The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. Kristi L. Harrington, Circuit Court Judge

Appeal 2011 199886

Consolidated Case No. 09-CP-10-6694
(Consolidating Cases 09-CP-10-6694, -8054, -8055, and -8056)

John Doe, Jane Doe 1, Jane Doe 2, Jane Doe 3, ... Appellants

v.

The Bishop of Charleston, A Corporation Sole, and
the Bishop of the Diocese of Charleston, in his
official capacity, ... Respondents

Final Brief of Appellants

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2. Did the trial court err in ignoring class action orders, which exempted Appellants from preclusive effects of a class action?

3. Did the trial court err in applying the statute of limitations when Respondents had waived the defense, and when the complaint alleged fraudulent concealment by Respondents?

4. Did the trial court err in disregarding that the class action was collusive?

Standard of Review

An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support. *Sharps v. Sharps*, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

"On a motion asserting the defense numbered (6) to dismiss for failure of the pleadings to state facts sufficient to constitute a cause of action, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." SCRCP 12(b).

Appellate courts review a grant of summary judgment under the same standard applied by the circuit court: no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, with the record, and all inferences which can be reasonably drawn from the record, viewed in the light most favorable to the nonmoving party. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 563 S.E.2d 331, 333 (S.C. 2002).

Statement of the Case

This appeal is from an order terminating four consolidated cases (R. App. p. 78, June 15, 2011 order at p. 1 n. 1), by granting a motion to dismiss that had been converted to a motion for summary judgment when the trial court utilized matter outside the pleadings (e.g., R. App. p. 86, July 15, 2011 order at 9). The appeal raises novel issues about (a) applying the statute of limitations when the statute of limitations had been waived, and (b) the novel issue of what preclusive effect a collusive class action has?

The 2011 order appealed from is from an action filed in Charleston County. The court that issued the order appealed from, R. App. pp. 78 – 94, is referred to in this appeal as the trial court. The trial court was presented with 2007 orders arising from a collusive class action issued in Dorchester County. R. App. pp. 1 – 75. The class action orders are referred to as coming from the class action court.

Viewed in the light most favorable to Appellants, the record reflects that in 2006, a mediation in three pending Charleston cases, one of which alleged a class action, produced a class settlement with the Respondent Diocese of Charleston for clergy sexual abuse claims. E.g., Amended Complaint in -6694 ¶¶ 50(b), 50(g), and 50(h) (R. App. pp. 106 – 107); Motion Opposition at Att. G (R. App. p. 323 — the then-pending Charleston case numbers are listed on page 1 of the attached Exhibit). As extensively detailed in the Amended Complaint and materials submitted to the trial court, the class settlement was collusive. Amended Complaint -6694 ¶ 50 (R. App. pp. 106-110); -8054 ¶ 52 (R. App. pp. 168-172); -8055 ¶ 52 (R. App. pp. 198-202); -8056 ¶ 52 (R. App. pp. 228-232).

The broad contours of the collusive 2006 class settlement were outlined in a handwritten

memorandum signed by counsel for the Diocese as an offer to the class representative, which was accepted. Amended Complaint -6694 ¶ 50(h) (R. App. 107; Motion Opposition Attachment G (2006 mediated class settlement, R. App. 323-326).

The collusive class settlement defined two groups within what was called the "primary class" (July 30, 2007 order at pp. 1, 2, and 12, R. App. pp. 33, 34, 44): (1) persons abused by employees or agents of the Diocese (the "victim class"), and (2) parents or spouses of the persons abused (the "consortium" class). July 30, 2007 order, R. App. pp. 33, 34, 44; Motion Opposition at Att. G, e.g., R. App. 324. At the time of the 2006 settlement there was pending no class action complaint alleging a "consortium class." As part of the settlement the Diocese waived charitable immunity and statute of limitations defenses for the class. E.g., July 30, 2007 class action order at pp. 7 n. 2, and 14, R. App. 271 n. 2 and 278; July 13, 2007 hearing transcript at R. App. 345. The July 13, 2007 hearing transcript is attached to the Second Amended Complaint (R. App. 123 – 155), and is incorporated into the allegations. R. App. 120 ¶ 332 – 364.

SCRCP 23(c) states, "A class action shall not dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Despite that rule, the collusive class settlement was not submitted to the Charleston circuit court for approval under SCRCP 23(c), even though the only cases then pending were in Charleston County. E.g., Second Amended Complaint in -6694 ¶ 50(i), R. App. p. 107. It was agreed among colluding counsel to not inform the Charleston County Court that a class settlement had been reached. E.g., Second Amended Complaint in -6694 ¶¶ 50(g) and 50(l), R. App. 107, 108-109. Instead, the class

settlement was submitted for approval in Dorchester County, where no case was pending when the class settlement was reached. Motion Opposition at Attachment D, R. App. p. 311; Second Amended Complaint in -6694 at ¶ 50(i), R. App. p. 107-108.

To avoid any Charleston County judge overseeing the class settlement, Second Amended Complaint in -6694 at ¶¶ 50(h) (R. App. p. 107) and 50(l) (R. App. pp. 108-109), the lawyers all agreed to start new cases in Dorchester County, and began doing so in August, 2006, two months after the settlement. First filed in Dorchester County was a "consortium class" complaint, 2006-CP-18-1310. The same day a "victim class" complaint was filed. 2006-CP-18-1311. Each case fell within the terms of the collusive class settlement, so they were cases already settled before they were filed. E.g., Second Amended Complaint ¶ 50(j) (R. App. 108); Motion Opposition at Att. B (order approving settlement) (R. App. 265).

