THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLETON COUNTY
Court of Common Pleas

J. C. Nicholson, Circuit Court Judge

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

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, and
Robert Guglielmone, 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, and
Robert Guglielmone, 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.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, the Appellants hereby request that the Court grant a rehearing in this matter. The Appellants respectfully assert that the Court erred in dismissing their appeal and denying their petition for a *supersedeas* order for reasons both procedural and substantive. The specific grounds in support of this Petition for Rehearing are set forth below.

STATEMENT OF THE CASE

This case arises out of allegations by the Respondents that they were abused by priests in the Diocese of Charleston many years ago. These claims have been extensively litigated as a result of a class action lawsuit filed in 2007 in Dorchester County. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494 (2014). The class action was resolved by way of a class settlement, which established a "fund from which awards would be made to claimants who established their sexual abuse claims by arbitration." *Id.*

These actions include consolidated civil complaints filed by various plaintiffs, all represented by Gregg Myers. The plaintiffs allege they are the victims of sexual abuse perpetrated against minors by agents of the Diocese parties. The plaintiffs in all of these various complaints have also named as defendants Lawrence E. Richter, Jr. and David K. Haller, and those attorneys' former law firm, Richer & Haller, LLC (collectively "the Richter Defendants").

Each plaintiff has alleged that he or she (or his or her child or spouse) was sexually abused, and that he or she is entitled to recovery under several legal theories including, but limited to, negligent supervision, fraudulent concealment, and legal malpractice, breach of fiduciary duty, and Unfair Trade Practices (as to the Richter Defendants). In addition the Appellants and the Richter Defendants are named in a cause of action for civil conspiracy.

In 2007 the circuit court approved a class action settlement, in which the Richer Defendants served as class counsel. The court-approved class action settlement provided a

mechanism in which primary sexual abuse claimants and loss of consortium claimants could participate in a process to resolve their claims through an arbitrator. The plaintiffs in these consolidated cases neither participated in this class action settlement opportunity, nor opted out of the class.

On October 26, 2016, the trial court issued an Order Bifurcating Trial and an Order on Limited Collateral Review. In bifurcating the trial of this case, the trial court ordered that the Appellants would first be required to proceed to trial on claims that the Respondents were sexually abused by priests. Then, following the conclusion of all sex abuse trials, the Appellants and the Respondents would be required to participate in a second round of litigation involving the legal malpractice, breach of fiduciary duty, and civil conspiracy claims. The trials in that second round would also involve the Richter Defendants, who would not be required to participate in the first round of trials.

The Appellants timely moved for reconsideration of both Orders in November, 2016. The Appellants pointed out to the trial court that this mode of trial would require them to try their case against each Respondent twice, and a verdict in the first case would not bring to a close the claims against the Respondents in the second case. Additionally, the Respondents would be required to try their cases against the Appellants twice. Moreover, neither the Appellants nor the Respondents would be able to appeal from the verdict or judgment in the first trial until after the second trial had concluded. Put simply, the Appellants contended that the mode of trial ordered by the trial court was manifestly unjust to both the Appellants and the Respondents.[1]

On May 4, 2017, the trial court denied the Appellants' motion to reconsider its Order Bifurcating Trial and, by separate order, its Order on Limited Collateral Review. At the same

[1] The Richter Defendants would not be subject to multiple trials against the same plaintiffs, and thus, the Order did not have any impact on their legal rights.

time as it issued its orders denying the motions to reconsider, the trial court issued a Scheduling Order, *sua sponte* and *ex parte*, which stated that the trial of this case would proceed beginning May 15, 2017, regardless of whether the Appellants appealed its Order Bifurcating Trial and/or Order on Limited Collateral Review. Put differently, the trial court clearly indicated that it would not recognize the automatic stay that would be trigged[2] when the Appellants filed their notice of appeal.

Following the issuance of these orders, the Appellants filed and served their Notice of Appeal on May 4, 2017. Due to the trial court's refusal to acknowledge the automatic stay, the Appellants also filed and served an Emergency Petition for *Supersedeas* Order to Stay Trial just hours after filing the Notice of Appeal.

On May 5, 2017, the Court issued an Order in response to the emergency petition, which stated the following:

> Appellants have served and filed a petition for supersedeas, requesting this court stay the trial scheduled for May 15, 2017. This court will act on the petition for supersedeas upon receipt and review of **a** return and reply. Pursuant to Rule 263(b), ACACR, and in light of the upcoming trial, **Respondents' return** shall be served and filed by noon on Tuesday, May 9, 2017, and Appellants' reply shall be served and filed by noon on Thursday, May 11, 2017.

[Order, p. 1 (emphasis added).] Pursuant to that Order, the Respondents filed a Return on May 8, 2017. The Appellants filed their Reply the following day.

