LLC, and
The Bishop of Charleston a corporation Sole, and Robert E. Guglielmone,
Bishop Of Charleston, Defendants,

AND

Robert Chimento, Appellant,

v.

Lawrence E. Richter, Jr., David K. Haller, Richter and Haller, LLC, and The
Bishop of Charleston a corporation Sole, and Robert E. Guglielmone,
Bishop Of Charleston, Defendants,

of which Lawrence E. Richter, Jr., David K. Haller, and Richter and Haller, LLC, are the Respondents.

Appellant's Initial Brief

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Issues on Appeal

1. Class counsel made a voluntary appearance in each of the federal court and (after remand), in the state court, by moving in each forum for substantive relief. According to SCRCP 4(d) it was the equivalent of personal service. Did the circuit court err in dismissing their complaint for lack of service?

2. Did the circuit court err in concluding that the professional obligations owed upon pleading a class action as articulated in *Premium Investment Corp. v. Green*, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (S.C. App. 1984), are somehow inapplicable because SCRCP 23 was adopted?

3. Did the circuit court err in dismissing claims against class counsel for breach of fiduciary duty and breach of attorney-client duties.

Introduction: Is There A Judicial Taboo That Prevents Review?

This appeal, and pending appeal 2023-00720, arise from the same 2006 class action settlement from mediation. Each appeal ought to be summarily reversed based on two controlling cases and one controlling Rule of Civil Procedure.

The cases we contend control are *Doe v. Bishop*, 407 S.C.128, 754 S.E.2d 494 (2014), and *Premium Investment Corp. v. Green*, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (S.C. App. 1984). The Rule of Civil Procedure we contend controls is SCRCP 4(d), as to voluntary appearance.

Doe v. Bishop reversed and remanded for further proceedings earlier cases that had been dismissed but which had arisen from the same underlying 2006 class action settlement. In *Doe v. Bishop* the court held:

> 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.

754 S.E.2d at 501 (S.C. 2014) (emphasis added).[1]

Premium Investment Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (S.C. App. 1984) held:

> 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. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *La Sala v. American Savings & Loan Association,* 5 Cal.3d 864, 97 Cal.Rptr. 849, 852, 489 P.2d 1113 (1971). The class representative also surrenders the right to settle the action in return for individual gain, alone. *Id.* at 852, 489 P.2d at 1116.

See also, *In re Green*, 291 S.C. 523, 524, 354 S.E.2d 557, 558 (1987) (attorney reprimanded for resolving that same class action without notice to the class).

Premium Investment Corp. v. Green also held that class proceeds are held in "constructive trust" and if any fiduciary obligation is breached, "under no circumstances will the fiduciary be permitted to profit from a breach of his duty."[2]

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[1] *Accord*, *Hospitality Management Associates, Inc. v. Shell Oil Co.*, 356 S.C. 644, 664, 591 S.E.2d 611, 622 (2004) ("[t]he adequacy heading also factors in competency and conflicts of class counsel," *quoting Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 626 n. 20, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997).

[2] *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. *Bank of America National Trust & Savings Association v. Ryan,* 207 Cal.App.2d 698, 706, 24 Cal.Rptr. 739, 744 (1962). This is true although the benefit received by the class representative is not at the expense of the class. *Id.* at 706, 24 Cal.Rptr. 739. Under no circumstances will the fiduciary be permitted to profit from a breach of his duty as fiduciary. *Crowder v. Lyle,* 225 Cal.App.2d 439, 449, 37 Cal.Rptr. 343, 350 (1964).

SCRCP 4(d) states that voluntary appearance "is equivalent to person service."

The basis of the legal malpractice and breach of fiduciary duty claims now on appeal rest on the exact foundations recognized in *Doe v. Bishop* and *Premium Investment Corp. v. Green* — lack of notice, inadequate representation, and breach of both fiduciary duty and (as to the McDonald appellants) breach of duty to actual class member clients.

Class counsels' representation is alleged to have been not only inadequate as to Due Process (the point of *Doe v. Bishop*) but also beneath the applicable standard of care and professional standards (the point of *Premium Investment Corp. v. Green*), each of which allegations the procedural posture requires be accepted as true. Among the breaches of duties alleged as to class counsel which must be accepted as true are:

- ignoring a direct order of the Supreme Court;
- making misrepresentations and giving false information to the circuit court;
- withholding material information from the circuit court;
- colluding with their "adversary" in the class action;
- judge-shopping for the class settlement approval;
- failing to disclose to class members conflicts of interest; and
- charging class members fees and costs not authorized by any order and without disclosing the fee that had already been awarded by the court.

As noted above, the procedural posture of this case, being an appeal from motions to dismiss, requires those allegations be accepted as true.

But there may be an historical hitch: it is undisputed that class counsel have social and professional connections to a circuit judge (Order on waiver disclosures). To date that fact may

explain a paralysis among South Carolina courts.[3]

When similar issues have been raised in other cases from the same class action, every court has consistently refused to address, or rule on, any of class counsel's alleged misconduct, except to prohibit full discovery.[4] Other than delay and limits to discovery, each court has looked away.

Years of judicial avoidance suggests that despite what appear to be controlling precedent,

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[3] If a connected lawyer taboo exists it lies adjacent to the court's long practice of avoiding any public discipline of any circuit court judge, as publicly reported in news outlets, facts about which the court can take judicial notice. *Bowers v. Bowers,* 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct.App.2002) (citation omitted). *Freeman v. McBee,* 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct.App.1984). *Accord*, *S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009).

Addressing any connected lawyer taboo as we advocate does not *require* disturbing the circuit judge taboo, given what she was told and not told, but if there are taboos, neither should exist.

[4] In addition to the orders in this appeal and appeal 2023-00720, other instances where courts have refused to rule on the collusion, conflicts, professional misconduct, inadequate representation issues or the professional misconduct include:

- a 2008 petition in the Supreme Court's original jurisdiction (declined by order of March 19, 2009 without comment on the allegations other than to criticize the lawyer who raised the issues); and

- 2011, in *Ex Parte Doe*, 393 S.C. 147, 711 S.E.2d 892 (2011) (no comment on the allegations); and

- February 21, 2013, during the hearing in *In re Flowers*, 402 S.C. 385, 741 S.E.2d 759 (2013) (no comment on the allegations), and

- April 4, 2013, in the oral argument of *Doe v. Bishop*, 754 S.E.2d 494 (S.C. 2014), during which (now Chief) Justice Kittredge referred to "serious allegations" as to class counsel, none of which issues were ruled on or mentioned beyond the holding quoted above); and

- 2020, in the petition in the Supreme Court's original jurisdiction filed by appellants John Doe 305 and the McDonalds, Appeal 2020-001415, declined by order of the Supreme Court dated April 19, 2021 (no comment on the allegations).

counsel's connections to a circuit judge is a judicial taboo that blocks ruling on the alleged collusion, misconduct, undisclosed conflicts, and acts of legal malpractice by class counsel for this appeal and in appeal 2023-00720. *Doe v. Bishop* and *Premium Investment Corp. v. Green* hold that actions such as are alleged in this record (and appeal 2023-00720) are relevant and reviewable *in theory*, but *in practice* no review is made, perhaps because the lawyers involved have connections to a circuit judge.

It is as if the holdings in *Doe v. Bishop* and *Premium Investment* should each bear an asterisk. In this appeal and appeal 2023-00720, the court should clarify for bench and bar which, if any, of the collusive tactics, acts of misconduct, undisclosed conflicts, and acts of legal malpractice are permissible, versus which are not. No court to date has touched those issues, either to affirm them or reject them. The issues have been simply avoided.

In this appeal and appeal 2023-00720 we contend the court should demonstrate that South Carolina law contains no such taboo, and that despite the present record of more than a decade of delay and avoidance, the court should explicitly and clearly address legitimate issues of procedure and misconduct *even when those issues involve lawyers connected to a circuit judge*; to make it explicit that the rules are the same for them, too. Rather than as at present, where judicial silence and avoidance and delay have implicitly sanctioned the misconduct alleged in this Record.

