The State of South Carolina
In The Court of Appeals

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

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SC Court of Appeals

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 Final Reply Brief

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Reply Argument

In Reply, appellants make the following points.

1. Inviting the judicial taboo. Most of the respondents' brief comprises various invitations for the panel to avoid the issues of class counsel's conduct of the class action and instead embrace the apparent judicial taboo against addressing the merits of those allegations when a lawyer is connected to a circuit judge.

The allegations of the complaints, and the evidentiary support for those allegations in the record, must be viewed in the light most favorable to the appellants. On this record the starting point on this record must presume that the class action was collusive, and class counsel committed substantial unethical and negligent conduct.[1]

Respondents contend the court should focus instead on various collateral arguments. It makes sense for them to do so, as after all, in his 2017 order Judge Nicholson focused his class duty analysis not on the classes as defined or approved but on one portion of one of the class action complaints. And in 2021 the Court of Appeals affirmed on a different ground, focusing on the claims against class counsel having been pled as alternative claims to those against the Diocese. Each time the conduct of class counsel evaded appellate review.

By those devices, the conduct of class counsel in the class action has remained, to date, beyond appellate review. If that approach is accepted by the Court, the Court can evade, yet again,

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[1] Viewing the facts, as they must be viewed, in the light most favorable to the appellants under SCRCP 56. E.g., *Shelton v. LS&K, Inc.*, 374 S.C. 294, 297, 648 S.E.2d 307, 308 (Ct. App. 2007) ("Appellate courts review a grant of summary judgment under the same standard applied by the circuit court pursuant to Rule 56, SCRCP.") Considerable factual matter in the record, which the final briefs detail, supports the allegations of the complaints, and all of it must be viewed favorably to the appellants.

neither approving nor disapproving the various alleged acts of breach of duty by class counsel. Which is the value of the apparent taboo, if it exists.

Addressed below are the actual issues in Reply as well as the particular invitations by Respondents to embrace the apparent taboo so that the conduct of the class action can continue to evade appellate review. Each invitation to the apparent taboo should be rejected. Unless, of course, there is indeed such a taboo, and in South Carolina different rules do indeed apply depending on a lawyer's proximity to a circuit judge. In that case, one or more of the taboo invitations should be embraced by the Court, so the conduct of class counsel in this class action can again evade appellate review, provided the Court regards that avenue for evasion to be worth implicitly affirming all the alleged misconduct, so other lawyers can repeat some or all of it in any future class action.

2. <u>That there are fiduciary duties imposed on counsel as a matter of law upon pleading a class action has been reaffirmed</u>. On July 22, 2026, the South Carolina Supreme Court explicitly recognized, in *Henson v. South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice*, Opinion 28343 (Advance Sheet 27, July 22, 2026 at p. 12), that *Premium Investment Corp. v. Green*, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (S.C. App. 1984) remains good law, and imposes on class counsel *upon pleading a class action*, "a fiduciary duty to the entire class, including absent class members." *Henson* at Advance Sheet 27 at p. 24. The Court quoted the identical passage from *Premium Investment* that we contend governs this appeal.

> [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.

283 S.C. 464, 470, 324 S.E.2d 72, 76 (S.C. App. 1984). The Supreme Court found that the

counsel who pled the class action at issue in *Henson* "owed a fiduciary duty to each of those 66,800 individuals" in the class as defined by the circuit court."[2] The court implicitly rejected respondents' theory (embraced by Judge McMaster, and before him by Judge Nicholson) that *Premium Investment* could be ignored for having been decided in 1984, before SCRCP 23 went into effect July 1, 1985. In this appeal, the fiduciary duty of class counsel to the appellants unarguably began when the initial class action complaint was filed in December 2005 in Charleston County (R. Vol. 5, pp. 2089 to 2103; duplicated in Dorchester County at R. Vol. 5, pp. 2133 to 2147), a duty class counsel claims in this appeal never existed.

The Supreme Court having affirmed the vitality of *Premium Investment* also implicitly affirms its holding that class proceeds are held in "constructive trust" and if any fiduciary obligation was breached, as is claimed in these actions, "under no circumstances will the fiduciary be permitted to profit from a breach of his duty."[3]

The respondents' rationale, Brief at 26 to 28, that they had no fiduciary duty to absent members of the class so were free to abuse the interests of class members as much as they

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[2] While the court reversed the circuit court's approval of two defined classes, each for lack of commonality and predominance, the fiduciary duty of class counsel upon *pleading* the class action, the precise point at issue in this appeal, was explicitly affirmed.