Class counsel also duplicated in Dorchester County the Charleston class action filing. The word "Charleston" in 2005-CP-10-4093 was changed to "Dorchester" and the identical class action complaint was re-filed as 2006-CP-18-1636. Second Amended Complaint ¶ 50(j) (R. App. p. 108). 2005-CP-10-4093 was still pending in Charleston County when 2006-CP-18-1636 was filed. John Doe 53 had pending in two counties, at the same time, identical class actions in which he claimed to be class representative, as did the plaintiff in 2006-CP-18-1311 (John Doe 67), the "victim class" filing in Dorchester County. This was true even though each case was already part of the collusive class settlement. Second Amended Complaint in -6694 ¶ 50(j) (R. App. 108).

Faced with an identical class complaint from two different counties on behalf of John Doe 53, and the John Doe 67 filings, the Diocese filed no motions to dismiss because of a prior

pending action under SCRCP 12(b)(8). Instead, as part of the collusion in the class action, the Diocese accepted service. Second Amended Complaint in -6694 at ¶ 50(j) (R. App. p. 108).

The reason colluding counsel sought to avoid Charleston County for Dorchester County was to judge-shop so that class approval and oversight would be by a Circuit Judge with long-standing ties to class counsel. Second Amended Complaint I -6694 at ¶ 50(i) (R. App. pp. 107-108).

By consent of colluding counsel, the Dorchester County judge was asked to, and the same day granted, complex case designation for the Dorchester County cases. See, Second Amended Complaint in -6694 ¶ 50(k1) (R. App. p. 108) and ¶ 50(k2) (R. App. p. 108), Motions Opposition at Attachment B (order approving class settlement) (R. App. p. 265). At the time, the South Carolina Supreme Court's standing order of July 26, 2006, governing complex case designation, required counsel to certify in their motion "that we have made a good faith effort to settle this case and thus far have been unable to do so." July 26, 2006 Order at p. 2 ¶ 2. Colluding counsel could not have truthfully requested complex case designation for these already-settled cases. A motion was immediately made in Dorchester County to certify the class and approve the settlement. Second Amended Complaint in -6694 ¶ 50(q) (R. App. p. 109), Motion Opposition at Att. D (2006 Motion to Certify Classes and Approve Settlement, R. App. p. 311). No such motion had at any time been made in the Charleston cases. That motion sought approval for nationwide notice for the class. Second Amended Complaint in -6694 ¶ 50(q) (R. App. p. 109), Motion Opposition Att. D at p. 3 (R. App. p. 313).

By consent of colluding counsel, a letter was sent to the administrative judge of Charleston County asking to dismiss the three pending cases without prejudice. No mention was

made that each case had been resolved by a class settlement. Second Amended Complaint in -6694 ¶ 50(h) (R. App. p. 107). The 2006 handwritten mediation agreement was typed into a formal settlement agreement, and in January 2007 an amended motion in Dorchester County asked the class action court to approve the class and the class settlement. The amended motion dropped any request for nationwide notice to the class. Second Amended Complaint in -6694 ¶ 50(q) (R. App. p. 109), Motion Opposition Att. E at p. 3 (R. App. p. 318).

The Diocese "took no legal or factual position on the motion for class certification" (Class Action order of Jan. 19, 2007 order at p. 3 n.2, R. App. p. 3); Second Amended Complaint in -6694 ¶ 50(m) (R. App. p. 109). Settlement without class approval was $460,000 (Motion Opposition Att. G (2006 mediated agreement, R. App. p. 325). Settlement with class approval could be as much as $12 million (Id. at ¶ 2, R. App. p. 324); Second Amended Complaint in -6694 ¶ 50(m) (R. App. p. 109). The $11.54 million potential difference did not elicit a position from the Diocese.

The Diocese also agreed to remain silent about (a) class counsel negotiating a fixed fee for himself while negotiating a variable recovery for the class, Second Amended Complaint in -6694 ¶¶ 50(c) and 50(d) (R. App. p. 107), Motion Opposition Att. G ¶ 4, R. App. p. 325); (b) class counsel being paid prior to the class claims period even having begun, Second Amended Complaint in -6694 ¶¶ 50(e) (R. App. p. 107) and 50(o) (R. App. p. 109); (c) class counsel's false, duplicative and fraudulent time and records in class counsel's application for costs and fees, Second Amended Complaint in -6694 ¶ 50(n) (R. App. p. 109); (d) class counsel's false expense records Second Amended Complaint in -6694 ¶ 50(a) (R. App. p. 106) and July 30, 2007 order at p. 15, R. App. p. 48)), (e) no post-award fairness hearing or review of class

counsel's ultimate fee of 51% of all sums disbursed, Second Amended Complaint in -6694 at ¶¶ 50(u), 50(v) (R. App. p. 110); and (e) no final accounting of the class distribution, Second Amended Complaint in -6694 ¶¶ 50(w) and 50(x) (R. App. p. 110).

In exchange for these financial concessions to class counsel the Diocese got (a) only in-state notice, not nationwide notice, Second Amended Complaint in -6694 ¶ 50(q) (R. App. p. 109), which necessarily reduced the number of class members making claims; (b) variable, and extraordinarily modest, limits to class member recovery to assure it stayed within the amounts the Diocese was prepared to pay, Second Amended Complaint in -6694 ¶¶ 50(r) and 50(s) (R. App. p. 109); (c) agreement for the Diocese to examine its own files to identify sexual abuse victims, Second Amended Complaint ¶ 50(t) (R. App. pp. 109-110) , and (d) the argument on display on this appeal (contrary to the "stipulated" relief for absent class members) that every other claim would be barred despite notice having been only in-state.

By his own account, class counsel had life-long ties to the Diocese and held positions within the Diocese. Second Amended Complaint in -6694 ¶ 50(a) (R. App. p. 106). During the class action, class counsel also had pending a sexual abuse case against a Diocese other than his own. Class counsel was prepared to accept for those of his clients claiming against his own Diocese, "a small fraction of what class counsel would agree to accept" when litigating the same issues against a Diocese other than his own. Second Amended Complaint in -6694 ¶ 50(f) (R. App. p. 107).