Despite not being a party to the appeal, and not being referenced at all in this Court's Order, the Richter Defendants also submitted filings to the Court on May 8, 2017. The Richter Defendants filed and served a Reply in opposition to the emergency petition, as well as a Motion

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[2] *See* Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . . .").

to Dismiss the Appeal. Although the Appellants contended – and still contend – that the Richter Defendants' filings were improper, the Appellants complied with the Order out of an abundance of caution by filing and serving a Reply to the Richter Defendants' Return before the close of business on May 9, 2017. The Appellants did not file a Return to the Richter Defendants' Motion to Dismiss because the time for doing so under Rule 240(e), SCACR, had not responded, and the Court had not established any other deadline for a motion to dismiss.

On May 11, 2017, the Court issued a second Order. This Order granted the Richter Defendants' Motion to Dismiss and denied the emergency petition for *supersedeas*. In this second Order, the Court (apparently *sua sponte*) added a line to the case caption indicating that the Richter Defendants were "Respondents." Significantly, however, the Richter Defendants were not listed as such in the Notice of Appeal, in this Court's original Order, in the Respondents' Return, or in the Appellants' Reply to that Return.

The Appellants have now filed this timely Petition for Rehearing. In doing so, the Appellants expressly reserve their rights to argue that if this petition is granted, in whole or in part, and/or if the Supreme Court grants a petition for certiorari, any proceedings that the trial court decides to conduct in the interim are nullities.

ARGUMENT

The Appellants respectfully assert that the Court overlooked or misapprehended the following points in its Order:

(1) The Richter Defendants are not actual Respondents and did not have standing to file a motion to dismiss the appeal.

(2) Even if standing for such a motion existed, the Court issued its Order without giving the Appellants the proper amount of time to respond to that motion under Rule 240(e), SCACR.

(3) The challenged Orders are immediately appealable pursuant to S.C. Code Ann. §14-3-330.

(4) The emergency petition should have been granted because the challenged orders are immediately appealable and granting the requested relief would not have resulted in any prejudice to the Respondents, who were the only parties with standing to oppose the petition.

The Appellants will address each of these grounds below.

I. Lack of Standing

The challenged orders affect the rights of the Appellants and the actual Respondents (i.e. the plaintiffs below). The bifurcation order requires the Appellants and Respondents to conduct two separate trials for what is essentially the same case, without any ability to seek appellate review of trial errors in between. This requirement is prejudicial to the Appellants (and also to the Respondents, for that matter) because it forces them to spend unnecessary amounts of time and money trying the same case twice. It also creates a real and substantial risk of duplicative and/or inconsistent results in the two trials.

Similarly, the limited collateral review order affects only the Appellants and the actual Respondents. The court-approved class action settlement was designed to give claimants an opportunity to recover appropriate amounts of damages, but also to give the Appellants protection against future claimants who neither participated in the class nor opted out of it. Thus, the issue involved in the limited collateral review requested by the Appellants – i.e. whether the

plaintiffs below could assert any claims against the Appellants at this juncture – involved the Appellants and the Respondents only.

Those orders do not affect or impair any legal rights of the Richter Defendants. The bifurcation order does not affect the Richter Defendants because it does not require those defendants to try any cases twice. As a result, the burden leading to duplicative time and expenses imposed upon the Appellants (and the Respondents) does not apply to the Richter Defendants. Those defendants no doubt like the bifurcation order because it allows them to sit idly on the sidelines, hoping that the Respondents obtain enough money from the Appellants to be satisfied and drop all other claims. But the fact that the bifurcation order gives the Richter Defendants a perceived strategic advantage does not mean that it affects any protected legal right. The only legal rights impacted by the bifurcation order are those held by the Appellants (and arguably the Respondents).

The limited collateral review order also does not involve the Richter Defendants. Those defendants were not parties to the court-approved class action settlement, and they cannot assert any defenses based on that settlement. But the Appellants do have legal defenses based on the court-approved class action settlement. The requested limited collateral review, which the trial court did not properly conduct, would determine whether or not the Respondents were legally permitted to assert any claims against the Appellants. That determination does not impact any legal rights of the Richter Defendants. Again, while those defendants might prefer, for strategic reasons, some specific outcome from the limited collateral review, that does not make them a legitimate part of the current appeal.

As this discussion demonstrates, the Richter Defendants are not really respondents, and they lack any standing to participate in this appeal. They are no doubt generally interested in the

outcome of the appeal, but that does not mean they have any legal right to be involved in it. Accordingly, the Richter Defendants lacked standing to seek dismissal of the appeal, and the Court overlooked or misapprehended that fact in addressing and granting those defendants' improper motion. Therefore, the Court should grant the petition and rehear this issue.