[3] *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).

desired up to certification, is incorrect, and is instead an admission that they failed to recognize, so could not possibly have complied with, the fiduciary duties they had assumed to absent class members including John Doe 305, Mr. Chimento, and Jane Doe 304 upon first pleading the class action in 2005 in Charleston County (R. Vol. 5, pp. 2089 to 2103; duplicated in Dorchester County at R. pp. Vol. 5, pp. 2133 to 2147). The respondents' admission is ground for the Court to not only reverse Judge McMaster's orders and to remand all three cases, but the Court should also direct that judgment be entered as to the breach of fiduciary duty claims by absent class members John Doe 305, Jane Doe 304 and Mr. Chimento. The claims about the duties class counsel owed the McDonalds, actual class member clients, and all the other class members class counsel breached duties towards, could then be addressed in the further proceedings below, and (for the first time) full discovery permitted, including the depositions of class counsel.

Each of Judge McMaster's orders should be reversed and remanded.

3. The standard of review as to the service issue is *de novo* because no facts are in dispute. The shallowness of respondents' argument as to the standard of review and the applicability of SCRCP 4(d) on their voluntary appearances, in both state and federal courts, is on embarrassing display in the Respondents' Brief at pp. 12 to 23. Each case cited by respondents to contend that an abuse of discretion standard governs the service of process issue featured a *factual dispute* about service.

Abuse of discretion deference is appropriate when a circuit court makes *factual* findings as to service. E.g., *Ex Parte: Trustguard Ins. Co.*, 442 S.C. 485, 505-506, 900 S.E.2d 448, 459 (Ct. App. 2023) (emphasis added):

> "The trial court's *findings of fact* regarding validity of service of process are reviewed under an abuse of discretion standard." *Graham L. Firm, P.A. v. Makawi*,

> 396 S.C. 290, 294-95, 721 S.E.2d 430, 432 (2012). "*Credibility determinations* regarding testimony are a matter for the finder of fact who has the opportunity to observe the witnesses, and *those determinations* are entitled to great deference on appeal." *Okatie River, L.L.C. v. Se. Site Prep, L.L.C.*, 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003)

Similarly, *Graham Law Firm, P.A., v Makawi*, 396 S.C. 290, 294, 721 S.E.2d 430, 431 (2012) (emphasis added):

> The trial court's *findings of fact* regarding validity of service of process are reviewed under an abuse of discretion standard.

On this record there is no factual dispute about the motions to dismiss on the merits made by the respondents that constituted their voluntary appearance in each of the federal court (before remand, R. Vol. 4, pp. 1263 to 1414), and the state court (after remand, R. Vol. 4, pp. 1417 to 1790). Respondents' motions to dismiss on the merits for failure to state a claim and due to *res judicata* are matters of public record in the respective court's files (R. Vol. 3, pp. 1263 to 1414; R. Vol. 4, pp. 1417 to 1790). The standard of review to interpret SCRCP 4(d) is *de novo*, because no facts are in dispute.[4]

In each forum, the respondents moved the court to assert its jurisdiction and dismiss the 305/McDonald complaint on the merits for failure to state a claim and due to *res judicata*.[5] (R. Vol. 3, pp. 1263 to 1414; R. Vol. 4, pp. 1417 to 1790). Doing so constituted

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[4] As it happens, an error of law by a circuit court in interpreting SCRCP 4(d) is, by definition, also an abuse of discretion. E.g., *Sharps v. Sharps,* 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

[5] As set forth in the initial brief, on October 7, 2022, class counsel filed in federal court ECF 21 and its exhibits, a motion to dismiss on substantive grounds under Fed R. Civ. P. 12(b)(6) (R. Vol. 3, pp. 1263 to 1394). On November 8, 2022, class counsel filed ECF 28, a reply memorandum in support of their motion to dismiss that also contended the case should be

a voluntary appearance, as each such filing invoked the court's jurisdiction on the merits.

As they must, the respondents concede they made 12(b)(6) motions to dismiss. E.g., Respondents' Brief at p. 22. Despite that concession as to their pleadings, they continue to claim (Respondents' Brief at pp. 22 - 23) they "did not demonstrate any intention to submit to the jurisdiction of the state court." Their intention is implied as a matter of law, by the nature of the motion.

Respondents are apparently unaware of the significance of their having asked for relief on the merits via their 12(b)(6) motions, which waived service by constituting a voluntary appearance. *Stearns Bank Natl Assn v. Glenwood Falls LLP*, 373 S.C. 331, 341, 644 S.E.2d 793, 798 (Ct. App. 2007) ("In order to establish waiver of the right to contest jurisdiction, it is only necessary that a party, by its conduct, evince an intent to proceed to the merits of the case," quoting *Jenkinson v. Murrow Bros. Seed Co.,* 272 S.C. 148, 154, 249 S.E.2d 780, 783 (1978) (Ness, J., concurring). Their motions proceeded to the merits.