The order of July 30, 2007, approving the class and the settlement provides, on page 4 (R. App. p. 36) a "stipulation as a condition of approval:"

> The Diocese has further stated that it understands that ***any person who should have had notice, but did not receive notice for whatever reason***, would not be

> bound by the *res judicata* effect of the settlement. Further, the Diocese has stipulated before me in open Court and on the record that ***any person who comes forward at a later date and can show that he or she should have received notice but did not could participate in an arbitration process with terms identical to the Settlement and Arbitration Agreement before the Court for approval today.***

Emphases added. This stipulation reflected the public commitment by both then-Bishop Baker, who articulated in, e.g., a January 2007 press release (Motion Opposition Att. F, R. App. p. 321-322), to provide relief for all victims, and comments on the record by counsel for the Diocese to provide for relief of absent class members even outside the class structure. July 30, 2007 order at p. 4 (R. App. p. 36). As noted, the class action settlement for the primary class was approved conditioned on that stipulation for absent class members. July 30, 2007 order at p. 4 (R. App. p. 36).

The stipulation by the Diocese and class counsel would turn out to be disingenuous, as reflected by the motion to dismiss in these consolidated actions.

In a later order of August 31, 2007, the class action court articulated a sub-class to govern approximately 20 sexual abuse victims the Diocese already knew about from its own files but could not locate. The sub-class was referred to as the "Actual Notice Class Members." The definition of that sub-class, at page 2 of the order (R. App. p. 74) is (italics in original):

> Furthermore, in the Court's Order of July 30, 2007, approving the Class settlement, the Court made reference to the existence of individuals who, according to the Diocese, (1) were potential class members; (2) came forward to the Diocese at some point in the past with their allegations of child sexual abuse; (3) never resolved their potential claims; and (4) were entitled to receive *actual* notice of the proposed class settlement pursuant to the agreement of the parties and earlier instructions from this Court (hereinafter referred to as "Actual Notice Class Members"). The Defendants have asked the Court to clarify how the settlement process will treat the Actual Notice Class Members. Accordingly, this Order clarifies and, where in conflict, supersedes the Court's order of July 30, 2007.

> Actual Notice Class Members shall have 120 days from receipt of actual notice of the class settlement to present their claims to an Arbitrator in the same manner as provided for in the Settlement and Arbitration Agreement. Actual Notice Class Members who present their claims more than 120 days after they receive actual notice of the settlement shall be barred from participation in the settlement process and shall be treated like any other class member who has failed to timely present a claim to the class settlement fund. Both the Arbitrator's fees and the claimants recovery (if any) shall be paid by the Diocese, and not by the class settlement fund, because the settlement fund may already have been subject to a final accounting by the time such claims are processed.

No other sub-class was created for any other persons. Appellants were found to have fit the groups in the primary class. June 15, 2011 order at pp. 4 and 6 (R. App. pp. 81 and 83). Appellants had each alleged they did not receive notice. E.g., Second Amended Complaint in -6694 at ¶ 11 (R. App. p. 98). Despite the class action order stipulation that persons who "did not receive notice for whatever reason, would not be bound by the *res judicata* effect of the settlement," the Appellants were denied relief by the Diocese and, after these complaints were filed, the trial court dismissed the complaints, determining that the claims were barred by *res judicata*, collateral estoppel, and the statute of limitations. June 15, 2011 Order at 1 (R. App. p. 78). The trial court interpreted the August 31, 2007 as restricting the July 30, 2007 order, and applied to Appellants the limitations imposed on only the subclass by the August 31, 2007 class action order. (R. App. pp. 86 – 87). The trial court construed the plain language of the class action orders to mean the exact opposite of what the two 2007 orders appear to state, and to do so relied on a colloquy not embodied in any written order in the class action. June 15, 2011 order at 10 (R. App. p. 87). The trial court also necessarily concluded that the collusion in the class action did not matter in any respect. R. App. pp. 327 – 331 (Rule 59 motion).

After a motion under SCRCP 59(e) (R. App. pp. 327-331) was denied (R. App. p. 95), this appeal followed.

Argument

1. **The trial court erred in applying to Appellants a sub-class definition Appellants did not satisfy.**

2. **The trial court erred in ignoring written orders which exempted Appellants from preclusive effects of a class action.**

A. <u>The trial court erred in applying *res judicata*</u>. The trial court recognized that Appellants were within the definition of the groups in the primary class approved in the July 30, 2007 class action order, rather than the sub-class established in the August 31, 2007 class action order. E.g., June 15, 2011 order at 6, R. App. p. 83 (finding Appellants in the primary class). Despite that recognition, the trial court applied to Appellants' claims the limitations imposed on the sub-class, rather than the expansive provisions that properly protected Appellants' claims.

The trial court rested its conclusion on a colloquy from an *ex parte* hearing[1] held August 9, 2007 in the class action. In that colloquy, one of the lawyers for the Diocese inquired of the class action court if the court intended the explicit provisions of the July 30, 2007 order to have "opened up future litigation to those who were ***not on the list*** of those entitled to notice of the settlement." Emphasis added. Either this is an inquiry by the Diocese about the "list" of those in the sub-class or the inquiry reflects that the Diocese interpreted the July 30, 2007 order consistently with the representations made publicly by Bishop Baker in his January, 2007 press release, consistently with the representations made on the record by counsel for the Diocese in the July 13, 2007 hearing, consistently with the protections class counsel says in the July 13,

[1] As indicated on page 29 of that transcript, R. App. p. 393, no notice of the hearing was given to other counsel who had appeared in the class action. Even after counsel for other parties had appeared in the March 2007 fairness hearing, only the colluding parties were given notice of the hearings of July 13, 2007 and August 9, 2007.

2007 hearing, he believed he had achieved (R. App. pp. 345 – 346), and consistently with the claims by Appellants — that the intention of the Diocese was to reach every victim, even those who were not reached within the class action structure because they received no notice.