The orders dismissing these actions should be reversed and the cases remanded for additional proceedings, with full discovery for the first time permitted into the allegations.

Statement of the Case

Three cases are included in this appeal. Other orders, from the related appeal (2023-00720) and the underlying 2006 class action settlement also "throw light on the questions involved." SCACR 208(a).

Each of the three actions in this appeal was filed in Charleston County. These appeals concern the conduct of only three of the four defendants: Lawrence E. Richter, Jr., David Haller and their firm, Richter & Haller, LLC. They are collectively referred to in this appeal as class counsel. The claims against the fourth defendant, the Bishop of Charleston (referred to in this appeal as the Diocese) have been "held in abeyance" by order of the South Carolina Supreme Court.

Each of the plaintiff-appellants is a resident of a state other than South Carolina, which is pertinent to class counsel's inadequate notice and the inadequate representation. Each qualified as a class member as the class was defined in the 2006 class settlement. Each of the McDonalds was an actual class member.

The complaint for Mr. Chimento (case 2018-CP-10-5802) was filed December 6, 2018. As to class counsel, it alleges causes of action for legal malpractice and breach of fiduciary duty. Class counsel moved to dismiss and for a protective order to stay discovery. On June 15, 2021, the South Carolina Supreme Court assigned his case to Hon. J. Derham Cole to be heard "on an expedited basis." From 2021 to 2025 Judge Cole held no hearing and issued no orders. As a result, no discovery has been permitted since the 2018 filing.

By order of September 10, 2025, the South Carolina Supreme Court appointed the Hon. William C. McMaster, III to preside over the three actions involved in this appeal.

The complaint for Jane Doe 304 (case 2019-CP-10-05892), was filed November 10, 2019. It too alleges as to class counsel causes of action for legal malpractice and breach of fiduciary duty. The Diocese removed her complaint to federal court, and during its time in federal court her complaint was amended (on December 23, 2019). After remand, a second amended complaint was filed February 27, 2020. On June 8, 2020 a consent order stayed the case pending the outcome of an appeal. On June 15, 2021, the South Carolina Supreme Court assigned this case to Judge Cole to be heard "on an expedited basis." From 2021 to 2025 Judge Cole held no hearing and issued no orders. As a result, no discovery has been permitted since the 2019 filing.

By order of September 10, 2025, the South Carolina Supreme Court appointed the Hon. William C. McMaster, III to preside over her proceedings.

The complaint for John Doe 305 and the McDonalds (referred to as the 305/McDonald complaint) was filed in October 2020 as part of a petition in the original jurisdiction of the Supreme Court. It alleged the same professional negligence and breach of fiduciary duty claims as are alleged in the *Chimento* and *Jane Doe 304* complaints, as well as causes of action for civil conspiracy, conversion, and breach of contract.[5] The complaint seeks declaratory relief, an accounting, and disgorgement of fees and costs class counsel wrongfully charged the McDonalds and other class members.

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[5] The breach of contract cause of action is alleged against the Diocese, so is one of the claims stayed by the Supreme Court. It is not part of this appeal.

Pertinent to this appeal, on December 1, 2020, class counsel filed with the Supreme Court a joint return to the petition which acknowledged (on p. 10) their having received the *305/McDonald* complaint that was part of the petition.

By order dated April 19, 2021, the Supreme Court declined to assert its original jurisdiction over the petition that included the *305/McDonald* complaint, and appointed Hon. J. Derham Cole to preside over these proceedings. By orders of June 15, 2021 and September 10, 2021, the Supreme Court clarified that the professional negligence and breach of fiduciary duty claims against class counsel in the *Chimento* and *Jane Doe 304* cases were also to be heard with the *305/McDonald* complaint by Judge Cole "on an expedited basis." Since 2021, Judge Cole held no hearing and issued no order.

On August 30, 2022, counsel filed in the Charleston County Court of Common Pleas the *305/McDonald* complaint from the Supreme Court petition. It was assigned case number 2022-CP-10-04031). As when it was attached to the Petition in Original Jurisdiction, the complaint alleges as to class counsel the same legal malpractice and breach of fiduciary duty causes of action for John Doe 305 as did the *Chimento* and *Jane Doe 304* complaints. However, since the McDonalds are actual class members, the complaint also alleges civil conspiracy and conversion as to class counsel. In addition to damages, the *305/McDonald* complaint seeks declaratory relief, an accounting, and disgorgement of fees and costs charged by class counsel but not authorized by any order in the class action.

Two days after the *305/McDonald* complaint was filed in Charleston, on September 1, 2022, the Diocese removed to federal court the *305/McDonald* action. Pertinent to the appeal as to the *305/McDonald* complaint, on September 15, 2022, class counsel voluntarily appeared in

federal court by filing a joint motion to remand (ECF 7). On September 21, 2022, class counsel filed another joint motion, to stay all deadlines (ECF 8) and a Notice of Appearance (ECF 11). On October 4, 2022, class counsel Haller filed a consent motion (ECF 15) to substitute as his counsel the counsel who had filed the joint motions and the notice of appearance, and (ECF 16) a joint reply to the motion to remand. On October 7, 2022, class counsel filed (ECF 21) a motion to dismiss on substantive grounds under Fed R. Civ. P. 12(b)(6). On November 8, 2022, class counsel filed a reply memorandum in support of their motion to dismiss (ECF 28). On November 23, 2022, class counsel filed another consent motion to substitute new counsel, Mr.Cuttino (ECF 31.

On June 12, 2023, the federal court remanded the action to the Court of Common Pleas for Charleston County, South Carolina." (ECF 35).

After remand, on September 1 and September 5, 2023, class counsel moved to dismiss on various grounds including substantive grounds under SCRCP 12(b)(6).

On March 26, 2025, consistent with the 2021 order of the South Carolina Supreme Court, Chief Administrative Judge in Charleston County Jennifer B. McCoy assigned the *305/McDonald* case to Judge Cole. Between March and September of 2025, Judge Cole held no hearing and issued no order. No discovery has been permitted.

By order of September 10, 2025, the South Carolina Supreme Court appointed the Hon. William C. McMaster, III to preside over the three cases in this appeal. Judge McMaster promptly held a status conference and scheduled a hearing for October 7, 2025, the first motions hearing in any of the cases. At that hearing Judge McMaster heard the motions to dismiss in each action. (Transcript of hearing).

By form 4 orders filed November 6, 2025, Judge McMaster dismissed each case and the order requested defense counsel prepare formal orders in ten days. The form 4 order dismissed the *305/McDonald* case "for lack of service pursuant to Rule 3 and Rule 4, SCRCP." The *Chimento* and *Jane Doe 304* actions were each dismissed by a form 4 order which adopted an order issued in 2017 by Hon. J.C. Nicholson by which summary judgment had been granted to class counsel in cases brought by other out-of-state class members.

Also on November 6, 2025, the clerk of court entered judgment in each of the three cases in this appeal.

Between November 6 and November 17, Judge McMaster extended the time for defense counsel to prepare formal orders.

While SCRCP 59(e) requires a motion to alter or amend a judgment be filed not later than 10 days after notice,[6] SCRCP 6(b) prohibits any extension of that ten-day period. Once the clerk entered judgment on November 6, each plaintiff filed a Rule 59(e) motion to alter or amend the judgment in his or her case based on the form 4 order.

On December 5, 2026, Judge McMaster entered a formal order in each case, expanding on, or changing, the form 4 order in granting each motion to dismiss.