We don't disagree that SCRCP 12 *permits* joining multiple 12(b) defenses, but even as Respondents cite to SCRCP 12(g) and SCRCP 12(h) (Respondent's Brief at 16), to argue they *had* to join their 12(b)(6) motions with other 12(b) motions, they contend

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dismissed based on *res judicata* (R. Vol. 3, pp. 1395 to 1414). Each filing constituted a voluntary appearance, and each brought the respondents into the case before remand.

Then 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) and *res judicata* (Rec. Vol. 4, pp. 1417 to 1790). Moving to dismiss on the ground of *res judicata* itself constitutes a voluntary appearance. *Connell v. Connell,* 249 S.C. 162, 167, 153 S.E.2d 396, 399 (1967). Note that in their brief (at p. 6), the Respondents make no mention of their federal court filings.

"[i]t defies logic" (Respondents' Brief at p. 16) to *require* joining Rule 12 defenses "yet to then find that one of the defenses so joined constitutes a voluntary appearance thereby waiving another of the defenses so joined." Respondents' Brief at p. 16.

But here the embarrassment of Respondents' shallowness becomes acute. They have apparently not actually read either of the rules they cite.

The text of SCRCP 12(g) and SCRCP 12(h) makes the respondents' error plain. They were *permitted*, but *not required*, to include a 12(b)(6) motion with their other filings. They did so as volunteers, asking the court for relief on the merits. SCRCP 12(g) requires joining defenses "except a motion as provided in subdivision (h)(2)." And SCRCP 12(h)(2) explicitly provides that "A defense of failure to state a cause of action upon which relief can be granted," and two other specified types of motions "may be made in any pleading permitted or ordered under Rule 7(a)."[6]

Under the plain text of SCRCP 12(h)(2), Rule 12(b)(6) motions are explicitly *not* waived if the 12(b)(6) motion for failure to state a claim is not joined with other Rule 12(b) defenses. Joining a 12(b)(6) motion with other Rule 12(b) motions is a choice, not a requirement. As such, when Respondents chose to make each of their 12(b)(6) motions, first in the federal court then in the state court, the respondents by implication made a voluntary appearance in each court, asking each court for relief on the merits, when the

[6] Federal Rules of Civil Procedure 12(h)(1) and 12(h)(2) are to the same effect as to a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Rules of Civil Procedure, state and federal, explicitly permitted them to have deferred those 12(b)(6) motions to a responsive pleading.[7]

These were choices by Respondents. They chose to make a voluntary appearance, eliminating by their voluntary actions the need for service of process. "Voluntary appearance by [a] defendant is equivalent to personal service...." SCRCP 4(d).

The dismissal of the 305/McDonald complaint for lack of service was plainly incorrect given the voluntary appearances through a motion on the merits made in each of the federal and state court. The order as to Doe 305 and the McDonalds should be reversed and the case remanded. Unless, of course, the apparent taboo renders SCRCP 4(d) unspeakable.

4. <u>The import of the Supreme Court's 2014 *Doe v. Bishop* opinion</u>. The respondents contend, beginning at p. 29 of their brief, that the 2014 decision of the Supreme Court in *Doe v. Bishop*, 407 S.C. 128, 754 S.E.2d 494 (S.C. 2014) is inapplicable because it was not a case which alleged legal malpractice.[8] The respondents are correct that class counsel were not parties to that

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[7] Even now, the respondents apparently don't understand the significance of their motions to dismiss on the merits, as they claim (Brief at pp. 7 – 8, 21 - 22) that when appellants' counsel extended the courtesy of alerting Respondents to their default status, explicitly because *"all [respondent] parties made an appearance in federal court*" (emphasis added), that somehow the courtesy was a change of appellants' position. (Respondent's brief at pp. 14 - 15). It has been appellants' consistent position throughout. E.g., Transcript of hearing before Judge McMaster at p. 33: "they made a voluntary appearance. First in federal court, then in state court." (R. Vol. 7, p. 3129).

[8] Respondents' opposite contention, that the 2014 decision in *Doe v. Bishop* is applicable, and has "already rejected" the claims of Jane Doe 304 and Mr. Chimento, are addressed below.

appeal and that the complaints in that appeal did not allege legal malpractice. The respondents are incorrect that the 2014 opinion in *Doe v. Bishop* has no bearing on this appeal.

The respondents concede the court's 2014 holding is about Due Process but deny (brief at 30) this language has anything to do with class counsel:

> 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.

Doe v. Bishop, 407 S.C. 128, ___, 754 S.E.2d 494, 501 (S.C. 2014) (emphasis added). "Representation in the class action proceedings" is about, and can *only* be about, class counsel's conduct in representing the class they choose to represent.