The Diocese now contends that it recognized that the July 30, 2007 class action order contained an expansive commitment to all victims which the class action court wrote into the July 30, 2007 order as a "condition of the approval" for the class settlement, July 30, 2007 order at p. 4, and sought to limit that expansive commitment. However, none of the orders issued by the class action court do so.

In that July 13, 2007 *ex parte* hearing, before the order that approved the class action settlement, the class action court discussed with counsel establishing the actual notice class. On page 12 (of 33, using the numbers in the footer, R. App. p. 343), counsel for the Diocese related to the Court, to get class approval:

> Judge, I view that responsibility [to provide relief] as ongoing, and so that we got to find the other four [referring to the people the Diocese already knew about from their own files, the "Actual Notice Class"] ***and we've got to find anybody else who has kind of, lack of a better word, comes out of the woodwork.***

Comments by Mr. Shahid, emphasis added. "And we've got to find anybody else" is not limited to only the people the Diocese already knew about. It is **in addition to** "the other four" from among the people "on the list" in what would become the "actual notice" sub-class. It cannot have been a reference to any list of the primary class members, because as of July 13, 2007 there was no order approving the settlement and there had been no notice period started in which primary class members could make claims. No "list" of primary class members was yet possible as of July 13, 2007. The "list" could refer only to the Actual Notice sub-class, and the "and anybody else" necessarily refers to others outside of the class action structure.

At p. 3 (of 33) of the same July 13, 2007 hearing, R. App. p. 334, Counsel for the Diocese also contemplated addressing claims in the situation where ***"someone pops back up who should have gotten notice who didn't get notice,"*** that "if that person shows up then we would have to deal with it." This is reinforced at page 14 (of 33) of the July 13, 2007 *ex parte* hearing, R. App. p. 345, when class counsel, without objection from counsel for the Diocese, relates that "if anybody has been missed . . . the diocese waives all the same defenses that they have given up in this class settlement [charitable immunity and statute of limitation], consents to the same method of compensation, consents to the same early disposition of that claim by a same arbitration method, the whole nine yards." July 13, 2007 hearing at pages 3 and 14 (of 33). R. App. pp. 334 and 345.

Counsel for the Diocese consented, by making no objection, to that characterization by class counsel of either its waiver of defenses or the Diocese providing relief for persons who received no notice. The open-ended commitment by the Diocese (limited, of course, only by the persons victimized) was embodied in the July 30, 2007 order as a condition for approving the class settlement. This made sense, since the class action was collusive, and (among other things) the Diocese was giving notice only within South Carolina for a class defined without geographic limit. In other words, the class action court had to have known with certainty that many persons within the class definition were not going to receive notice, and the open-ended offer by the Diocese solved what would otherwise have been a significant Due Process issue with the proposed class settlement.

When the July 30, 2007 order included the open-ended commitment by the Diocese, at the August 9, 2007 *ex parte* hearing, within the ten days permitted to do so by SCRCP 59(e),

counsel for the Diocese attempted an oral motion to modify that open-ended commitment by asking if the class action court intended that result for persons other than the actual notice sub-class: "You weren't opening up future litigation to those who were not on the list of those entitled to notice of the settlement," to which the class action court responds, "Not at all." August 9, 2007 hearing at 58, R. App. p. 422.

The oral response by the class action court may have been what the Diocese wanted to hear, and what is argued by the Diocese now, but as the written orders show, it actually reflected the class action court directing its attention to only the sub-class. When the August 31, 2007 class action order was filed, the order contained restrictions only on claims of the sub-class, and placed no restrictions on the open-ended claims authorized for the primary class. R. App. p. 74 ¶ 1. Further, the August 31, 2007 order defined the sub-class in a way that excluded Appellants, and all other primary class members, so does not apply to them. *Id.* In short, the colloquy of July 13, 2007 did not accomplish what the Diocese now claims, and the trial court erred in relying on colloquy not embodied in any written order.

No written order modified the open parameters applicable to the primary class, or the open-ended commitment by the Diocese to the primary class that the July 30, 2007 order states was a condition for the class settlement approval, and which was stated publicly by the Bishop (R. App. p. 321) was the intention of the Diocese.

It does not matter whether the class action court realized while deliberating after the August 2007 *ex parte* hearing that the question by counsel for the Diocese was an effort to retreat from its explicit, on-the-record commitments in the July 2007 *ex parte* hearing, R. App. pp. 334 and 345, or whether the class action court understood counsel to be making a point about the

sub-class and responded by imposing in the August 31, 2007 order a post-notice time limitation of 120 days on the claims of the sub-class. The August 31, 2007 orders states, at p. 2, "The Defendants have asked the Court to clarify how the settlement process will treat the Actual Notice Class members." R. App. p. 74. What matters is what the class action court actually ordered. The order filed August 31, 2007 contained limits only to the claims process for the sub-class once those members received notice. The August 31, 2007 order contains no limitations for the primary class. R. App. p. 74. The August 31, 2007 order explicitly stated that it superseded the July 30, 2007 order only "where in conflict" with the July 30, 2007 order. In other words, its terms do not affect the rulings as to the primary class because it relates to only members of the sub-class.

The Diocese did nothing to appeal or modify the August 31, 2007 order after its effort to modify the July 30, 2007 order limited only claims by the sub-class. If the Diocese intended to obtain limits on claims of primary class members who got no notice "for whatever reason," it would have undertaken such steps. No doubt the Diocese failed to do so because it counted on its collusion in the class action as sufficient protection. The trial court erred in rewarding the Diocese for colluding in the class action to try to minimize and defeat as many claims as possible through its coordination with corruptible class counsel. The collusion alleged in the complaint is all based on the documented record, and all of it on this appeal must be accepted as true.