II. Premature Ruling

Even assuming *arguendo* that the Richter Defendants had any legitimate basis for filing a motion to dismiss the appeal, the Court should not have issued its second Order because it was procedurally premature. The Richter Defendants filed their improper motion on May 8, 2017, and sent it to the counsel for the Appellants and the Respondents by e-mail after 5:00 pm that day. Under Rule 240(e), SCACR, the Appellants had until May 18, 2017, to file and serve a Return in opposition to that motion. Yet, the Court filed its Order granting that motion a full week before that deadline ever arrived.

It is true that Rule 240(e) and Rule 263(b) of the South Carolina Appellate Court rules give the appellate court discretion to extend or shorten the deadline for responding to a motion. However, it is at least implicit in these rules that the Court will let the parties know about any shortened deadline, thereby allowing the parties to comply with it. That notice never occurred in the present case. The Richter Defendants filed their motion at the end of the day on May 8th, and the Court issued its Order essentially two business days later.[3] At that point, the Appellants believed they still had over a week to submit a Return in opposition to the motion because the Court had never instructed them otherwise. As a result, the Court decided the motion without giving the Appellants a fair opportunity to respond to it.

[3] The Court was closed on Wednesday, May 10, 2017, for a state holiday.

Although the Court issued a *de facto* scheduling order the day after the appeal was filed, that Order did not contemplate or apply to any motion to dismiss the appeal. The language of the Order (which is quoted in full on page 4 of this Petition) referenced only the return and reply for the emergency petition for *supersedeas*. Thus, there was no reason for the Appellants (or anyone else) to believe that the Order was intended to shorten deadlines for responding to anything other than the emergency petition and the subsequent filings related to it.

The result of the Court's premature ruling was that the Appellants saw their appeal be dismissed without ever having a meaningful opportunity to respond to the motion to dismiss, which the Appellants believed (and still believe) to be improper. This outcome was obviously unfair and prejudicial to the Appellants. The Court overlooked that fact in issuing its second Order, and it should now grant this Petition and vacate that Order.

III. Appealability

As discussed in the previous section, the Court dismissed the appeal without ever giving the Appellants the opportunity to argue for the immediate appealability of the challenged orders. Due to the denial of the emergency petition for *supersedeas*, and the resulting need for the Appellants' attorneys to prepare for trial beginning May 15, 2017, presenting as full an argument on this point as the Appellants would like to do is also impracticable. However, to demonstrate the need for rehearing, and for the purposes of issue preservation, the Appellants will briefly set forth their arguments.

South Carolina's appellate courts have jurisdiction to review:

> (i) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from

> such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. §14-3-330. In the present case, the challenged orders are immediately appealable under subsection (3) of this statute.

Although there is precedent concluding that orders bifurcating different issues in a case for separate trials are not immediately appealable, the Supreme Court has recently held that the simple fact an order is styled a "bifurcation order" does not determine its appealability. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). In *Morrow*, the Supreme Court concluded the challenged order was immediately appealable, regardless of what it was called, because it implicated the appellant's substantial rights. As the Court stated, "Our review of the trial court orders is not constrained by how the order is styled." *Id.* at 539, 773 S.E.2d at 147. The Court further cited this Court's decision in *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 479 (Ct. App. 2011), for the proposition that "an appellate court should look to the effect of an interlocutory order to determine its appealability." *Id.* at 540, 773 S.E.2d at 147.

Here, the challenged orders affect the Appellants' substantial rights. As discussed above, the bifurcation order requires the Appellants and Respondents to conduct two separate trials for what is essentially the same case, without any ability to seek appellate review of trial errors in between. This requirement is prejudicial to the Appellants (and also to the Respondents, for that matter) because it forces them to spend unnecessary amounts of time and money trying the same case twice. It also creates a real and substantial risk of duplicative and/or inconsistent results in the two trials.

This order must be immediately appealable because even a successful appeal after a final judgment would not provide the Appellants any meaningful relief. If the Appellants are forced to try each case twice before having an ability to seek appellate review, that review would be pointless. By that time, the Appellants already would have spent the unnecessary time and money conducting multiple trials of the same cases. The costs and the limited attorney's fee available to a prevailing party on appeal would not come anywhere close to making the Appellants whole for the expenses of numerous "double trials." Thus, any victory on a post-judgment appeal of the bifurcation order would be entirely Pyrrhic in nature. *See generally Knight Pub. Co. v. University of S.C.*, 295 S.C. 31, 367 S.E.2d 20 (1988) (order allowing discovery of materials claimed to be confidential was immediately appealable because it in effect determined the action and prevented any meaningful appellate review); *rev'd on other grounds*, *Simpson v. Sanders*, 314 S.C. 413, 445 S.E.2d 93 (1994).