The respondents are quite confused, perhaps intentionally, about the "limited collateral review" that *Hospitality Management Associates, Inc. v. Shell Oil Company*, 356 S.C. 644, 591 S.E.2d 611 (2004), requires to determine if a class action precludes by *res judicata* a later made claim.

When a defendant, in this instance class counsel, seeks to bar claims on the merits by using *res judicata*, the plaintiffs are entitled to that limited collateral review. That review overcomes a defense if Due Process was not received in the class action.

Two different circuit judges who have made that limited collateral review in related cases for this class action have each concluded that claims of out of state class members from the 2006 class settlement were not barred by *res judicata*, because those out of state class members did not receive Due Process from the notice program (R. Vol. 1, pp. 201 to 211 (Judge Young); R. Vol. 1, pp. 212 to 216 (Judge Nicholson)). As is evident from the pleadings in the class action (Compare, R. Vol. 5 at p. 2130 ¶ 3(a) with R. Vol. 5 at pp. 2155 to 2156 ¶ 3(a)), class counsel reduced the notice program (from nationwide to only statewide), and did so (according to class counsel in a 2014 hearing) at the request of their "adversary," the Diocese (R. Vol. 8 at p. 3619 lines 21 to 25). Respondents refer in their brief at p. 30 to Judge Nicholson's 2016 order finding that other absent class member sexual abuse victims were not barred via *res judicata* by the 2006 class settlement (R. Vol. 1, pp. 212 to 216). In 2011, Judge Young reached the same conclusion (R. Vol. 1, pp. 201 to 211). Each order was a function of class counsel at that time trying to dispose of those cases on the merits, *to the disadvantage of the absent class members to whom they owed fiduciary duties*.

5. <u>Each of the various invitations to ignore class counsel's conduct and apply the apparent taboo should be rejected</u>**.**

a. <u>The "two issue rule</u>." One of the most obvious of the respondents' invitations to invoke the apparent taboo is their contention that the "two issue rule" applies. (Resp. Brief at pp. 12, 36 - 38). The respondents contend the court should apply the rule to their argument that Mr. Virzi's expert affidavits for each of Mr. Chimento and Jane Doe 304 are in some manner defective. *Id*.

At p. 12 of their brief the Respondents refer to "issues raised" in the proceedings below. Respondents omit that the two-issue rule applies only when a circuit judge has actually <u>ruled</u> on an issue raised. E.g. (emphases added), *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, *where a decision is based on* more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."), *abrogated on other grounds by Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018); *Shirley's Iron Works*, *Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed *ruling* is the law of the case and requires affirmance."); Rule 220(c), SCACR ("The appellate court may affirm any *ruling*, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")

On p. 9 in his orders as to each of Mr. Chimento (R. Vol. 1, p. 13) and Jane Doe 304 (R. Vol. 1, p. 46), Judge McMaster listed, in each case, the three arguments by respondents that his order addressed: (1) the references in the complaint to the pending appeal,[9] (2) whether Mr. Chimento or Jane Doe 304 had alleged a fiduciary or attorney-client relationship, and (3) whether Mr. Chiumento or Jane Doe 304 had alleged damages caused by the lawyers.

Judge McMaster's rulings concern those three issues as to Mr. Chimento and Jane Doe 304. No part of his opinion ruled on the contentions about the expert affidavit, or any of the other extraneous issues the respondents now contend control. Unless the apparent taboo is real, the two-issue rule plays no part in this appeal.

b. <u>The supposed SCACR 208 "abandonment" issue</u>. In Respondents' Brief at p. 23 they invite the Court to use the apparent taboo to avoid examining class counsel's conduct to conclude that because appellants discuss in a single section two issues related to class counsel's duties to absent class members — the fiduciary duties (issue on appeal two) — and the duties to actual class member clients (issue on appeal three) — that somehow since the text begins after the third issue that the Court should regard the second issue as "abandoned" under SCACR 208.

As the issues of class counsel's duties in a class action are obviously related, and as class actions have unusual procedures to accommodate those duties, it makes sense to discuss in one

[9] Meaning the appeal that produced the 2021 Court of Appeals opinion (R. Vol. 1, pp. 238 to 241) that did not address the issues from the conduct of the class action but instead focused on the alternative claims in the complaints of those actions, none of which allegations are present in the complaints involved in this appeal, as also addressed below.

section those different duties, parallel to how SCRCP 23 combines in one rule of civil procedure the framework for those duties. Compare, SCRCP 23 with the Supreme Court's treatment in a single section of its opinion in *Henson* beginning at p. 19 of the July 22 Advance Sheet and running to page 24 of "the three issues presented to the Court by SCDC and SCDJJ."

When issues are related it can make sense to arrange them together.

