

# Turner | Padget

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June 7, 2017

**Via Hand Delivery**

Hon. Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

RECEIVED

JUN 07 2017

SC Court of Appeals

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 Appellants' Brief on Appealability, and (2) the original and one copy of the Proof of Service. 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. Matthew Bennett*

for Richard S. Dukes

RSD  
Enclosures

Hon. Jenny Abbott Kitchings  
June 7, 2017  
Page 2

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

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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JUN 07 2017

APPEAL FROM CHARLETON COUNTY  
Court of Common Pleas

SC Court of Appeals

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

Appellate Case No. 2017-001092

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,

And Lawrence E. Richter, Jr.; David K. Haller; and  
Richter and Haller, LLC, are.....Respondents.

**BRIEF ON APPEALABILITY**

The Appellants respectfully submit this Brief on Appealability pursuant to the Court's Order filed on May 24, 2017.

### **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.<sup>1</sup>

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 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

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<sup>1</sup> 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.

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 triggered<sup>2</sup> 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.] Pursuant to that Order, the Respondents filed a Return on May 8, 2017. The Appellants filed their Reply the following day.

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 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

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<sup>2</sup> See Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . .").

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*. The Appellants responded to the Order by filing a timely Petition for Rehearing. The Appellants argued, *inter alia*, that the Court had ruled on the Richter Defendants' Motion to Dismiss without allotting the full amount of time for the Appellants to make a formal response. The Court then issued another Order on May 24, 2017. That Order gave all parties fifteen days from the date of the Order (i.e. until June 8, 2017) to submit briefs on the appealability of the challenged lower court orders. The Appellants now submit this brief in response to that Order.

## ARGUMENT

### **I. The order forcing the Appellants to participate in multiple duplicative trials is immediately appealable.**

South Carolina's appellate courts have jurisdiction to review:

(1) 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.

Here, the “bifurcation order” affects the Appellants’ substantial rights. The order requires the Appellants to conduct two separate trials for 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 Doe 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.

Although the two trials would technically involve different causes of action against the Appellants, the Appellants would still be required to present the same testimony, exhibits and arguments in both. Some of the legal issues might be slightly different in the second trial, but for all practical purposes, the Appellants would have to repeat the presentation of their case from the first trial. This unnecessary and prejudicial repetition would take place in every one of the cases that goes to trial. The end result would be several weeks’ worth of additional trial time and expenses that the Appellants would have to incur for no compelling or legitimate reason.

The Respondents, specifically the Richter Defendants, may argue that there is a legitimate or compelling reason for this arrangement, but the Appellants obviously disagree, and that is the whole point of this appeal. The trial court made a decision that has a tremendous, negative impact on the Appellants’ interests, both financial and strategic. That harmful impact

will be immediate and effectively irreversible. For that reason, the Appellants have exercised their right to have this Court review the trial court's decision. If the appeal proceeds, as it should, both sides will have a fair opportunity to present their arguments for and against that decision. If this Court conducts a full review and allows the decision below to stand, at least the necessary appellate oversight would have occurred before the harmful impact, not afterwards. Thus, this immediate appeal is proper and serves to protect the Appellants' substantial rights.

Furthermore, immediate appellate review is necessary 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.

This is especially true when one considers that the only remedy this Court could grant in that circumstance would be a new trial. This would merely add insult to the injury the Appellants had already sustained. Granted, the Appellants would have won their appeal, but the "victory" would simply mean the Appellants would have to try each case a third time in a consolidated proceeding. The only way to avoid this absurd and unfair result is to recognize that the "bifurcation" order significantly affects the Appellants' rights and to allow this appeal to proceed.

Although they have not addressed this specific factual scenario, South Carolina's appellate courts have found immediate appeals to be warranted in analogous cases where an

appeal after a final judgment would not afford any meaningful relief. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (an order disqualifying a party's attorney in a civil case is immediately appealable because "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the afflicted party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification."); *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004) (denial of a motion to proceed anonymously was immediately appealable because a post-judgment appeal would not adequately protect the party's claimed need for privacy); *Lakes v. State*, 333 S.C. 382, 510 S.E.2d 228 (Ct. App. 1998) (denial of a motion to proceed in forma pauperis was immediately appeal because otherwise the plaintiff could not pursue the case at all); *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993) (denial of a motion to dismiss for lack of subject matter jurisdiction was immediately appealable because this threshold issue had to be determined in order for the lower court to hear the case); *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); *Rutledge v. Tunno*, 63 S.C. 205, 41 S.E. 308 (1902) (denial of a motion to intervene is immediately appealable because the purported intervenor would have no other way to obtain appellate review).

Again, the present case falls into the same category. The Appellants' substantial rights will have already been negatively impacted by the time of final judgments because the duplicative trials (and the expenses stemming from them) will have taken place. At that point,

even a successful appeal would only make things worse in terms of the time and expenses, as the Appellants would have to try each case a third time.

Of course, it is possible that if this appeal is allowed to proceed, the Court (and/or the Supreme Court) could wind up affirming the “bifurcation” order. In that event, the Appellants would be forced to incur the expenses of duplicative trials. But at least in that scenario the necessary appellate review would already have occurred, and all parties could go to trial in the knowledge that the trial court’s procedure had been deemed proper by higher courts. Thus, an immediate appeal is not only proper under the governing statute, but it also removes one potential basis for re-trials of these cases.

In addition, 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 order is not constrained by how the order is styled.” *Id.* at 539, 773 S.E.2d at 147. The Court further cited *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 (emphasis added). As discussed above, the effect of the trial court’s order in the present case makes it immediately appealable under the statute, no matter what the order is called.