Whatever the class action court's comment meant in its *ex parte* discussion, when the written order is filed it is that written order that controls. A trial court colloquy, even one which contains an oral ruling, is not the judgment of the court until it is written and entered on the record. SCRCP 58; *Ford v. State Ethics Comm'n,* 545 S.E.2d 821, 823 (S.C. 2001) ("Until

written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. The written order is the trial judge's final order and as such constitutes the final judgment of the court." Citation omitted); *Owens v. Magill*, 419 S.E.2d 786 (S.C. 1992) (written rulings can conflict with oral ruling); *Case v. Case*, 134 S.E.2d 394, 396 (S.C. 1964) (even an oral ruling in favor of one party is neither final nor binding until reduced to writing, signed, and recorded). *Accord*, *Badeaux v. Davis*, 522 S.E.2d 835, 839 (S.C. App. 1999) ("a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling."); *Doe v. Doe,* 478 S.E.2d 854, 859 (S.C. App.1996) ("Judgments ... are not final until written and entered."); *First Union National Bank v. Hitman, Inc.*, 411 S.E.2d 681, 682 (S.C. App. 1991), affirmed, 418 S.E.2d 545 (S.C. 1992); *Bayne v. Bass*, 394 S.E.2d 726 (S.C. App. 1990) (divorce decree not final until written and recorded).

In short, the trial court erred in relying on class action colloquy not embodied in any class action order. The class action court's August 31, 2007 order reflects it understood the Diocese to be asking for limits on the sub-class claims, as that is what the August 31, 2007 order addressed. R. App. p. 74.

The trial court's error is more plainly displayed in its extended rationale on pages 10 - 11 of the June 15, 2011 order, R. App. pp. 87-88, where the trial court explains that the Appellants' position "would render the creation and definition of the Actual Notice sub-group meaningless" (page 10, R. App. p. 87) and "there would be no need for the [class action] Court to carve out this small group of potential claimants [in the Actual Notice sub-class] to protect them from the application of the Doctrine of *res judicata*." (page 11, R. App. p. 88). Neither is the case, and neither conclusion is warranted by review of this record. The order creating the Actual Notice

sub-class doesn't "protect" that class from *res judicata*, it ***applies*** those limits to that sub-class. In other words, the class action court accommodated the Diocese to create some time frame for *ending* Actual Notice class member claims, not to extend them. The class action court could easily have extended the same conception to the primary class, but chose not to. The class action court could easily have declined to create a sub-class, could easily have defined the sub-class differently, or could easily have applied its August 31, 2007 order to both the sub-class and the primary class. It did none of those, and the trial court erred in applying the 2007 orders as if the class action court had done any of them.

Nothing in the 2007 orders restricts the open-ended commitment the Diocese sought, publicly and on the record, as a condition of getting approval for the class action settlement with the known defective notice, and there is nothing inequitable in recognizing the Diocese has received exactly that to which it had stipulated, what class counsel claims to have obtained for class members, R. App. pp. 345-346, and what the class action court used as a condition for approving the class settlement (R. App. pp. 36 – 37) — that claims for class members who did not get notice "for whatever reason" are not barred by *res judicata* and may be presented without restriction of either the defense of the statute of limitations or the defense of charitable immunity — exactly as the Diocese stipulated. R. App. p. 36.

Finally, as argued below, the trial court erred in excluding from any consideration the extensive facts alleged as to collusion in the class action.

B. <u>The Court erred in applying collateral estoppel</u>. Because the trial court erred in construing the class action orders, the trial court erred in applying collateral estoppel. The

estoppel binds the Diocese, not Appellants.

The trial court order recognized, June 15, 2011 order at p. 5, R. App. p. 82, that there are only two pertinent class action orders: the order from July 30, 2007 and the order from August 31, 2007. As set forth above, those orders explicitly relieve the Appellants of any *res judicata* effect of the class action. As argued below, neither can collateral estoppel properly apply to Appellants, particularly when collusion in the class action existed.

The trial court elected to construe the "context" of the colloquy about the sub-class, June 15, 2011 order at 9, R. App. p. 86, in a manner inconsistent with those orders, and inconsistent with the record, and chose to interpret the facts underlying that discussion in the light most favorable to the Diocese rather than in the light most favorable to Appellants. The trial court erroneously interpreted those orders, June 15, 2011 order at 10, R. App. p. 87, as meaning "that the *only* group who is entitled to come forward without the res judicata effect of the Class Action Settlement Agreement are those individuals who satisfy the above enumerated criteria and are within the umbrella of this new sub-class." In fact, the August 31, 2007 order imposes a 120 day time limit on the sub-class once a member of the sub-class has received notice, whereas the July 30, 2007 order relieves a class member (and all sub-class members until the August 31, 2007 order was filed) from *res judicata* and collateral estoppel only if that person has not received notice. In either case, once a person has notice, then action must be taken. For the sub-class, action must be taken within 120 days. For a primary class member, no time limit is given. Presumably a three year limit for tort claims, running first from the time of notice, would apply, and should the Diocese reject the claim, a different time limit would also apply from the time of any wrongful rejection.

The commitment of the Diocese made both publicly by the Bishop, and on the record to the Court by Diocese counsel, expanded the traditional finality which a class action ordinarily would enjoy. If traditional limitations were contemplated, none of the July 13, 2007 discussion would have applied. The Diocese was not obligated to make the stipulation to go outside the usual parameters of the class structure to provide relief. The Bishop was not obligated to make his public commitments to provide relief to every victim of abuse. It was described by counsel for the Diocese as an "ongoing" responsibility, not a responsibility confined to the class action. July 13, 2007 hearing at p. 12 (of 33), R. App. 343. The class action court explicitly cited the stipulation by the Diocese to exceed conventional class action finality as a condition of approving the class action settlement. R. App. pp. 36 – 37. And note: had the Diocese not been disingenuous in the Bishop's comments or in its stipulation, it would have obtained a type of finality for scope of relief, if not finality of claims. First, its commitments are limited to only persons sexually abused. Second, its collusive class action might not have been discovered in 2008, and had the collusion remained unknown, it might have limited the recovery for a class member who got no notice "for whatever reason," to the collusive relief provided the class. That result would have ended all litigation and led to a series of informal resolutions that that eventually would reach every victim after finally getting notice.