As noted above, as to Mr. Chimento and Jane Doe 304, the form 4 orders embraced a 2017 order by Judge Nicholson which had granted summary judgment to class counsel in related litigation. The formal orders as to *Chimento* and *Jane Doe 304* are identical in rationale. Each claims to adopt Judge Nicholson's order (e.g., *Chimento* Order at p. 8, *Jane Doe 304* Order at 9),

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[6] Recently amended to 20 days.

but instead embraces the 2021 Court of Appeals decision which affirmed Judge Nicholson's order, on grounds other than that used by Judge Nicholson. Judge Nicholson had granted summary judgment to class counsel as to other absent members of the class because he concluded, as a matter of law, that no duty was imposed on class counsel as to absent class members based on one paragraph in a 2006 class complaint. Judge Nicholson did not examine the class definitions as proposed or as approved. Judge Nicholson concluded that based on a 2006 class complaint that the classes were limited to South Carolina residents.[7]

By contrast, Judge McMaster's formal order relied on the 2021 Court of Appeals decision which affirmed Judge Nicholson but on different grounds. First, because each complaint at issue in the cases before Judge Nicholson (unlike the complaints in this appeal appeal), had alleged the malpractice and breach of fiduciary duty claims against class counsel as "alternative claims in the event they are precluded from bringing claims against the Diocese," (2021 Court of Appeals Order at p. 1).[8]

Second, and also due to the "alternative claims" pleading present in the record of the 2021 Court of Appeals decision: that the complaints stated alternative claims against the Diocese, the Court of Appeals affirmed Judge Nicholson on the alternative ground that each of

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[7] Because the class action had not been closed in 2009, as directed by the South Carolina Supreme Court, it was not until 2024 that the law of the case in the underlying class action was established (from a 2013 order of Judge Dickson that was not appealed). Judge Dickson held that the class settlement included residents of states other than South Carolina.

[8] As discussed below, none of the complaints in this appeal made alternative allegations against the Diocese for sexual abuse itself, because none of Mr. Chimento, Jane Doe 304, or John Doe 305 has a good faith basis to overcome the statute of limitations defense the Diocese enjoys against them. That defense had been waived for the class action. Only in the class action settlement could they have made their claims.

the complaints brought before 2017 had “failed to establish damages proximately caused by [class] Counsel’s alleged breach of fiduciary duty and legal malpractice.” In other words, because the complaints stated alternative claims, the Court of Appeals concluded there were not cognizable damages as to class counsel (2021 Court of Appeals Order at p. 2). In each of the cases in this appeal, class counsel’s conduct is alleged to have made that avenue for relief unavailable outside of the class action settlement.

Judge McMaster’s orders as to Mr. Chimento and Jane Doe 304 noted (at p. 9 in each order) that each of their complaints acknowledged (*Chimento* complaint at ¶ 15 and *Jane Doe 304* complaint at ¶ 21) that the appeal then pending concerned whether a duty to absent class members was imposed on class counsel *as a matter of law*. Judge McMaster’s orders state, “Plaintiff even alleges her claim “overtly” depends on the outcome of the appeal of Judge Nicholson’s order.” (McMaster Order as to Jane Doe 304 at p. 9; accord, Order as to Mr. Chimento at p. 9). But the same cited paragraph of each complaint adds the alternative liability theory of duty as having been voluntarily assumed by class counsel:

> However, this complaint also alleges, and the record shows, that [class counsel] voluntarily assumed a fiduciary duty as to the absent members of the class such as the plaintiff, which duty was breached.

(See also, *305/McDonald* complaint at ¶¶ 63, 87 and 103, 105, 114 to 121, which note both sources of duty, imposed and assumed, and that class counsel acknowledged fiduciary duties on the record of the class action). In other words, none of the complaints rest exclusively on the duty imposed by law, as Judge McMaster presumes (E.g., in his orders in Jane Doe 304 at pp. 9 to 10). And as of 2024, the law of the case in the class action now includes that the class settlement extends to out-of-state residents.

Beginning at p. 10 in each formal order Judge McMaster began his analysis of whether class counsel had an attorney-client or fiduciary relationship with absent class members, concluding there was neither. The order finds no attorney client relationship because the order finds that occurs only after a class is certified (e.g., Jane Doe 304 Order at p. 11), and it was before certification that class counsel reduced the originally proposed notice program so as to exclude Mr. Chimento, Janes Doe 304, and John Doe 305 (e.g., Jane Doe 304 order at p. 12).

Judge McMaster discounts the holding in *Premium Investment Corp. v. Green* (that fiduciary obligations are assumed by both class counsel and a class representative upon pleading a class action), because that case was decided in 1984, a year before the 1985 effective date of SCRCP 23 (e.g., Jane Doe 304 Order at p. 13). Despite the plain language in *Premium Investment* about fiduciary obligations imposed upon pleading a class, Judge McMaster concluded that the fiduciary obligation followed only from a "constuctive certification" that he found had taken place in *Premium Investment*. (Jane Doe 304 Order at pp. 13 to 14).

At p. 14 Judge McMaster's order concluded there were alleged, "no facts or circumstances outside of an attorney-client relationship giving rise to" the fiduciary duty claim. The order omits any reference to the detailed allegations in each complaint (e.g., Chimento complaint at ¶¶ 20 to 26), about class counsel recognizing on the record their obligations to absent class members, as well as class counsel claiming, also on the record, after certification, to have reached agreement with the Diocese that absent class members who got no notice would get the same relief as class members, relief which class counsel failed to secure in any written order. Those omissions are discussed below.

Judge McMaster's orders (e.g., Chimento Order at p.18) conclude that assumed duty is "contrary to South Carolina law," as the complaints failed to satisfy the Restatement of Torts Section 323 (which is not part of any of the complaints), because neither Mr. Chimento's nor Jane Doe 304's complaint alleged either "physical harm," or their "reliance," on class counsel, or any "physical injury" and that obligations from Section 323 are "duplicative" of the attorney-client duties. Despite the authorities discussed, Judge McMaster concluded the plaintiffs had "provided no authority" that "it is even possible for an attorney to 'assume' fiduciary obligations to absent members of a purported class prior to certification." (E.g., Chimento Order at p. 18).

As noted above, the Orders (e.g., Chimento Order at pp. 19 to 20) also concluded that the plaintiffs each "failed to articulate damages sustained due to the alleged legal malpractice" because they allege they were excluded from the class action and cannot make a claim against the Diocese for their sexual abuse. Judge McMaster cited *Doe v. Bishop of Charleston*, 445 S.C. 31, 911 S.E.2d 323 (2025), which held that charitable immunity does not exclude intentional tort claims (Chimento order at pp. 19-20).

Finally, the Order observes (e.g., Chimento Order at p. 20) that the law of the case that established in the underlying 2006 class action (that the class settlement included class members who reside outside of South Carolina), was not the law of the case in *this* action, that class counsel were not party to the class action they brought as lawyers, and that the law of the case applied only to the class action. Which is undisputed, as it is the significance of the law of the case *in the class action* that has implications for this appeal.

As to the 305/McDonald complaint, the court's formal order (305/McDonald Order at p. 7) determined that even though class counsel appeared in the federal court and made various

filings for substantive relief, and did the same in the state court after remand, that class counsel "did not voluntarily appear," in the federal court, or subsequently in the state court, so the 305/McDonald case was dismissed for lack of service of process.

The clerk of court also filed judgments in each case on December 5, 2025.

On December 15, 2025, each plaintiff filed a second motion to alter or amend the judgment in his or her respective case.

By form 4 orders entered December 30, 2025, Judge McMaster denied each of the Rule 59 motions filed December 15, 2025, implicitly denying also the Rule 59 motions filed November 17 as to the form 4 orders.

The Notice of Appeal was served on January 26, 2026.

The other orders and proceedings which also shed light on the issues in this appeal (and appeal 2023-00720) are from the underlying 2006 class action settlement.[9] Those are addressed more fully in Argument. Briefly summarizing the undisputable portions of the public record, that class settlement was agreed to during a 2006 mediation for a 2005 class action and two individual 2005 cases filed in Charleston County in 2005. After that class settlement was reached in a June 2006 mediation, the parties undertook a series of steps to move class settlement approval to a desired judge in Dorchester County. New class cases were filed in Dorchester County even though each was within the 2006 class settlement.

