THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Circuit Court Judge

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Consolidated Case Nos. 2010-CP-10-5520; 2010-CP-10-7233;
2012-CP-10-5559; 2013-CP-10-3733; 2013-CP-10-4175; 2013-CP-10-4176

Appellate Case No. 2015-002095

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John Doe 2 and Jane Doe 4, John Doe 10, Jane Doe 11,
John Doe 193, Father Doe 194 and John Doe 194, ..... Respondents,

v.

The Bishop of Charleston, a Corporation Sole,
Robert Gugliemone, The Bishop of Charleston, in his official capacity,
Rev. Monsignor Martin Laughlin, former Administrator of the
Diocese of Charleston, in his official capacity, Robert J. Baker,
former Bishop of Charleston, in his official capacity,
Lawrence E. Richter, Jr., David K. Haller,
and Richter and Haller, LLC..... Defendants,

Of whom,

The Bishop of Charleston, a Corporation Sole,
Robert Gugliemone, The Bishop of Charleston, in his official capacity,
Rev. Monsignor Martin Laughlin, former Administrator of the
Diocese of Charleston, in his official capacity, and Robert J. Baker,
former Bishop of Charleston, in his official capacity, are ..... Appellants,

Of whom,

The Bishop of Charleston, a Corporation Sole,
Robert Gugliemone, The Bishop of Charleston, in his official capacity,
Rev. Monsignor Martin Laughlin, former Administrator of the
Diocese of Charleston, in his official capacity, Robert J. Baker,
former Bishop of Charleston, in his official capacity,
Lawrence E. Richter, Jr., David K. Haller,
and Richter and Haller, LLC.....Respondents/Lawyer Defendants,

## RESPONDENTS/LAWYER DEFENDANTS' RETURN TO APPELLANTS' EMERGENCY PETITION FOR SUPERSEDEAS

Defendants Lawrence E. Richter, Jr., Richter & Haller, LLC, and David K. Haller (collectively, the "Lawyer Defendants") hereby respond to the Diocese Defendants' Emergency Petition for Supersedeas (the "Petition"). For the reasons that follow, the Petition should be denied, and the Circuit Court permitted to proceed with trial on May 15, 2017.

## INTRODUCTION

The Diocese Defendants are attempting to stop the trial of several nearly 10-year-old sexual abuse cases by appealing an interlocutory trial-management order that manifestly is not immediately appealable. Recognizing the impropriety of the Diocese Defendants' delay tactics, the assigned Circuit Court judge, the Hon. J.C. Nicholson, Jr., issued a Scheduling Order stating that trial would go forward regardless of any appeal unless stopped by an supersedeas order from this Court. To be clear, the Court's Scheduling Order was properly issued *sua sponte*. **Contrary to the claim in the Petition, the Scheduling Order was not entered *ex parte*.**[1] In characterizing

[1] *Ex parte* orders are orders issued at the request of one party without hearing argument from the other parties to the litigation. *See* Black's Law Dictionary 576 (noting that an order is *ex parte* when it is entered at the request of and after hearing from one side without notice or contestation by the other side) (6th ed. 1990). Under South Carolina law, *ex parte* orders are permitted in only limited, exigent circumstances. *See, e.g.*, Rule 65(b), SCRCP (strictly regulating issuance and effect of an *ex parte* temporary restraining order). Characterizing a scheduling order as *ex parte* was clearly intended to suggest favoritism and impropriety on the part of Judge Nicholson. This characterization is false. The Scheduling Order was not requested by any party to the case, and no party was heard on the matter. Therefore, the order was not *ex parte*.

The proper characterization of the Scheduling Order is *sua sponte*, meaning that it was entered of the Court's own volition without prompting or suggestion. *See* Black's Law Dictionary 1424 (defining *sua sponte*) (6th ed. 1990). Nothing in South Carolina law makes it improper for a Circuit Court judge assigned to complex cases to issue trial management orders *sua sponte*; rather, Circuit Court judges have wide discretion to manage their docket and control the order of

the order as *ex parte*, the Diocese Defendants have improperly and baselessly questioned the integrity of the Circuit Court.

This Court should permit the May 15, 2017 trials to go forward for two reasons. ***First***, as set forth in the Lawyer Defendants' Motion to Dismiss Appeal and request for Expedited Relief, this Court lacks appellate jurisdiction over the orders on appeal. The Supreme Court has long held that when, as here, a litigant attempts to notice the appeal of unappealable orders, jurisdiction does not transfer to the Court of Appeals, and no automatic stay applies. Without appellate jurisdiction, there is no basis to stop the May 15, 2017 trial. ***Second***, regardless of this Court's jurisdiction, any alleged error in the Circuit Court's management of the trials can readily be corrected after trial. Thus, as the Circuit Court determined, the most prudent course in these almost 10 year old cases is to dispense with any further delay, allow the cases to be tried as set by the Circuit Court, and handle any alleged errors in the orders through a proper post-trial appeal.