Argument specific to each issue is included. Appellants' brief at pp. 26 to 35 addresses the fiduciary duties recognized in *Premium Investment* (issue on appeal two), and pages 35 to 37 concern the duties to actual class member clients (issue on appeal three).

Unless the apparent taboo applies, and the Court is intent on avoiding any examination of class counsel's conduct of the class action due to their proximity to a circuit judge, the contention should be rejected and the issues considered on the merits.

c. Judicial estoppel. At p. 24 of their brief Respondents invite the Court to avoid examining class counsel's conduct by using the references, in each of the complaints for Mr. Chimento and Jane Doe 304, to an appeal that was then pending on one issue when those cases were filed. The invitation should be declined, particularly in light of the Supreme Court's July 22, 2026 decision in *Henson v. SCDOC and SCDJJ,* which explicitly recognized the ongoing vitality of the fiduciary obligations imposed as a matter of law on class counsel by *Premium Investment* upon pleading a class action.

Paragraphs 15 and 16 of Mr. Chimento's complaint as to class counsel allege (emphasis added):

> 15. *In pleading that class action, as a matter of law* [class counsel] *assumed fiduciary duties to the Plaintiff*, of which [class counsel] were apparently unaware as they have denied such duties were assumed. Presently an order from a trial court [the 2017 order from Judge Nicholson] maintains that no fiduciary duty was imposed

by law on [class counsel] as to the plaintiff or any other absent class member, so *to that extent this complaint overtly depends on the outcome of an appeal presently pending in the South Carolina Court of Appeals*. However, this complaint also alleges that [class counsel] voluntarily assumed a fiduciary duty as to the plaintiff, which was breached.

> 16. [Class counsel] acknowledged that they had voluntarily assumed fiduciary duties towards absent members of the class, such as the plaintiff, in the March 9, 2007 initial fairness hearing. In the transcript of that hearing at page 53, [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 [putative] class or actual class, [putative] initially, now an actual class.

(R. Vol. 1, pp. 250 to 251). The transcript of that March 9, 2007 hearing referred to is in the Record (R. Vol. 7 at p. 3208). Similarly, paragraphs 21 and 26 of the second amended complaint for Jane Doe 304 allege as to class counsel (emphasis added):

> 21. *In pleading that class action, as a matter of law* [class counsel] *assumed fiduciary duties to the Plaintiff*, of which [class counsel] were apparently unaware as they have denied such duties were assumed. Presently an order from a trial court [the 2017 order from Judge Nicholson] maintains that no fiduciary duty was imposed by law on [class counsel] as to the plaintiff or any other absent class member, which order conflicts with other orders of other state courts, including the one who issued that order, so *to that extent this complaint overtly depends on the outcome of an appeal presently pending in the South Carolina appellate courts*. 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.

(R. Vol. 2, p. 787).

> 26. Whether or not those fiduciary duties were imposed by law, [class counsel] voluntarily assumed those fiduciary duties.

(R. Vol. 2, p. 789).

Each complaint maintained what the Supreme Court has now affirmed in *Henson*: that a duty to absent class members Mr. Chimento and Jane Doe 304 was imposed by law, that a trial judge had (we now know, erroneously) ruled no duty was imposed by law, that an appeal was pending which we expected might resolve that issue, but that in any event the complaints for Mr. Chimento and Jane Doe 304 also alleged assumed fiduciary duty, an issue not present in the appeal. Each complaint states overtly that "to that extent" the complaint depends on the appeal, as there is an alternative source of duty not involved in the appeal, that being assumed duty.

As it would turn out, of course, the 2021 opinion of the Court of Appeals (R. Vol. 1, pp. 238 to 241) would affirm Judge Nicholson (R. Vol. 1, pp. 217 to 237), but without addressing any of the conduct of class counsel or even the fiduciary duty question imposed by law (via *Premium Investment*, the duty imposed by law upon pleading issue now resolved by the Supreme Court in *Henson*.) Instead, in a brief, unpublished decision, the Court of Appeals decided the appeal based on the complaints in those cases alleging only alternative claims against class counsel (R. Vol. 1, pp. 238 to 241). The Court determined the alternative claims were not cognizable because the plaintiffs could state claims against the Diocese.

Unless the apparent taboo applies, these paragraphs from each complaint would not eliminate the claims of Mr. Chimento or Jane Doe 304. The Respondents argue (Respondents' Brief at p. 24) that the allegations constitute judicial estoppel as to Mr. Chimento and Jane Doe 304 because Judge Nicholson's result was affirmed. But Judge Nicholson's rationale has now been entirely rejected by *Henson*, so cannot form the basis of dismissing either complaint.