In July, 2007, when it made its stipulation on the record, the class notice the Diocese was trying to get approved was a notice the Diocese (and class counsel, and the court) knew with certainty would be insufficient to reach all class members, and was less than the notice originally proposed by class counsel. As set forth in the Second Amended Complaint in -6694 ¶ 50(q) (R. App. p. 109), and attachments to the July 30, 2007 order, (R. App. pp. 281 – 304) filed as

Attachment B to the Motion Opposition, the class definition approved by the court has no geographic limits for the class members. Pertinent to this case, the class of victims the Diocese was seeking to have approved was a class that met these criteria (See Motion Opposition Attachment B at page 20, R. App. p. 284):

> Born on or before August 30, 1980,
> Was sexually abused as a minor,
> By an agent or employee of the Diocese of Charleston, and
> Had not previously had a similar claim fully heard by a court or settled.

No geographic limitation applies to the class definition. If you were abused as a minor, you fit the class definition no matter where you live.

As alleged in paragraph 50(q) of the Second Amended Complaint, e.g. R. App. p. 109, consistent with a class definition that applies nationwide, class counsel had originally proposed nationwide notice to the class through notice in *USAToday*. That proposal was made in an October, 2006 motion for class approval (Motion Opposition Attachment D at p. 3, R. App. p. 313). In January, 2007, class counsel and the Diocese elected to modify that broad notice to propose notice only within the state, necessarily agreeing to a plan to vastly under-inform the class. Compare Motion Opposition Attachment E at p. 3, R. App. p. 318 (2007 proposal for only in-state notice) with Motion Opposition Attachment D at page 3 R. App. p. 313 (2006 proposal for in-state and national notice). In 2007, the parties in the class action colluded to remove *USAToday* as a source of notice to the class and give only notice within the state.

The Appellants seek to require the Diocese to comply with the July 31, 2007 order it sought and obtained. Given the assurance by the Diocese, publicly through a press release (R. App. pp. 321-322), and reiterated by its on-the-record comments to the Court (R. App. pp. 334 and 343), that it would provide relief to class members who got no notice — a deficiency which

the Diocese, class counsel, and the class action court each knew with certainty would occur — it made sense for the class action court to approve the proposed settlement with the limited notice. Given the certainty that many would get no notice, when the Diocese stipulated that it would provide relief outside the class action, it solved the Due Process problem otherwise presented by the limited notice that was definitely going to be insufficient to reach the class.

In the June 15, 2011 order at p. 10, R. App. 87, the trial court reasoned that the class action order couldn't mean what it says about claims for persons who did not receive notice "for whatever reason" because the August 31, 2007 order provides that sub-class members who miss the 120 day window after notice, whenever that notice occurs, "shall be treated like any other class member who has failed to timely present a claim." June 15, 2011 order at 10, R. App. p. 87. The trial court seems not to have realized that the limitation on primary class member claims — when primary claims are excluded — applies to primary class members who have received notice, not for those who have not received notice. If a primary class member got notice and failed to present a timely claim it would be barred, just as if a sub-class member got notice and failed to timely present a claim it is barred. As the 2007 orders stand, neither primary nor sub-class claims are barred if the claimant has received no notice, and both are barred if after notice no action is taken. If the orders mean what they say, each of the primary class and the sub-class is treated in a comparable manner. As read by the trial court, only the sub-class enjoys the benefit of later claims, hardly an equitable result when the Diocese stipulated to relief "if anybody has been missed." July 13, 2007 hearing at 14 (of 33), R. App. p. 345.

What is at issue in this action is that portion of the July 30, 2007 order which applies to class members who have ***not*** received notice "for whatever reason," exactly as promised by the

Diocese:

> ***The Diocese has further stated*** that it understands that ***any person who should have had notice, but did not receive notice for whatever reason***, would not be bound by the *res judicata* effect of the settlement. Further, ***the Diocese has stipulated*** before me in open Court and on the record that ***any person who comes forward at a later date and can show that he or she should have received notice but did not could participate in an arbitration process with terms identical to the Settlement and Arbitration Agreement before the Court for approval today***.

R. App. p. 36, emphases added. As the Diocese now argues it, and as erroneously construed by the trial court, these were representations to the Court the Diocese apparently intended to be disingenuous only, for public relations purposes, not to be considered an actual commitment by the Diocese to provide relief to all abuse victims. The Diocese apparently intended to say one thing, in court (R. App. 334, 343 and 345) and in public (R. App. pp. 321-322), during the collusive class action, while it planned to do another after the class action ended.

However, when the class action court relied on the representations as a condition of approving the class settlement in the July 30, 2007 order with its open-ended relief provision, R. App. p. 36, and then restricted only sub-class claims in the August 31, 2007 order, R. App. p. 74, it was incumbent on the Diocese to either appeal or file a motion under SCRCP 59 when the August 31, 2007 order aligned the sub-class with the "no notice" provision applicable to the primary class. Somehow the trial court finds a restriction where none exists, to limit the primary class whether notice was or was not received. Having sought no relief from the open-ended July 30, 2007 order, the Diocese cannot now claim it is not bound by it. The class action court explicitly restricted the *res judicata* effects of the class action from applying to those who "did not receive notice for whatever reason," R. App. p. 36, and recognized that the Diocese had "stipulated before me in open Court and on the record," R. App. p. 36, it would provide relief to

"any person who comes forward at a later date and can show that he or she should have received notice but did not." July 30, 2007 order at 4, R. App. p. 36. This provision explicitly authorized claims by absent members of the primary class who received no notice, and the trial court erred in protecting the Diocese from its own stipulation. Particularly where the Diocese was attempting by collusion in the class action to say one thing in 2007 and do another in 2011.