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[9] Drawn from the court's own records, a history that may be "ascertained by reference to readily available sources of indisputable reliability." *Bowers v. Bowers,* 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct.App.2002) (citation omitted). "[A] court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee,* 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct.App.1984). *Accord*, *S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009).

Significant to this appeal, terms were added to the class settlement reached in mediation that made class counsel's fee the highest priority of the class action, simultaneously negotiating for class counsel a fixed fee while the case recovery would be variable, and subordinate to the fee. The McDonald appellants were actual class members, actually represented by class counsel, and were (with other class members) charged fees and costs not authorized by any order, and without disclosing the $2.5 million court-awarded fee. That background information is addressed below, and is also set out in appeal 2023-00720, which is an appeal from the class action itself.

Facts Alleged in the Complaints

The following facts are alleged in the complaints, and must be accepted as true and viewed in the light most favorable to the appellants, with every doubt resolved on their behalf for relief on any theory of law. *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

Each appellant is within one of the two classes in the 2006 class settlement (reached in three cases in Charleston County, one of which alleged a class). (Chimento complaint ¶¶ 13, 47, 48, 51; Jane Doe 304 complaint at ¶¶ 1, 7, 15, 17, 54, 58; 305/McDonald complaint ¶3, 6 – 8, 24 – 26, 48, 87). The McDonald appellants were actual class members (305/McDonald complaint ¶ 9, 87).

The 2006 class action settlement is alleged on various grounds detailed in the complaints to have been, and in this appeal must be presumed to have been, collusive. Collusive steps are detailed in, e,g., the 305/McDonald complaint ¶¶ 4, 26 – 34, 44 – 61, 129 - 135. Among the apparent rationales for the collusion and judge-shopping was to evade appellate review, so class counsel's conduct would not be scrutinized. (305/McDonald complaint ¶ 59 to 61).

During the class proceedings, class counsel represented that they had obtained relief for absent persons such as appellants Chimento, Jane Doe 305, and John Doe 305, but class counsel never actually secured in any written order the relief they claimed on the record to have secured for class members who got no notice. (E.g., Chimento complaint at ¶ 14). As a result, the claimed relief is unavailable; it cannot be enforced by any of the appellants.

Drawing from representations made on the record, class counsel's fiduciary obligations to the appellants is alleged as both imposed by law as well as assumed (E.g., Chimento complaint ¶¶ 4, 15, 16, 17, 20, 23, 29, 34, 35, 37, 46 – 58, 61; Jane Doe 304 complaint ¶ 8, 17, 305/McDonald complaint ¶ 87). As to assumed duty the complaint alleges: "this complaint also alleges that [class counsel] voluntarily assumed a fiduciary duty as to the plaintiff, which was breached." (Chimento complaint ¶ 15; Jane Doe 304 complaint at ¶ 21; accord, 305/McDonald complaint ¶¶ 63 – 65, 87).

The allegations of assumed duty are drawn from the record in the underlying 2006 class action, and excerpts are quoted in the complaint (E.g., Chimento complaint ¶ 16; Jane Doe 304 complaint ¶ 22; 305/McDonald complaint ¶ 89). For example, from the transcript of that July 13, 2007 hearing at page 53, where class counsel stated:

> we represent the interests of persons who might be here today, may not be here today, may not have made a claim yet, a class, punitive [sic, probably intended to be putative] class or actual class, punitive [sic] initially, now an actual class.

In the light most favorable to the appellants, the assumed fiduciary duty to absent class members was overtly acknowledged by class counsel, and is alleged based on (a) class counsel pleading the class action, and (b) class counsel defining the classes so as to include the appellants. (Chimento complaint ¶¶ 16 – 17; Jane Doe 304 complaint ¶¶ 22-24; 305/McDonald complaint ¶¶ 1, 76, 87,

92, 95, 98, 138). The complaints quote from *Premium Investment Corp. v. Green*, 324 S.E.2d 72, 76 (S.C. App. 1984) (internal citations omitted):

> 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. * * * 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. * * * This is true although the benefit received by the class representative is not at the expense of the class. Under no circumstances will the fiduciary be permitted to profit from a breach of his duty as fiduciary.

(Chimento complaint ¶ 18; Jane Doe 304 complaint ¶ 24; *accord*, 305/McDonald complaint ¶¶ 91 - 92). We contend that *Premium Investment* remains good law and controls, and that fiduciary duties are imposed as a matter of law (Chimento complaint ¶ 19; Jane Doe 304 complaint ¶¶ 24 – 25; 305/McDonald complaint ¶ 63, 87, 92, 103, 105, 115 - 121).

Judge McMaster accepted that *Premium Investment* is no longer good law, even though nothing about Rule 23 being enacted compels such a conclusion. Whether or not those fiduciary duties were imposed by law, class counsel voluntarily assumed those fiduciary duties by defining the class without geographic limit (Chimento complaint ¶¶ 20 to 23, 49; Jane Doe 304 complaint ¶¶ 26 – 29, 40, 56; 305/McDonald complaint ¶114 - 121), but then changing the notice program from the nationwide notice originally proposed (e.g., 305/McDonald complaint ¶ 51)[10] to exclude those victims who resided out of state (E.g., Jane Doe 304 complaint ¶ 41 – 42, 46; 305/McDonald complaint ¶¶ 51 – 57, 98 – 102, 130).

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[10] On the record, in an April, 2014 hearing in a related action, class counsel described this change, which disadvantaged the classes they represented, as an accommodation to their "adversary," the Diocese. It was an (apparently) unwitting admission of legal malpractice. (305/McDonald complaint ¶ 51 – 55).

Various acts of misconduct are alleged as to class counsel. Class members were not informed of class counsel's "lifelong ties" to their adversary. (Chimento complaint at ¶¶ 24, 52; Jane Doe 304 complaint ¶ 30, 46, 53; 305/McDonald complaint ¶ 45). Judge-shopping was done after the class settlement was reached, to choose the judge for class approval (Chimento complaint ¶ 39; Jane Doe 304 complaint ¶¶ 44, 46, 53; 305/McDonald complaint ¶¶ 3, 34 – 37, 46 – 47, 49). The classes were not informed that victims who opted-out received better settlement terms than the class (e.g., Chimento complaint ¶ 39; Jane Doe 304 complaint ¶ 46)[11] and class representatives also received better terms (Chimento complaint ¶ 39; Jane Doe 304 complaint ¶ 46; 305/McDonald complaint ¶ 84). Class counsel simultaneously negotiated a fixed fee for themselves but a variable recovery for the class (e.g., Jane Doe 304 complaint ¶ 46). Ignoring a direct order of the South Carolina Supreme Court to conclude the class action by September 2009 (Chimento complaint ¶ 39; Jane Doe 304 complaint ¶ 46, 50; 305/McDonald complaint ¶ 38 - 39).[12] Submitting blatantly

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[11] To secure class settlement approval and class counsel's fee, class counsel agreed to themselves fund, or have their class clients fund, $100,000 towards those better terms. (Jane Doe 304 complaint ¶ 46). A copy of that trust account check is in the record.

[12] As noted above, the class action was concluded only in 2023, at the impetus of the McDonald appellants, which is also part of appeal 2023-00720.

At the 2025 hearing before Judge McMaster, class counsel described as "absolutely false" that the Supreme Court's 2009 order had been ignored, because another order was entered four days later in the class action (Transcript of October 7, 2025 at p. 45). But of course additional proceedings would necessarily be required to close the class action, so additional proceedings alone indicate nothing. In March 2009 the Supreme Court ordered two things, and it is undisputed that neither was done: close the class action by September, 2009 or return to the Supreme Court for more time to do so. The class action remained open for another fourteen years. It is plain that the Supreme Court's order was ignored.