## BACKGROUND

This appeal involves a series of cases, the first of which was filed in April 2009, all alleging that, as minors, Plaintiffs were victims of sexual abuse committed by priests of the Roman Catholic Diocese of Charleston, or claims brought by parents or spouses alleging that they lost consortium with victims of such abuse.[2]

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business before them. *See, e.g.*, *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980) ("This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants."). Thus, there is nothing remotely improper about Judge Nicholson issuing a scheduling order of his own volition in an effort to manage the trials of these old and complex cases.

[2] The first case was filed in federal court as Case No. 2:09-cv-00955-CWH and ultimately dismissed for lack of federal jurisdiction and re-filed in state court. This appeal involves eight (8) sexual abuse cases consolidated for purposes of discovery.

In 2007, before the instant cases were filed, the Diocese Defendants settled a class action involving sexual abuse claims.[3] The Lawyer Defendants were class counsel in that case. Under the terms of the settlement, victims known to the Diocese received direct notice, and notice was published in a series of South Carolina and nearby newspapers for victims not known to the Diocese. Abuse victims could participate in the settlement by recounting their abuse to an arbitrator selected by the parties in a non-adversarial process (i.e., they were not subject to cross-examination by the Diocese), who then awarded them compensation based on the level of abuse suffered within compensation ranges previously agreed to by the parties. Following the settlement, the claims of the class were dismissed with prejudice.

Plaintiffs in the instant cases contend that they are not bound by the prior class action settlement because the notice provided to the class was inadequate as to Plaintiffs who lived outside of South Carolina because notice was only published within and near the border of South Carolina.[4] Thus, Plaintiffs argue that the prior class action should not prevent them from pursuing their sexual abuse claims against the Diocese Defendants.

Recognizing the potential that their sexual abuse claims could be barred, Plaintiffs also brought, expressly in the alternative, legal malpractice claims against the Lawyer Defendants and an alternative civil conspiracy claim against all defendants. The basic theory of the alternative claims is that the defendants improperly conspired to avoid giving notice of the settlement to out-

[3] To avoid overburdening the Court with paperwork, exhibits demonstrating the facts set forth in this Background section are attached to the Lawyer Defendants' Motion to Dismiss Appeal and Request for Expedited Review, filed this same date.

[4] In addition, one of the Plaintiffs, John Doe 193, claims that he lived in-state at the time of the class settlement notice but had repressed his memories of the abuse and therefore could not participate in the settlement. He contends that he is not bound by the settlement because his repressed memory precluded him from receiving adequate notice.

of-state victims and that Plaintiffs were harmed because their claims against the Diocese might be barred by the class action.

In preparing these cases for trial, the Circuit Court issued two case-management orders that the Diocese Defendants now attempt to appeal. ***First***, the Circuit Court ordered that the primary claims and alternative claims be bifurcated into separate trials under Rule 42(b), SCRCP, to avoid jury confusion and prejudice, which reasons were explained in a written order. ***Second***, applying *Hospitality Management*, the Circuit Court opined that, ***as a general matter***, it appeared that notice was not reasonably calculated to reach out-of-state plaintiffs and that out-of-state plaintiffs could therefore pursue sexual abuse claims against the Diocese Defendants. The Court, however, did not apply this opinion to any particular plaintiff and instead left open for trial (or pre-trial motion) any argument as to whether a specific plaintiff should or should not be barred by the prior class action. The Court set a trial date of May 15, 2017 for the first of these consolidated cases.

On the eve of trial, the Diocese Defendants filed the instant appeal of the Order on Limited Collateral Review and the Order Bifurcating Trials and petitioned this Court for supersedeas relief to prevent the May 15, 2017 trial from going forward.[5] For the reasons that follow, the Diocese Defendants' petition should be denied.

[5] The Diocese Defendants make much of their contention that they should not need supersedeas relief because the automatic stay should preclude the May 15, 2017 trial. This contention elevates form over substance. It is clear from the Circuit Court's Scheduling Order that the Circuit Court believes this appeal is improperly filed for the purposes of delay. While the Circuit Court has ruled that it does not believe the automatic stay applies to this appeal, it is equally clear that the Circuit Court would grant relief from the automatic stay if needed, which relief is within its discretion. Thus, whether phrased as a petition for supersedeas relief or as an appeal from the Circuit Court's grant of relief from the automatic stay, the central issue before this Court is simply whether the May 15, 2017 trial should go forward in the face of the Diocese Defendants' improper appeal.