While it is not necessary to reach this ground, the trial court has also erred in its order at pages 12 and 13 (R. App. pp. 89 - 90) by construing collateral estoppel for Appellants as being on the same footing as Judge Nicholson's decision in 09-CP-10-7751, where the plaintiffs each participated in the class and signed releases. None of those things occurred as to Appellants, none is claimed, and the trial court erred as a matter of law in treating Appellants as if they had done either participated in the class action or signed releases. The same facts do not apply, and imposing those facts on Appellants is contrary to the record in this action. The Due Process considerations are considerably different, as discussed below.

3. The trial court erred in applying the statute of limitations when Respondents had waived the defense and when the complaint alleged fraudulent concealment by the Respondents

As explicitly stated in the July 13, 2007 hearing transcript at 14, R. App. p. 345, and as alleged in the Second Amended Complaint in -6694 at ¶ 9, R. App. p. 98, the Respondents waived defenses of charitable immunity and statute of limitations for every person within the class and sub-class definitions. The class settlement agreement necessarily failed to assert the defenses, but facts exist, and were cited to the Court, to show that the Diocese overtly agreed to waive its defenses. The July 13, 2007 hearing transcript which reflected the waivers was attached to the Second Amended Complaint and incorporated into its provisions. Second

Amended Complaint in -6694 ¶¶ 9, 47 and 93 (R. App. pp. 98, 106 and 120) incorporating the July 13, 2007 transcript).

These materials allege (and on this Record the allegations must be accepted as true), waiver by the Diocese of the limitations defense. "Agreements, in general, are interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense." *Stanley v. Atlantic Title Insurance Company*, 661 S.E.2d 62, 67 (S.C. 2008) (finding letter waived statute of limitations defense). The trial court erred in applying the statute of limitations to Appellants' claims when facts of that defense having been waived are alleged. Accepting those facts in the light most favorable to Appellants cannot be the basis for dismissing the Appellants' claims.

While it is unnecessary to reach this ground, given the waiver issue, but independent of the waiver issue, the trial court also erred in its fraudulent concealment analysis. June 15, 2011 order at pp. 13 – 15, R. App. pp. 90 - 92. The trial court analyzed the fraudulent concealment issue from the perspective of a claim against the individual priest or other Diocesan agent or employee who inflicted a personal injury by the intentional misconduct of sexual abuse. The trial court reasoned, June 15, 2011 order at 14, R. App. p. 91, that "A defendant cannot fraudulently conceal a personal injury of which the Plaintiff is aware from the time of injury." But the Appellants' claims are against the Diocese, not the individual perpetrators, for liability facts ***about the Diocese***, concealed by the Diocese and not known to the Appellants.

The second amended complaints allege reckless and negligent conduct by the Diocese (e.g., R. App. p. 98, ¶9), in that the Diocese knew or had reason to know (e.g., R. App. pp. 99 – 100, ¶¶ 15 and 20) that the offending priest had a sexual interest in children, and the Defendants

negligently supervised the priest's access to children (e.g., R. App. p. 99, ¶ 17). When that sexual interest was displayed, the Defendants made no effort to locate victims, such as Appellants, or was grossly negligent in doing so (R. App. pp. 99 – 100, ¶¶ 20 to 22). The Defendants are alleged to have failed to warn the Appellants (R. App. p. 99, ¶ 19).

It is also alleged, and must be accepted as true, that Defendants have fraudulently concealed their knowledge of "when their agents and employees sexually abuse children." (e.g., R. App. p. 100, ¶ 23). Appellants did not know, due to that concealment, what the Defendants knew about the priest. This concealment disguises the knowledge and liability of the Defendants, for abuse the Diocese knew or should have known would occur. Appellants were told nothing about the Defendants having advance knowledge of the offending priest, yet inducing their participation in events which exposed them to the danger of the priest. E.g., R. App. pp. 101 – 102, ¶ 27.

The Defendants are alleged (e.g., R. App. pp. 101 – 110, ¶¶ 25 to 51) to have a long history of secreting from Appellants and all others what the Defendants knew about the abuse, and to have maintained on one hand a special relationship with Appellants, but on the other hand a structure of record keeping which is designed to conceal what the Defendants knew of the sexual abuse by the offending priest, as well as to conceal that the Defendants could have, but did, nothing to warn or otherwise protect Appellants. Id. Defendants are required to maintain a "secret archive" of files (R. App. pp. 102 – 103, ¶ 31). When the priest's sexual interest in children became known, the Defendants kept record of it secret, in those archives. (R. App. p. 103, ¶ 32). Defendants are alleged to have also maintained secrecy by moving documents to places where they would enjoy diplomatic immunity (R. App. p. 103, ¶ 33). In 1962 Defendants

articulated mandatory requirements for secrecy (e.g., R. App. pp. 103 – 105, ¶¶ 34 – 44), and failed to locate victims of the priest, an assumed duty. (e.g., R. App. p. 104, ¶ 39). Finally, Defendants are alleged to have colluded with class counsel (e.g., R. App. pp. 105 – 110, ¶¶ 44 – 51) to manipulate the class action to pay modest recovery to some victims while evading entirely any responsibility to many other victims, using a class counsel the Defendants calculated would, for a fee, be complicit with drastically limiting recovery for claims by persons against class counsel's own Diocese, e.g., R. App. 107, ¶ 50(f), and enabling the Diocese to argue all other claims were barred.

Liability of the intentional tortfeasor, knowable at the time of injury, is different from liability of Defendants, who are alleged to have concealed the known dangers when Defendants "solicited into danger" the Appellants. E.g., R. App. pp. 97 – 98, ¶ 7. See also R. App. p. 98, ¶ 8 ("children at risk were regarded as expendable" so the organization could appear pastoral).