The limited collateral review order also affects the Appellants' substantial rights because it allows claims to proceed against the Appellants when those claims should be barred by the previous court-approved class settlement. The Appellants have not been able to find any case directly on-point as to the appealability of this specific kind of order, which suggests this is a

novel question in South Carolina. The Appellants respectfully submit that this type of novel issue should not be decided in a cursory fashion in which the party seeking to appeal has not been given a full and fair opportunity to brief and argue the issue. Therefore, the Court should grant the Petition and conduct a full rehearing after allowing the Appellants to file a Return to the motion.

Furthermore, even if the Court were to determine that the limited collateral review order were not immediately appealable, that would not warrant dismissal of the appeal. As previously argued, the bifurcation order is immediately appealable under S.C. Code Ann. §14-3-330(3). For this reason, the Court can – and should – also review the limited collateral review order. *See Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998) (an order not immediately appealable will nevertheless be reviewed if another appealable issue is before the court and review will avoid unnecessary litigation). This rule provides an additional reason to grant the rehearing petition.

IV. Petition for *Supersedeas*

For reasons that are connected to the grounds previously discussed, the Court should have granted the Emergency Petition for *Supersedeas* Order to Stay Trial. The Court has provided no reason for denying the motion other than the erroneous conclusion that the challenged orders from the trial court were not immediately appealable. In other words, it appears the Court denied the emergency petition solely because it chose to dismiss the appeal. Therefore, since the Court never should have considered the motion to dismiss, let alone granted it,[4] the denial of the petition was also in error.

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[4] *See* sections I, II and III of this Petition.

When the Richter Defendants are taken out of the equation, as they should be for this appeal, the only relevant parties for purposes of the emergency petition are the Appellants and the Respondents. Considering only those parties, the one fair result to both sides is to grant the emergency petition. The Appellants need to obtain the requested stay the trial court proceedings in order to protect their ability to obtain any meaningful review of the challenged orders, particularly the bifurcation order. As discussed above, an appeal after multiple trials would not do the Appellants much good (if any) in this context.

At the same time, granting the requested relief will not result in any prejudice to the Respondents. Especially now that it appears the John Doe 10 trial will begin on May 15, 2017, the Respondents have articulated no legitimate claims of prejudice if future trial court proceedings are stayed. The Respondents can adjust travel plans or scheduling issues accordingly, which means they will be in no worse position if a stay is imposed.

Obviously, the original, specific need for the stay (i.e. the John Doe 10 trial) may be a moot point by the time the Court considers this Petition.[5] Yet, that does not mean a stay is no longer necessary. As the trial court has told the parties, it intends to continue conducting trials against the Appellants only – one after the other – until they are completed. Even if the John Doe 10 case is tried before the Court reaches this Petition, a stay is required in order to prevent additional trials from going forward. This is especially true since the violation of the Appellants' substantial right only increases with every trial that takes place. Therefore, this is still a critical

[5] Here, it should be noted that the Appellants will participate in the John Doe 10 trial if necessary to avoid any finding of contempt or sanctions by the trial court. However, the Appellants will do so under protest and without waiving their rights to argue that the trial is and/or was a nullity because the appeal should not have been dismissed and a *supersedeas* order should have been issued.

and pressing issue, and the Court should grant the Petition and enter an order staying all future proceedings in the trial court until the end of this appeal.

CONCLUSION

For all of these reasons, the Court should grant this Petition, vacate its Order of May 11, 2017, and allow this appeal to proceed on the merits. At the very least, the Court should vacate the Order and allow the Appellants the full amount of time to respond to the dismissal motion under Rule 240(e), SCACR.

Respectfully submitted,

R. Hawthorne Barrett

for

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May 12, 2017

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May 12, 2017

Via Hand Delivery

Hon. Jenny Abbott 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-105520, 2010-CP-10-7233, 2012-CP-10-5559, 2013-CP-10-3733, 2013-CP-10-4175, 2010-CP-10-4176
Appellate Case No. 2017-001092
Our File No. 8427.252

Dear Ms. Kitchings:

Enclosed are the following materials: (1) the original and seven copies of the Petition for Rehearing, and (2) the original and one copy of the Proof of Service. Also enclosed is a check for the filing fee. Please file the originals and necessary copies and return the extra stamped copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.

R. Hawthorne Barrett

for Richard S. Dukes

RSD
Enclosures

cc: Gregg Myers, Esq.
James L. Bruner, Esq.
Susan Taylor Wall, Esq.

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Official capacity; and Robert J. Baker, former Bishop of,
Charleston in his official capacity, are.....Appellants.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellants, certifies that I have this **12th day of May, 2017**, served copies of the **Petition for Rehearing** upon counsel for the Respondents and counsel for the Defendants in the lower court by causing them to be deposited in the United States mail with sufficient postage attached, addressed to:

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