## ARGUMENT

### A. Trial Should Go Forward Because This Court Lacks Appellate Jurisdiction

The Diocese Defendants' appeal is improper because this Court lacks appellate jurisdiction over the interlocutory trial management orders from which the Diocese Defendants are attempting to appeal. Therefore, as argued more fully in the Lawyer Defendants' Motion to Dismiss Appeal and Request for Expedited Relief, the appeal should be dismissed. As the Supreme Court held long ago, "the notice of appeal from [an unappealable] order did not transfer jurisdiction to this Court or stay further proceedings in the trial court." *Crout v. S.C. Nat'l Bank*, 278 S.C. 120, 124, 293 S.E.2d 422, 424 (1982) (holding that attempt to notice an improper appeal did not stay proceedings in the trial court). For this reason alone, the appeal should be dismissed, the request for supersedeas should be denied, and the May 15, 2017 trial should be allowed to proceed.

### B. Trial Should Go Forward Because There Is No Prejudice And Any Alleged Errors Can Be Addressed After Trial

In addition to this Court's lack of jurisdiction, the petition for supersedeas relief should be denied because these sexual abuse cases are old, there is no prejudice to going forward with trial, and any errors can be corrected on post-trial appeal. Given that all of the Diocese Defendants' motions for summary judgment have been denied (which denials are not appealable as a matter of law), there is no valid legal impediment to the claims against the Diocese Defendants going to trial. If the Diocese Defendants believe their legal defenses, such as *res judicata*, will be borne out by the evidence in the case, they are free to move for a directed verdict and/or for judgment notwithstanding the verdict, and to appeal from any adverse legal rulings at the conclusion of trial. There is nothing improper or prejudicial about making the Diocese Defendants go through the same process as every other defendant whose motions for summary judgment have been denied,

and there is certainly no reason to hear an interlocutory appeal and make the alleged sexual abuse victims wait several more years for their day in court.

Likewise, there is nothing prejudicial about proceeding with a bifurcated trial. It is clear from the complaints that the substantive sexual abuse claims are the primary claims in these cases. Merely separating those claims from the alternative legal malpractice claims brought against the Lawyer Defendants does not prejudice the Diocese Defendants, and, even if it somehow does, they may attempt to demonstrate such prejudice on appeal after trial. Again, the mere fact that the Diocese Defendants would prefer not to try these cases in the manner prescribed by the Circuit Court is no reason to tie up these already stale cases with an interlocutory appeal. It is well past time for these cases to be tried, and this Court can certainly correct any trial management issues after verdict as it would with any other case. For these reasons as well, the Diocese Defendants' petition for supersedeas relief should be denied.

## CONCLUSION

For the foregoing reasons, the Diocese Defendants' petition for supersedeas relief should be DENIED.

**[SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE]**

Respectfully submitted,

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LAWRENCE E. RICHTER, JR. AND RICHTER & HALLER, LLC

May 8, 2017

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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John Doe 2 and Jane Doe 4, John Doe 10, Jane Doe 11,
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v.

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former Bishop of Charleston, in his official capacity,
Lawrence E. Richter, Jr., David K. Haller,
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and Richter and Haller, LLC.....Respondents/Lawyer Defendants,

## PROOF OF SERVICE

The undersigned hereby certifies that on May 8, 2017, the foregoing **RESPONDENTS/LAWYER DEFENDANTS' RETURN TO APPELLANTS' EMERGENCY PETITION FOR SUPERSEDEAS** was served on all counsel of record via e-mail and U.S. Mail, addressed as follows:

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**[SERVICE LIST CONTINUES ON FOLLOWING PAGE]**

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May 8, 2017

**VIA HAND DELIVERY**

The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *John Doe 2, et al. v. The Bishop of Charleston, et al.*
*Consolidated Case Nos. 2010-CP-10-5520; 2010-CP-10-7233; 2012-CP-10-5559; 2013-CP-10-3733, 2013-CP-10-4175; 2013-CP-10-4176*
Appellate Case No.: 2015-002095



Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven copies of the following:

1. Respondents/Lawyer Defendants' Motion to Dismiss Appeal and Request for Expedited Relief; and

2. Respondents/Lawyer Defendants' Return to Appellants' Emergency Petition for Supersedeas.

Our firm's check in the amount of $25 is also enclosed for the filing fee for the Motion to Dismiss.

By copy of this letter and evidenced by the Proof of Service, I have provided counsel of record with a copy of the same.

Please file the originals and return time-stamped copies via our courier.

Thank you and with kind regards, I am

McNAIR LAW FIRM, P.A.
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Mailing Address
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Very truly yours,

McNAIR LAW FIRM, P.A.

Susan Taylor Wall

STW:rgm
Enclosures: as stated

cc: Gregg Myers, Esq.
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