Even without *Henson*, the argument should be rejected for two reasons. First, each complaint merely notes the existence of one issue on appeal that might be resolved. Neither complaint alleges that the claims depend on the appeal, only that one issue, the duty imposed by law, is on appeal and might be resolved. As it turns out, the issue wasn't resolved, or even addressed, by that appeal (but has now been resolved by *Henson*), so the 2021 Court of Appeals decision left only Judge Nicholson's (now erroneous) trial court order on the issue. Second, each complaint also alleged a different source of duty, an assumed duty, so even if the appeal had held that no duty was imposed by law from pleading the class action (as *Premium Investment* holds and *Henson* has now reaffirmed), the complaints allege a different source of duty.

The South Carolina Supreme Court has ended the debate in *Henson*: as a matter of law, a fiduciary duty is imposed on class counsel (and the class representatives) when a class action is pleaded.

d. Damages. At page 24 of their brief, the respondents invite the Court to affirm Judge McMaster because they claim no damages are alleged to have been proximately caused to Mr. Chimento or Jane Doe 304 by class counsel's breaches of duty.

The assertion is plainly incorrect. Each complaint alleges, e.g., R. Vol. 1, p. 255 ¶ 37; R. Vol. 1, p. 257 ¶ 40 (as to Mr. Chimento) and R. Vol. 2, p. 786 ¶ 18 (as to Jane Doe 304), and the initial brief explains (at p. 34), that neither Mr. Chimento nor Jane Doe 304 (or for that matter, John Doe 305) has a good-faith basis to allege a claim against the Diocese for their sexual abuse itself *because of the statute of limitations*, a defense waived in the class action. Had class counsel not eliminated their chance of receiving notice, each could have made a claim.[10]

Each complaint alleges, and Mr. Virzi's respective affidavits explain (R. Vol. 1, pp. 262 to 264; R. Vol. 2, pp. 801 to 812), that class counsel claimed on the record to have secured relief for absent class members who got no notice, but then failed to secure that relief in any written order.

[10] Judge McMaster's orders speculating about claims that might overcome charitable immunity doesn't help any of the parties in these cases. While charitable immunity was also waived in the class action, that is not the defense that these plaintiffs have no good faith basis to overcome.

E.g., Chimento complaint ¶¶ 25 - 37 (R. Vol. 1, pp. 252 to 255) and the transcripts referred to as to class counsel's on-the-record claims. Jane Doe 304 second amended complaint at ¶¶ 34 – 44 (R. Vol. 2, pp. 790 to 793), and the transcripts cited therein. That is the damage to each of them from class counsel's malpractice.

e. <u>What *Doe v. Bishop* in 2014 did *not* decide</u>. At p. 29 – 30 of their brief, Respondents reflect confusion about the import of the holding in the 2014 *Doe v. Bishop* opinion as to the claims of Jane Doe 304 and Mr. Chimento. Respondents contend their claims have already been ruled on and rejected in the 2014 opinion in *Doe v. Bishop*. They have not. In that 2014 opinion, the Supreme Court ruled that absent class members who got no notice were not entitled to the protections set out in two of the 2007 ***written orders*** from the class action. One of those ***written*** orders permitted certain absent class member abuse victims, a subset of all of the absent class members, to make claims outside the normal class claims process.

The Supreme Court's opinion does not in any way address the claims in these cases, which are not derived from the ***written*** orders but, as discussed above, are derived from class counsel's claim on the record in July, 2007, to have secured relief for absent members generally (R. Vol. 8, p. 3343); but then class counsel failed to secure that broader claim through ***written*** order. (E.g., R. Vol. 1, p. 255 ¶ 34, as to Mr. Chimento; R. Vol. 2, pp. 789-790 ¶ 31, as to Jane Doe 304).

Had class counsel done their job to secure in a written order the relief they represented to the court they had achieved, class counsel would have committed no malpractice. The professional negligence alleged in the complaints, and explained by Mr. Virzi's affidavits, are drawn from the class action transcripts referred to and quoted in the complaints, as they display class counsel promising on the record more than was delivered in the written orders. Which, it is contended, was done to avoid having to explain the reduced notice program. (E.g., R. Vol., 1 p. 255 ¶ 37, as to Mr. Chimento; R. Vol. 2, pp. 793 ¶ 44 and Vol. 2, p. 799 ¶ 69, as to Jane Doe 304).

The Chimento and Jane Doe 304 claims are based on what class counsel *claimed* on-the-record to have secured but then failed to get a written order to protect. That disconnect reflects class counsel's breach of fiduciary duty to the absent class members such as Jane Doe 304, and Mr. Chimento. In short, the Supreme Court has not "already rejected" the claims, as Respondents contend at in their Brief at pp. 30 - 32.

f. <u>The "same position" claim</u>. We end with the single most astounding claim in the respondents' brief as to the absent members of the class, which appears at p. 32: that even if absent class members received lack of notice and inadequate representation "the absent class members were not precluded from bringing their claims in the first place. They were in the same position after the settlement as they were before it."