However, a taboo may apply different rules. The Supreme Court was informed (in 2013, during the argument in *Doe v. Bishop*) that its 2009 order had been ignored, and that the class action had still not been closed. The Supreme Court took no steps to compel its order be enforced and the

false time records (e.g., Chimento complaint ¶ 39) with more than 24 hours claimed for many days (e.g., Jane Doe 304 complaint ¶ 53; 305/McDonald complaint ¶ 2; VIRZI affidavits).

As to the McDonalds and other class members, class counsel is alleged to have charged and collected fees and costs which no order authorized (Chimento complaint ¶ 39; Jane Doe 304 complaint ¶ 46; 305/McDonald complaint ¶ 4),[13] and without disclosing to class members before the unauthorized charges that class counsel had already been awarded a $2.5 million fee by the court (305/McDonald complaint ¶¶ 4, 62). The McDonalds, and presumably every class member represented by class counsel, were each charged a 20% fee which no order authorized (305/McDonald complaint ¶ 61, 80 - 81).[14]

When one of the class representatives, acting *pro se*, filed in 2016 a motion seeking review of class counsel's conduct, that motion also was ignored (305/McDonald complaint ¶ 131).

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class action remained open for another decade. It was closed only after the McDonald appellants sought to have class counsel's conduct reviewed. That relief was denied and the class action was closed. (305/McDonald complaint ¶ 40 – 42).

[13] As alleged in the 305/McDonald complaint, class counsel did not disclose to the circuit court a $145,000 contingent fee payment made to class counsel by the Diocese that applied to nearly all the time submitted to the court to support the $2.5 million court-awarded fee (305/McDonald complaint ¶ 4, 83 and the Exhibit to that complaint). No accounting reflects any of these payments to class counsel, which is why appellants have sought an accounting. (305/McDonald complaint ¶ 62, 85, 128 to 135).

[14] Nor does the record contain any written contingent fee agreement with the McDonalds. The implications are that class counsel has apparently charged class members some $900,000 not authorized by any order (305/McDonald complaint ¶ 62, 80 – 81, 134), and, in addition, costs that were required to be paid by the class fund, implying that class counsel may have also double-billed for costs also paid by the class fund. Which discovery, if ever permitted, would show.

Also, overtly false factual representations were made to the class action court, including an "understanding" that persons who did not receive notice and later "shows up" would be given the same relief as the class (Chimento complaint ¶¶ 25 – 26, 28-29, 32, 50; Jane Doe 304 complaint ¶¶ 31 – 37, 59 – 61; 305/McDonald complaint ¶¶ 4, 56 – 58, 93 - 97). Those benefits were claimed to include the same waived defenses, and the same relief (Chimento complaint ¶ ¶ 32 – 33; Jane Doe 304 complaint ¶¶ 36 – 38; 305/McDonald complaint ¶96, 137 - 142).[15] But no written orders secured that relief, an omission by class counsel in the interest of themselves and the Diocese, not the classes they represented. (CH 34 – 36, 53 – 56; Jane Doe 304 complaint ¶ 38 – 39, 59 – 61; 305/McDonald complaint ¶¶ 3, 5, 26, 43, 66 – 70, 76 – 78, 99).

Contrary to Judge McMaster's order, the complaint also alleges the damage to the appellants from class counsel failing to secure a written order waiving the same defenses the Diocese had waived for the class action: (CH 37, 40-41, 46, 57; Jane Doe 304 complaint at ¶ 18 – 19, 47, 64; 305/McDonald complaint ¶ 56 – 58, 76). That failure excluded appellants Chimento, Jane Doe 304, and John Doe 305 from any recovery for their sexual abuse due to the statute of limitations (CH ¶ 46, Jane Doe 304 complaint ¶¶ 18 – 19, 48; 305/McDonald complaint ¶¶ 51 – 53, 76, 105, 109, 132), a defense which had been waived in the class action.

The class settlement made class counsel's fee the highest priority of the class action, with a *pro rata* reduction for class members if "too many" victims recovered (Chimento complaint ¶¶

[15] The "understanding" is alleged to have been misrepresented to the court so as to deflect inquiry of the notice program having been changed from nationwide (originally proposed in October 2006) to only in and around South Carolina (modified January 2007). E.g., 305/McDonald complaint ¶ 98 - 99. Had the misrepresentation been truthful, and secured by an order, then appellants Chimento, Jane Doe 304, and John Doe 305 would not have been damaged by class counsel intentionally eliminating them from the notice program used in the class action.

37, 39, 55 – 56; Jane Doe 304 complaint ¶¶ 62 – 63; detailed in the 305/McDonald complaint ¶¶ 66 – 70, 86 – 87, 105 – 107, 110, 133). As noted above, the McDonalds (and other class members) were charged fees and costs not authorized by any order, and without proper disclosures of conflicts and the court awarded fee. The contingency fee they were charged is not supported by any written fee agreement as is required.

ARGUMENT

1. Class counsel made a voluntary appearance in each of the federal court and (after remand), in the state court, by moving in each forum for substantive relief. According to SCRCP 4(d) it was the equivalent of personal service. The circuit court erred in dismissing their complaint for lack of service.

The standard of review for interpreting the Rules of Civil Procedure is *de novo*. *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012). That review uses the same rules of construction as interpreting statutes. *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). "In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court." *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012). If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced. See, *Knotts v. S.C. Dept. of Natural Res.*, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002).

SCRCP 4(d) states that voluntary appearance "is equivalent to person service."

It is no criticism of Judge McMaster to recognize that before he was elevated to the bench his background in law and procedure was far deeper in the criminal context than the civil

context.[16] Class action issues draw from the more complex end of the civil litigation spectrum, as does the history and recent changes to the former law of special appearance versus general appearance for civil cases.

Class counsel appeared in each of the federal court (after removal) and in the state court (after remand). In each forum, class counsel moved the respective court for affirmative relief on the merits of the 305/McDonald complaint in the form of a 12(b)(6) motion.[17] Their motion practice was not restricted to challenging jurisdiction.

A motion "for affirmative relief on a non-jurisdictional ground" is "what would have constituted a general appearance under prior law." *Williams v. Williams*, 436 S.C. 550, 591, 873 S.E.2d 785, 807 (Ct. App. 2022) (finding that by a federal motion seeking relief on a non-jurisdictional ground the party "submitted itself to the jurisdiction of the [c]ourt," even when "*filings purport[ed] to reserve the issue of personal jurisdiction"* (emphasis added). *Williams v. Williams*, 436 S.C. 550, 591, 873 S.E.2d 785, 807 (Ct. App. 2022) (citing a decision of South Carolina District court Judge Hendricks, *Revman Int'l, Inc. v. SEL Mfg. Co.*, No. 7:17-CV-01944-BHH, 2019 WL 10893956, at *8 (D.S.C. Mar. 26, 2019) and *Ins. Corp.*

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[16] Although this appeal argues Judge McMaster got it wrong, the court should appreciate and recognize, as do appellants, that that after being assigned he acted promptly, after years of delay, to hold the first hearing in any of these cases.

[17] The pertinent federal filings are ECF 21 and its exhibits filed October 7, 2022, seeking relief under Fed. R. Civ. P. 12(b)(6), and ECF 28 and its exhibits, a memorandum filed November 8, 2022 contending that *res judicata* also required dismissal. The pertinent state court filings are the motions and exhibits by class counsel of September 1, 2023 and September 5, 2023. A claim of *res judicata* has been held to constitute a voluntary appearance. *Connell v. Connell,* 249 S.C. 162, 167, 153 S.E.2d 396, 399 (1967).

of Ireland, 456 U.S. 694 at 704, 102 S.Ct. 2099 at 2015 (1982). See also, *Connell v. Connell*, 249 S.C. 162, 166-67, 153 S.E.2d 396, 398-99 (1967) (stating if a defendant, by his appearance, "asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a general appearance ... and waives any defect in the jurisdiction arising either from the want of service on the defendant or from a defect therein"). *Accord*, *Smalls v. Weed,* 291 S.C. 258, 353 S.E.2d 154 (Ct.App.1987) (voluntary appearance made by joining jurisdictional objections with claims which went to the merits).