*Morrow* is vital to the current issue because it undercuts the Respondents' primary argument for dismissal of the appeal. Citing two decisions by the Supreme Court,<sup>3</sup> the Respondents claim that bifurcation orders are not immediately appealable as a hard and fast rule. However, *Morrow* makes it clear that no such *per se* rule exists anymore (to the extent one ever did), and appellate courts must consider the effects of each individual order to make the determination. This is significant because the present case is very different than the situations in *Senter* and *Flagstar*.

*Senter* was a personal injury case involving disputed liability and significant damages claims. The defendant moved to bifurcate the trial into a liability phase and then, if necessary, a damages phase. The defendant based its motion on a belief that a jury would be unduly swayed by the damages evidence and would not pay sufficient attention to the question of liability. The trial court denied the motion, and this Court dismissed the resulting appeal. The Supreme Court granted a writ of certiorari and affirmed the dismissal, concluding that participating in a standard trial procedure (i.e. liability and damages determined in a single trial) would not impact the defendant's rights. The present case, of course, does not involve the denial of a motion to bifurcate, and, therefore, *Senter* has no impact on the appealability of this order.

*Flagstar* was a contract dispute between an insured and its excess insurer over whether coverage existed for payments of a class action settlement. The trial court granted the insured's motion to bifurcate the trial into two phases. The first would determine the threshold issue of whether a specific exclusion in the excess policy applied. If the jury determined it did, the proceedings would end. If the jury decided the exclusion did not apply, the second phase would cover the remaining substantive issues, which were unrelated to the exclusion. The insurer

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<sup>3</sup> *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000)

appealed, and this Court addressed the merits of the bifurcation order. However, the Supreme Court granted a writ of certiorari and reversed, concluding that “an order granting separate trials of issues in a contract case is not immediately appealable.” 341 S.C. at 73, 533 S.E.2d at 334. Significantly, though, the Court also took the opportunity to caution trial courts that bifurcation under Rule 42(b), SCRPC, is only appropriate for truly “separate issues.” *Id.* at 73, 533 S.E.2d at 333, n. 8.

Although *Flagstar*, unlike *Senter*, did involve an order granting bifurcation, the situation was much different than the one in the present case. The bifurcation order in *Flagstar* did not force either side to participate in duplicative trials covering the same issues. To the contrary, the first trial in *Flagstar* involved a separate threshold issue that had the potential to end the case. A second trial was only necessary if the party seeking coverage cleared that first hurdle, and even then the second trial did not involve re-litigating the same issue. Thus, assuming the threshold exclusion did not apply, the litigation of the remaining issues was necessary, regardless of whether that litigation occurred in one trial or two separate proceedings. In other words, *Flagstar* represented the bifurcation of truly separate issues, as contemplated by Rule 42(b), SCRPC.

No such tidy division exists in the present case. The challenged order is not really one of “bifurcation” as it applies to the Appellants. It may be called a bifurcation order, but *Morrow* instructs the Court to disregard that label and examine the order’s effect on the Appellants. As discussed above, the order forces the Appellants to try the same case twice, several times over. Granted, the specific causes of action may be different, but both trials will necessarily involve the same evidence, witnesses and arguments from the Appellants. The second trial will be an

unnecessary duplication of efforts for the Appellants; there is simply no other way to state it. This was not the situation in *Flagstar*, and that case is not controlling here.

*Senter* and *Flagstar* involved appellants who were merely dissatisfied with the planned methods of trying the cases because they preferred different methods for strategic reasons. This is why those appeals were dismissed. Here, on the other hand, the harm to the Appellants involves much more than strategic disadvantages. The order will force the Appellants to devote vast amounts of time and money to duplicative trials in several different cases. Thus, this is a much different kind of order than the ones seen in previous decisions.

Furthermore, under the Respondents' position, the Appellants would have no right to appeal until the duplicative trials were finished. This means the harm to the Appellants would have already occurred before they could seek any appellate review. For that reason, an appeal on this issue at that juncture would not – and could not – provide any real remedy to the Appellants. As previously discussed, our appellate courts have not hesitated to find orders to be immediately appealable in past analogous “no win scenarios,” where an appeal after final judgment would not do the party any good.

While the Appellants may not be entitled to a trial in the exact format of their preference, they do have a substantial right not to be forced to try the same cases twice for no justifiable reason. This is the real issue for purposes of appealability, not the title that the trial court gave to the order. Therefore, this Court should vacate its previous dismissal order and allow this appeal to proceed in the normal course.

**II. The Court should also review the limited collateral review order.**

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. Thus, this order has the practical effect of denying and/or striking one of the Appellants' defenses. This makes the order immediately appealable under S.C. Code §14-3-330(2)(c). *See Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) ("An order affects a substantial right and is immediately appealable when ... [it] strikes out an answer or any part thereof or any pleading in any action.").

Furthermore, even if the Court were to determine that the limited collateral review order is not itself 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).

**CONCLUSION**

Based on the authorities and arguments set forth above, this Court should vacate its previous dismissal order and allow this appeal to proceed.

(Signature on next page)

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS

June 7, 2017

THE STATE OF SOUTH CAROLINA  
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Appellate Case No. 2017-001092

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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,

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The Bishop of Charleston, A Corporation Sole, and the  
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Of whom,

The Bishop of Charleston, A Corporation Sole, and the  
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And Lawrence E. Richter, Jr.; David K. Haller; and  
Richter and Haller, LLC; are.....Respondents.

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**PROOF OF SERVICE**

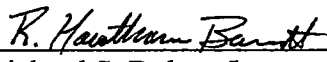
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The undersigned, an attorney in this matter for the Appellants, certifies that I have this 7<sup>th</sup> day of June, 2017, served copies of the Appellants' **Brief on Appealability** upon counsel for the Respondents by causing them to be deposited in the United States mail with sufficient postage attached, addressed to:

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June 7, 2017