The respondents propose an airtight safe harbor defense for every lawyer who commits some version of legal malpractice. We would state their same proposition this way: pretend I never undertook your representation, so even if I breached my fiduciary duties to you and compromised your rights (whether because your adversary asked me to or not), and even if I represented to a judge, and my adversary agreed on the record before that judge, that I had protected your interests as an absent class member but then I failed to do so by a written order, if we just assume I hadn't ever done any of those things, and we pretend that I had never undertaken your representation at all, you would be in the same position you are today.

But of course, the positions are not the same because they did undertake the representation, and for a time, until they began breaching their duties, they acted in the interests of appellants.

Until they began advancing their own financial interests ahead of the classes they undertook to represent, and to advance those financial interests they allowed the benefits they had secured for absent members of the classes to be reduced. It is also factually incorrect, as the appellants could have made claims for their sexual abuse in the class action that they cannot make outside of it, due to defenses that had been waived within the class action only.

It is now undisputable that class counsel had duties to absent class members upon filing their class complaint in 2005. *Henson*; *Premium Investment*. Class counsel denied having any such duties, so could not possibly have complied with them.

And the Record reflects[11] they breached those duties. Class counsel reached a class settlement after a 2006 mediation[12] that included appellants. After some judge-shopping,[13] they maneuvered the class settlement approval to the judge they favored, sitting in a different county[14] ("cloning" for that county the original class action complaint).[15] In October 2006 they moved that

[11] R. Vol. 1, pp. 248 to 264, Complaint of Mr. Chimento; R. Vol. 2, pp. 783 to 812, Second Amended Complaint of Jane Doe 304; R. Vol. 3, pp. 1108 to 1154, Complaint of John Doe 305 and the McDonalds.

[12] 2006 mediation agreement, e.g., R. Vol. 1, pp. 34 to 37.

[13] Letter to Judge Jefferson to seek voluntary dismissal without prejudice of Charleston County cases (e.g., R. Vol. 1, pp. 466 to 467); repeated 2006 filings in Dorchester County (R. Vol. 5, pp. 2104 to 2112, case 2006-CP-18-1310; R. Vol. 5, pp. 2113 to 2132, case 2006-CP-18-1311; R. Vol. 5, pp. 2133 to 2147, case 2006-CP-18-1636.

[14] 2006 order of Judge Goodstein assigning the cases to herself (R. Vol. 1, pp. 95 to 97); 2007 order on waiver disclosures (R. Vol. 1, pp. 113 to 114).

[15] *Compare*, Doe 53 complaint in Charleston County (R. Vol. 5, pp. 2089 to 2103, case 2005-CP-0-4913), *with* the identical Doe 53 complaint in Dorchester County (R. Vol. 5, pp. 2133 to 2147, case 2006-CP-18-1636).

favored judge to approve the classes that included appellants and proposed giving nationwide notice,[16] notice commensurate with the classes for which they sought approval, which they had fiduciary duties to do, given the classes they had undertaken to represent.

After that motion, they then negotiated changes in the proposed class settlement that placed their own financial interests above the recovery to the class,[17] and by doing so they created a financial incentive for both class counsel (*pro rata* client reductions to pay fee first) and the Diocese (residual fund) to not have "too many" absent class members make claims. Class counsel claims the Diocese requested, so class counsel agreed, to reduce the proposed notice program from nationwide notice to only statewide notice,[18] obviously not "the best practicable" notice required by SCRCP 23 (*Hospitality Management Associates, Inc. v. Shell Oil Co.*, 356 S.C. 644, 653, 591 S.E.2d 611, 616 (S.C. 2004) (*quoting*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811, 105 S.Ct. 2965 (1985)), depriving appellants and every absent out of state class member of the chance of notice. Then they resubmitted to the favored judge the motion for class settlement approval with that reduced notice program (R. Vol. 5, pp. 2153 to 2180), but classes still defined with no geographic limit.[19] Then they represented to that favored judge in a July 13,

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[16] October 2006 motion for class approval (R. Vol. 5, pp. 2148 to 2152).

[17] January 2007 revised settlement agreement with new financial provisions for class counsel (R. Vol. 5 at p. 2170 ¶ 6(B); residual fund provision for the Diocese (R. Vol. 5 at p. 2171 ¶ 6(C), and reduced notice program (*compare,* R. Vol. 5 at p. 2150 ¶ 3(a), notice to run in *USA Today,* with R. Vol. 5 at p. 2155 to 2156 ¶ 3(a), notice in *USA Today* deleted.