Judge McMaster's order dismissing the 305/McDonald complaint for lack of service does not address that the federal court filings gave that court jurisdiction before remand. Fed. R. Civ. P. 4(e)(1) permits service "following state law," which explicitly incorporates the voluntary appearance standard of SCRCP 4(d). E.g., *Maybin v. Northside Corr. Ctr.*, 891 F.2d 72, 74 (4th Cir. 1989) (the federal rules incorporate the voluntary appearance in SCRCP 4(d)). Nor was that addressed after the Rule 59(e) motion.

Nor does his ruling address the motions to dismiss filed in state court.

There is no reason to parse the voluntary appearance provision of SCRCP 4(d) into minute oblivion. "The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give him notice of the action and an opportunity to appear and defend." *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 8-9, 753 S.E.2d 537, 541 (2014) (quoting *State v. Sanders*, 118 S.C. 498, 502-03, 110 S.E. 808, 810 (1920)). Class counsel moving both

the federal and state court for relief claiming the complaint fails to state a claim obviously reflects they have notice of the complaint.[18]

While the issue of voluntary appearance is to be assessed "case by case," *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 340, 644 S.E.2d 793, 797–98 (Ct. App. 2007) (finding a letter to counsel constituted a voluntary appearance), and cases cited therein, unless the judicial taboo applies some different lens to the actions of class counsel who is connected to a judge, there is no valid basis not to find that SCRCP 4(d) is satisfied. Judge McMaster's order dismissing the *305/McDonald* complaint for lack of service should be reversed and the case remanded.

2. The circuit court erred in concluding that the professional obligations owed upon pleading a class action as articulated in *Premium Investment Corp. v. Green*, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (S.C. App. 1984), are somehow inapplicable because SCRCP 23 was adopted.

3. The circuit court erred in dismissing claims against class counsel for breach of fiduciary duty and breach of attorney-client duties.

These are not issues of statutory interpretation, as above, but are questions of law, for which the standard of review is also *de novo*, with "no particular deference to the trial court." *Buonaiuto v. Town of Hilton Head Island*, 440 S.C. 144, 150–51, 889 S.E.2d 625, 629 (Ct. App. 2023), *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008).

[18] To say nothing of class counsel acknowledging having the complaint in 2020, (at p. 10) when they opposed the petition in the original jurisdiction of the Supreme Court. Class counsel even filed that petition *and the 305/McDonald complaint* as an exhibit in their federal filing ECF 21-2, pages 22 to 89.

> In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief.

E.g., Flateau v. Harrelson, 355 S.C. 197, 201-202, 584 S.E.2d 413, 415 (Ct. App. 2003).

Class counsel's fiduciary duties. In 2005, class counsel brought in Charleston County civil action 2005-CP-10-4913, a class action for sexual abuse victims. The class complaint identified the class representative as a client identified as John Doe 53.[19] In 2006, the parties conducted a mediation and on June 14, 2006 a class settlement proposal was agreed to. The classes defined in that class settlement and defined in later filings (and ultimately approved in 2007) included certain sexual abuse victims (such as Mr. Chimento, Janoe Doe 304, and John Doe 305) who resided in a state other than South Carolina. Those settlement classes also included the two individual cases for sexual abuse victims pending in Charleston County as of June 14, 2006. No cases were then pending in Dorchester County, and at that point, if not before, is when it is alleged that the collusive conduct began.

Class actions are relatively rare, and relatively few appellate decisions in South Carolina have analyzed SCRCP 23.

> The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable.

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[19] In 2006, as part of the collusive judge-shopping after the class settlement was reached, the identical class complaint for John Doe 53 was re-filed as Dorchester County case 2006-CP-18-1636, making the identical complaint pending in two counties simultaneously. See, *Chinn v. Giant Foods, Inc.*, 100 F.Supp. 2d 331, 333 (D. Md. 2000) ("The cases are legion that a party may not institute new actions duplicating existing litigation."); *In Re Cypress Semiconductor Securities Litigation*, 864 F.Supp. 957, 959 (N.D. Cal. 1994) ("A class action identical in scope to an earlier certified class action is unnecessary because the class members' claims are already being litigated in the earlier action.").

Hansberry v. Lee, 311 U.S. 32, 41, 61 S. Ct. 115, 118 (1940).

Until SCRCP 23 became effective in 1985, South Carolina class actions were governed by S.C. Code § 15-5-50.[20] See, *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154, 157 (Ct. App. 1986) (S.C. Code § 15-5-50 was repealed by the adoption of SCRCP 23). Representative suits in South Carolina predated even S.C. Code § 15-5-50. See, e.g., *Dockside Association, Inc. v. Detyns, Simmons and Carlisle*, 285 S.C. 565, 330 S.E.2d 537 (Ct. App. 1985), aff'd as modified, 287 S.C. 287, 337 S.E.2d 887 (1985) (overruled as to standing by *Queen's Grant Villas Horizontal Property Regeimes I-IV v. Daniel Intern. Corp.*, 286 S.C. 555, 335 S.E.2d 365 (1985).

SCRCP 23 is modeled after the corresponding federal Rule 23. 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, 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). 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)

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[20] S.C. Code § 15-5-50 was very brief:

> When the question is one of common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

The statute was first enacted in 1870. Historically, a class was proper only if composed of plaintiffs who could properly be joined as parties. *See*, *Faber v. Faber*, 76 S.C. 156, 56 S.E. 677 (1907).

(fiduciary duties on class representative and counsel, corresponding "special responsibility" on court to "checkmate any abuse of the class action procedure.").

As noted above, *Premium Investment Corp. v Green*, 283 S.C. 464, ___, 324 S.E.2d 72, 76 (Ct. App. 1984) held:

> 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. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *La Sala v. American Savings & Loan Association,* 5 Cal.3d 864, 97 Cal.Rptr. 849, 852, 489 P.2d 1113 (1971). The class representative also surrenders the right to settle the action in return for individual gain, alone. *Id.* at 852, 489 P.2d at 1116.

See also, *In re Green*, 291 S.C. 523, 524 354 S.E.2d 557, 558 (1987) (attorney reprimanded for resolving that same class action without notice to the class, even though class certification had not occurred).

Judge McMaster's orders conclude that class counsel has no fiduciary duty to absent members of the class until a class is certified, directly discounting the fiduciary obligations that *Premium Investment* and *In re Green* hold begin at pleading. The orders are incorrect and should be reversed, with the cases remanded for further proceedings.

First, there is nothing about the transition to SCRCP 23 that changes the obligations on the class representative and class counsel that is articulated in *Premium Investment* and *Green*. Using as examples the identical John Doe 53 class actions complaints, one in Charleston County and one in Dorchester County,[21] paragraph 34 of each alleges that John

[21] A "cloning" alleged as part of the collusion and judge-shopping.

Doe 53 "brings this action on behalf of himself and as a representative of a class of other persons similarly situated as victims of priest sexual abuse in South Carolina pursuant to Rule 23 of the South Carolina Rules of Civil Procedure."

Pleading a class action is an aspirational statement that the class representative client and the lawyer who voluntarily signs the pleading are asking to represent a class of persons. Under SCRCP 23, certain approvals must occur before that aspiration is recognized by the court and counsel can be deemed to represent the class. That judicial recognition occurs at certification, and establishes that thereafter, class counsel may form an attorney-client relationship with class members. It does not bind class members to be represented by class counsel, but the court recognizes the class, and identifies counsel for the class.

Certification *should* assure the class (although it did not for the Charleston County version of the John Doe 53 class complaint)[22] that the action will not be dismissed or compromised without notice to the class.

As to the period between pleading and class certification, the period pertinent to Mr. Chimento, Jane Doe 304, and John Doe 305, the ready example that a fiduciary duty applies to both the class representative and class counsel upon pleading a class action is the effect on absent members of any class action filing as to tolling the statute of limitations for putative class members. This is a constitutional aspect of a class action, required by Due

[22] The Charleston class complaint was both settled and voluntarily dismissed without notice to the class after it had been "cloned" and re-filed in Dorchester County as part of the parties colluding and judge-shopping for the class settlement approval process.