All of the concealment is alleged to account "for the delay in this action being brought against the Diocese defendants." E.g., R. App. p. 100, ¶ 23.

Being injured by a priest does not necessarily tell anyone that his employers, Diocese and Bishop, knew, before the priest abused a child, that the priest posed that danger to the child. Nor does it disclose that the employer Diocese and Bishop were content to conceal that knowledge and expose the child to that risk. It is not a new concept that one must have reason to know that there might be a claim against another party before a claim accrues. E.g., *Grillo v. Speedrite Products, Inc.*, 532 S.E.2d 1, 3 (S.C. App. 2000) ("the statute of limitations accrues at the time of the negligence or when the facts and circumstances would put a person of common knowledge on notice that there might be a claim against another party."). Accord, *True v. Monteith*, 489

S.E.2d 615, 616 (S.C. 1997) (claim approved after 19 year delay due to concealed conflict of interest by counsel).

On each ground, the trial court erred in dismissing the complaints.

4. The trial court erred in disregarding that the class action was collusive

Collusion in a class action is against public policy, and ought to be a matter of considerable policy concern of Constitutional dimension. Of course, if collusion is acceptable then the considerable steps of collusion alleged in this complaint, Second Amended Complaint in -6694, R. App. pp. 106 – 110, ¶ 50 (a) to ¶ 50 (y), can all be ignored.

The trial court apparently viewed the collusion in the class action as literally unremarkable, as it merited exactly zero comment or analysis in the orders. R. App. pp. 78-94 (initial order) and p. 95 (order denying motion to alter or amend). Perhaps it is just to be expected that such things will occur as judge-shopping, evading SCRCP 23, duplicating actions, false time records, buying class counsel's cooperation in working for the Diocese and against the interests of the class and against the interests of absent members of the class, permitting class counsel to negotiate a fixed fee for himself while simultaneously negotiating a variable, and very low, recovery for the class members, and providing misinformation to the class action court, all to defeat participation by as many absent class members as possible. Perhaps class counsel claiming, July 13, 2007 hearing at 14 (of 33), R. App. pp. 345 – 346, that considerable benefits had been obtained for absent members of the class when in fact, if the Diocese is correct and the trial court is upheld, class counsel (and the class action court) was either colluding with the Diocese to make a knowingly false claim, or was completely out maneuvered and deceived by

counsel for the Diocese, and that none of those benefits had been secured to absent members of the class.

We contend that the collusion is properly a subject of considerable concern to the court. Absent members of a class are entitled to due process before their interests are precluded. *Hansberry v. Lee*, 311 U.S. 32, ___, 61 S.Ct. 115, 118 (1940) ("there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."). An absent class member is entitled to "limited review" to assure that procedural due process was met, *Hospitality Management Association Inc. v. Shell Oil Co.*, 591 S.E.2d 611, 619 (S.C. 2004), with a focus on whether sufficient notice and adequate representation were in fact in place. *Hospitality Management Association Inc. v. Shell Oil Co.*, 591 S.E.2d 611, 619 (S.C. 2004). This does not collaterally attack the class action orders, it only ascertains if it accords with Due Process to impose the class action on the Appellants.

Having chosen to interpret the class action orders so as to preclude Appellants' claims, the trial court erred in making no review of the collusion. If the class action orders mean what they say, and primary class members who received no notice can make claims, as the July 30, 2007 order plainly seems to state, then the Due Process problems are resolved because Appellants are not precluded. However, to preclude Appellants' claims requires grappling with the facts of the collusion, and that cannot properly be done on a motion to dismiss. If the collusion is presumed, as on this record it must be, then the trial court must be reversed. "More specifically, we must determine: (1) whether there were safeguards in place to guarantee sufficient notice and adequate representation; and (2) whether such safeguards were, in fact,

applied." *Hospitality Management Association Inc. v. Shell Oil Co.*, 591 S.E.2d 611, 619 (S.C. 2004). On this record, which must presume the collusion, such safeguards were NOT in fact applied.

If the practices alleged in ¶ 50(a) to ¶ 50(y) of the Second Amended Complaint, e.g., R. App. pp. 106 – 110, are all acceptable, and the collusion is determined to have in fact protected absent members of the class, then all the Appellate Court need do is laud the creativity of lawyers who created the fraudulent mechanisms for hand-picking the judge desired to oversee the class action settlement, so those fraudulent mechanisms are available to all members of the bench and bar as part of SCRCP 23. We contend that ignoring these practices is error, and a proper examination of the collusion should factor into the analysis of both the preclusive effect of the class action and the professional conduct of counsel in the class action. In not making that review, the trial court erred. Nothing about that review disturbs the orders in the class action. They remain as they are. What is affected is the equities of how those orders are applied to persons who never got notice, did not get it because collusion by class counsel and the Defendants created an agreement designed not to notify many class members. The Diocese appeared to solve that problem by stipulating to provide relief to persons who failed to receive notice "for whatever reason," but that stipulation has been erased by the trial court, and poses an enormous Due Process problem that should not bind Appellants.

Conclusion

The trial court's order should be reversed, and the actions reinstated. Alternatively, fraudulent techniques for judge-shopping and manipulating class actions should be publicized

and lauded as new creations under SCRCP 23.

Respectfully submitted,

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The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. Kristi L. Harrington, Circuit Court Judge

Appeal 2011 199886

Consolidated Case No. 09-CP-10-6694

John Doe, Jane Doe 1, Jane Doe 2, Jane Doe 3, ... Appellants

v.

The Bishop of Charleston, A Corporation Sole, and
the Bishop of the Diocese of Charleston, in his
official capacity, ... Respondents

Proof of Service

I certify pursuant to SCACR 208(a) that I have served one copy of the

Final Brief and
Final Reply Brief

by placing a copy of each document in the United States mail, first-class postage pre-paid, addressed to:

Peter Shahid
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