[18] Transcript of April, 2014 hearing, testimony proffer by class counsel that they reduced notice at the request of the Bishop. (R. Vol. 8 at p. 3619, lines 21 to 25, proffer and representation of Mr. James Bruner).

[19] January 17, 2007 amended motion for class settlement approval, R. Vol. 5 at p. 2154 ¶ 1.

2007 hearing that they had gotten agreement with the Diocese that anybody who "came out of the woodwork" (R. Vol. 8 at p. 3352) and didn't receive notice (R. Vol. 8 at p. 3354) would get the same relief,[20] making the reduced notice program of little moment. Then they failed to secure that relief for absent class members in any written orders of the class, protecting by written order only a subset of absent class members.[21] They both withheld information from, and submitted false information to, the favored judge to get their fee approved.[22] They failed to disclose that objectors got better settlement terms than class members, those better terms partially funded by class counsel or class representatives.[23] Then, without proper disclosures of either their conflicts of interest or that the court had awarded them a $2.5 million fee (R. Vol. 8 at p. 3639) they charged actual class members, actual clients, a contingent fee and costs authorized by no order, and without a contingent fee agreement.[24] Then they submitted incomplete accountings.[25] Then they ignored a direct order from the South Carolina Supreme Court to close the class action in

[20] Transcript of July 13, 2007 hearing, R. Vol. 8 at pp. 3352 (remarks of Mr. Shahid) and 3354 (remarks of class counsel).

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

[22] *Compare*, R. Vol. 8, 3638 to 3645 (2008 accounting) and p. 3639 and 3640 to R. Vol. 2 p. 506 (undisclosed $145,000 payment to class counsel).

[23] R. Vol. 1 at p. 160 (class counsel "and/or his clients" paid $100,000 to help fund settlement for those opting out).

[24] McDonald statements at R. Vol. 4 at pp. 1827 to 1828 (Julie McDonald), and 1830 to 1831 (Richard McDonald).

[25] The 2008 accounting is at R. Vol. 8, pp. 3638 to 3645.

2009,[26] leaving the class action open so as to evade any appellate review. Then they ignored a 2016 motion by a class representative that sought review of class counsel's conduct.[27]

True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (1997) would like a word. Yes, a class action has unique features and both fiduciary duties and notice procedures for assembling the actual client class members. None of that limits the lawyers' obligations to protect their clients' interests commensurate with the duties they voluntarily undertake, including the absent class members to whom they owe fiduciary duties. *True* refutes that a lawyer could simply walk away from a legal malpractice action by claiming that, well, if the lawyer had never undertaken the representation, or had never performed poorly (by lack of notice or inadequate representation or, as in *True*, by failing to disclose a conflict), then you client, or you, class member, are no worse off, provided we are permitted to impose on you the pretense that we had never undertaken the representation where we originally protected your interest then decided to compromise your interests so as to promote our own financial interests. There is no SCRCP 23 exception for class counsel's professional obligations.

If the apparent taboo applies, this theory will likely be adopted, so a lawyer with proximity to a judge can avoid scrutiny. But no taboo ought to apply, any taboo should be rejected, and Judge McMaster's orders should be reversed and the cases remanded as set forth below.

Conclusion

Each of the three cases dismissed by Judge McMaster should be remanded for further proceedings and full discovery.

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[26] 2009 Supreme Court order to close the class is at R. Vol. 1 at pp.161 to 162.

[27] 2016 motion by class representative at R. Vol. 6, pp. 2379 to 2384.

As Respondents' brief reflects, class counsel denied they had any fiduciary duties to absent class members imposed upon them as a matter of law by their pleading the class action beginning in December 2005 in Charleston County (R. Vol. 2, pp. 2089 to 2103), before the overt judge-shopping collusion moved the cases to the desired judge in Dorchester County (R. Vol. 2, pp. 2133 to 2147). In light of that denial and the Supreme Court's July 22, 2026 ruling in *Henson*, that fiduciary duties are indeed imposed as a matter of law upon pleading a class action, reaffirming *Premium Investment*, Respondents' brief on this Record constitutes an admission of liability by class counsel as to breaching those fiduciary duties. Judge McMaster's orders should be reversed and each case remanded, but the remand should also be accompanied by instructions to enter judgment on liability as to class counsel in favor of absent class members John Doe 305, Jane Doe 304, and Mr. Chimento for the admitted breach of duties that class counsel refused to recognize, let alone implement and the undisputed facts that class counsel reduced the class notice program to eliminate any chance of notice to them and every other out of state absent class members. Full discovery should be permitted after remand as to damages and the claims of the actual class members, the McDonalds.

Respectfully submitted,[28]

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