Process. *Commencing* a class action tolls the statute of limitations to protect the interests of all putative class members:

> "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as a plaintiff in the pending action.

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353-354, 103 S.Ct. 2392, 2397 (1983), *quoting American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554, 94 S.Ct. 756, 786 (1974). That effect derives from the fiduciary obligation to protect the interests of the class that the class complaint aspires to represent.[23] See Virzi affidavit attached to the 305/McDonald complaint, ¶ 8 (on the change to class notice); ¶ 9 (on claiming relief not secured by order); ¶ 10 (providing no post-award review); ¶ 11 (failing to disclose conflicts); ¶ 12 (charging unauthorized fees and doing so without proper disclosures), which mirror his affidavits for Mr. Chimento and Jane Doe 304.

We also attach a brief "Ethics Watch" article by the late Professor Freeman from the South Carolina Lawyer magazine in September 2007, discussing *Premium Investment*, "constructive certification," *In re Green*, and an ABA Formal Opinion addressing the

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[23] South Carolina has not yet ruled on this issue. It was raised in *Roof v. Swanson*, 344 S.C. 315, 319, 543 S.E.2d 278, 280 (Ct. App. 2001) but the court deemed it "unnecessary to address." But due process considerations are recognized by SCRCP 23. E.g., *Hospitality Management Associates, Inc. v. Shell Oil Co.*, 356 S.C. 644, 664, 591 S.E.2d 611, 622 (2004).

ethical limits on lawyers communicating before certification with putative class members. Twenty-two years after SCRCP 23 became effective, Professor Freeman did not take the view that *Premium Investment* has been in any way diminished by SCRCP 23. To the contrary, Professor Freeman concluded (emphases added):

> For lawyers bringing class actions, *In re Green* means that, ***so long as the caption claims the case is a class action***, unless and until the class certification motion is denied or the class is decertified, class counsel must assume that a ***duty of loyalty and fair dealing is owed to absent class members.***

Class counsel's position is that they had no fiduciary duties to absent class members until certification. So until certification they claim they were at liberty to serve their own interests by intentionally excluding absent class members who resided out of state by changing the notice program to statewide rather than nationwide — which class counsel has represented on the record was done to accommodate a request of their adversary, the Diocese.

The first problem with class counsel's position, and Judge McMaster's orders, is that if class counsel intentionally disadvantaged their absent class members before certification (because until certification they owed them no duty), then what is their obligation after certification? *Once certification happened*, and the absent class members had become clients to whom a duty was owed, then class counsel would have a duty to repair the very damage class counsel had themselves intentionally caused their own client class members before the class was certified. Class counsel would not be relieved of the duty to clients to remedy the problems class counsel had created for their own clients.

Having defined and gotten approval for the class that included Mr. Chimento, Jane Doe 304, and John Doe 305, class counsel would have been obligated to move to modify the class notice program so as to revert that program back to the original nationwide notice proposal, to change the scope of the notice program to fully satisfy the class members that class counsel had chosen to define. It would be the only course of action available that would be consistent with the "high degree of fidelity and good faith" that the attorney-client relationship requires. *Spence v. Wingate*, 395 S.C. 148, 158–59, 716 S.E.2d 920, 926 (2011).

The class definition binds class counsel. *Tilley v. Pacesetter Corp.*, 355 S.C. 301, 381, 585 S.E.2d 292, 302 (2003) (class definition a strategy choice "they have to live with."). It can't be evaded by damaging one's clients before undertaking the representation.

The second problem with class counsel advocating that they were at liberty to abuse the interests of their absent class members as long as it was before certification is that it ignores the fiduciary duties to absent class members recognized in *Premium Investment* and *Green*.

The third problem with class counsel advocating that they were at liberty to abuse the interests of their absent class members as long as they did so before certification is that it is an admission of three things, each of which is deadly to their obligations to clients: (a) that class counsel indeed colluded with the Diocese by making the change to damage their clients at the request of the Diocese, (b) that class counsel was unaware of the fiduciary obligations they had taken on as to absent class members in bringing the class action, and (c) that class counsel had committed malpractice, given that on the merits they are alleged

to have failed — and it must be accepted as true — to secure in any written order the relief they claimed on the record in the class action to have obtained for absent class members who got no notice. Which, it is alleged and must be accepted as true, was done to further their own collusive financial interest to not have "too many" class claimants getting reduced, pro rate recoveries because they competed with class counsel's fixed fee, which took priority.

Misrepresenting to the court the agreement with the Diocese operated so as to both explain, and eliminate concern for, class counsel changing the original proposed notice (nationwide through *USA Today*) in the first motion for settlement approval (October, 2006) to statewide notice only in the revised motion (submitted in January 2007). The court was assured that anyone missed would later be given the same treatment.

Judge McMaster erred in failing to recognize that *Premium Investment* and *In re Green* impose fiduciary duties on class counsel and class representatives the moment a pleading is styled as a class action. Judge McMaster also erred in dismissing the actions for failing to state a claim, given that those duties to absent members of the class were breached when class counsel unilaterally changed the notice program to intentionally eliminate notice to out of state. They were also, and independently, breached when class members failed to secure by a written order the relief class counsel claimed on the record that they had gotten the Dioese to agree to. Each of those independent wrongs advanced the financial interests of class counsel and the Diocese with which class counsel is alleged to have been colluding to enhance the chances of there being a residual fund. Colluding

with an adversary against one's client states a claim for professional negligence, *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997) (Undisclosed conflicts states a claim and tolls limitations period for legal malpractice action).

At page 19 of his orders Judge McMaster's order notes that charitable immunity may not bar potential intentional tort claims by Chimento and Jane Doe 304, citing to *Doe v. Bishop of Charleston*, 445 S.C. 31, 911 S.E.2d 323 (2025), where the complaint alleged intentional torts by the Diocese and, as to the statute of limitations, *claimed a repressed memory* of the events of abuse. The observation is irrelevant to the issues on appeal.

For the appellants Chimento, Jane Doe 304, and John Doe 305, the charitable immunity defense of the Diocese is irrelevant. None of them has alleged an intentional tort *by the Diocese*. None of them was sexually abused by the Diocese. The statute of limitations defense, on the other hand, is not irrelevant. None of the appellants has alleged repressed memory, as did the plaintiff in *Doe v. Bishop of Charleston*, 445 S.C. 31, 911 S.E.2d 323 (2025). None of the appellants has a good faith basis to file a present claim against the Diocese independent of the class action settlement. Because they don't get the benefit of the defenses waived in the class settlement, each was damaged by class counsel having excluded them from any chance of receiving notice of the class action settlement. Within the settlement, they could have made their claims, and should have gotten notice of the settlement.

Finally, Judge McMaster invokes Section 323 of the Restatement (Second) of Torts. The restatement has no applicability to these claims. The complaints don't refer to it, and it does not form a defense for class counsel that it has not been invoked and does not apply. The complaints rest on the fiduciary duty and attorney-client duties that were breached by class counsel.

Judge McMaster’s orders should be reversed, and the cases remanded for additional proceedings.

Duties to the McDonalds, actual class members. Unlike Mr. Chimento, Jane Doe 304, and John Doe 305, the McDonald appellants were each an actual class member, so were actual clients of class counsel. (Virzi affidavit attached to their complaint at ¶ 6).

As noted above, they are each alleged to have been charged (with apparently all other class members) a 20% contingent fee and costs which no order in the class action authorized. That contingent fee is not supported by any written agreement, as is required, and implies that some $900,000 in unauthorized fees was improperly charged class members by class counsel.

The class action orders provide that costs were to be borne by the class fund, but each of the McDonalds, and presumably other class members, were also charged costs, implying that class counsel may have double-billed costs.

Class counsel is also alleged to have not disclosed the court-awarded fee or his substantial conflicts of interest to the classes before charging fees and costs of the McDonalds.

These are acts which violate the duties owed to clients.

> “The relationship of an attorney with his or her client is ‘highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of *159 fidelity and good faith.’ ” *Weatherford,* 340 S.C. at 582, 532 S.E.2d at 315 (quoting 7 Am.Jur.2d *Attorneys at Law* § 137 (1997)).

Spence v. Wingate, 395 S.C. 148, 158–59, 716 S.E.2d 920, 926 (2011). Failing to disclose conflicts states a claim, as noted above. *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997).

Consequences

What is the implication of the court failing to address the tactics, procedures, and misconduct alleged in this record that were used to gain approval of this class action settlement?

Newberg on Class Actions § 15.9 (5th ed.) states: "Examples of ethical conflicts in a class action context include the simultaneous negotiation by class counsel of a common fund recovery for a class and a fixed fee amount for class counsel."

"The concern is also greater when the value of the settlement fund and the fees were negotiated simultaneously, because that could indicate that some of the fund was traded off for greater fees." Newberg on Class Actions § 13:61 (5th ed.)

The *Manual for Complex Litigation*, Fourth, in § 21.61, sets out abuses, or "red flags," for class action settlements. From that list two common abuses are present in this class action settlement:

- filing or voluntarily dismissing class allegations for strategic purposes (for example, to facilitate *shopping for a favorable forum* or to obtain a settlement for the named plaintiffs and their attorneys that is disproportionate to the merits of their respective claims;
- treating similarly situated class members differently (for example, by settling objectors' claims at significantly higher rates than class members' claims).

The conduct of class counsel from this class settlement should be reviewed. The appellate courts have had a number of opportunities to address the manipulations in the record of this class action, each time (to date) refusing to do so. If the courts implicitly sanction the techniques in this record — among them judge shopping, collusion, revisions to the settlement to promote the financial interests of class counsel, pertinent information withheld from the judge, ignoring an order of the South Carolina Supreme Court, failure to make a complete accounting, failing to

disclose to the class conflicts of interest, submitting blatantly fraudulent billing records — those actions will, and should, be repeated by other lawyers in South Carolina. Other clients will be disadvantaged and improperly charged fees and costs. Lawyers with connections to a circuit judge will be seen to enjoy different rules, putting on display that there is indeed a judicial taboo. Class member clients will continue to be ill-served by lawyers who have placed their own financial interests above those of their clients.

Conclusion

We contend that each of the three cases dismissed by Judge McMaster should be remanded for further proceedings with direction on remand appropriate to protecting the members of the class from class counsel's conduct, and by the court ordering the manipulations in this record be independently examined, with new counsel appointed to represent the class due to the conflicts. The orders by which the claims of these appellants were dismissed should be reversed, and all cases be remanded with permission to engage in full discovery of the allegations.

Respectfully submitted,[24]

s/ Gregg Meyers

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[24] Generative AI drafted no portion of this filing and counsel has verified each citation.

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Column
John Freeman

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ETHICS WATCH
Dealing with Putative Class Members

On April 11, 2007, the ABA's ethics advisory committee issued Formal Opinion 07-445, outlining the rights and ethical responsibilities of counsel for plaintiff and the defense in communicating prior to class certification with persons who may be class members, but are not named parties. The opinion gives a green light to pre-certification communications by both sides, with some caveats.

Central to the ABA's analysis was its view that putative class members are not clients of the lawyer seeking to have the class certified. The ethics panel held that an attorney-client relationship results only when either (1) a client or the client's agent requests legal services, with the lawyer then accepting that invitation, or (2) "a substitute for that assent is given by a court," such as occurs when a class is certified. The panel held that putative class members are not represented by counsel for the named plaintiff prior to entry of a certification order, followed by the running of the opt-out period specified in the notice. The ABA panel held that putative class members cannot be viewed as class counsel's clients prior to the running of the opt-out deadline. This finding led the panel to conclude Rule 4.2 cannot prohibit defense counsel from contacting putative class members without going through opposing counsel.

The ABA's bright line test works fine for class actions under F.R.C.P. 23(b)(3), which requires notice and gives class members an opt-out right. Notice dissemination obligations and opt-out rights are less clear for class actions brought under federal Rule 23(b)(1) & (2), as well as under S.C.R.C.P. 23. What is clear under South Carolina law is that any lawyer bringing a class action is foolish to assume no special duties are owed to putative class members prior to the certification order/opt-out deadline set in the ABA's ethics ruling. The problem with depending on a bright line test is that class certification can occur informally in South Carolina.

In *Premium Inv. Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (S.C. App. 1984), the lawyer who brought a class action that was settled but never formally certified was sued by a putative class member for breaching his fiduciary duty to protect the absent class member's rights. The suit was upheld despite the absence of any formal certification order. The Court of Appeals ruled "constructive certification" had occurred. Subsequently, in *Matter of Green*, 291 S.C. 523, 354 S.E.2d 557 (1987), the lawyer in *Premium*

Inv. Corp. was publicly reprimanded for settling the lawsuit without notice to the class, even though no formal certification order had been issued and even though "it was clear that no other property owners would participate." *Id*. at 523, 354 S.E.2d at 558.

In essence, the Supreme Court in *Green* held that a fiduciary obligation is owed by class counsel to putative class members so long as the case is postured as a class action regardless of whether a formal certification order has been issued. *Premium Inv. Corp.'s* "constructive certification" concept presents risks in two directions. For lawyers bringing class actions, it means that, so long as the caption claims the case is a class action, unless and until the class certification motion is denied or the class is decertified, class counsel must assume that a duty of loyalty and fair dealing is owed to absent class members. Likewise, lawyers defending the case must be wary of violating Rule 4.2 by contacting unnamed class members after some form of "constructive certification" has occurred, making the unnamed class members class counsel's actual clients.

Rule 4.3 (covering contacts with unrepresented persons) and Rule 7.3 (dealing with advertising) were highlighted in Opinion 07-445 as the two ethics rules most apt to be applicable to communications with putative class members. The panel pointed out that Rule 4.3 "does not limit factual inquiries" of putative class members, but it does regulate such communications. The regulation comes in the form of Rule 4.3's requirement that the lawyer make clear his or her role in the matter, and not state or imply that the lawyer is disinterested. In other words, Rule 4.3 prohibits lawyers from taking advantage of the unnamed class members' naiveté or ignorance.

Like Rule 4.3, Rule 7.3 is designed to prevent lawyers from treating the public unfairly. In holding that lawyers seeking to bring a class action may use advertising to generate class action business, the ABA broke no new ground. *See, e.g*., North Carolina State Bar 2004 Formal Eth. Op. 5 (Jan. 21, 2005) (Solicitation of Claimants in a Class Action) (lawyer may send solicitation to prospective class members on wide array of topics prior to class certification, but letter must contain the words "This is an advertisement for legal services."); District of Columbia Bar Assn. Eth. Op. 302 (Nov. 21, 2000) (Soliciting Plaintiffs for Class Action Lawsuits or Obtaining Legal Work Through Internet-based Web ***11** Pages) (permissible for lawyers to use Internet-based Web pages to seek plaintiffs for class action lawsuits as long as communications are not vexatious or harassing); Massachusetts Bar Assn. Eth. Op. 93-5 (Mar. 23, 1993) (lawyer in class action permitted to contact prospective plaintiffs under applicable class action law).

Though Rule 7.3 was held applicable to communications designed to drum up class action business, Opinion 07-455 held that "rule 7.3's [advertising] restrictions do not apply to contacting potential class members as witnesses, so long as those contacts are appropriate and comport with the Model Rules."

The big winners under the ABA's analysis of dealings with putative class members are defense lawyers who can now legitimately claim they are entitled to interview putative class members prior to class certification without notifying class counsel. Data gathered through such interviews may pave the way for defeating class certification, which, in turn, may provide a means for ending the lawsuit's economic viability.

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