The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-001996

John Doe 2 and Jane Doe 4, John Doe 10, Jane Doe 11, John Doe 193, Father Doe 194, John Doe 194, John Doe 245 and Father Doe 245, and John Doe 297,

Appellants

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,

Respondents

Initial Brief of Appellants

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Table of Contents

Table of Cases, Statutes and Other Authorities

Cases

Statutes, Court Rules and Other Authorities

Statement of Issues on Appeal

1. Did the trial court err in disregarding the holdings of *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984), and finding that class counsel assumed no fiduciary obligation to absent class members

   a. upon pleading a class action, or

   b. upon reaching a class settlement, or

   c. upon court approval of a class settlement?

2. Did the trial court err in holding that the plaintiffs other than Doe 193 fell outside the class definition and that Doe 193 was "not an intended beneficiary" of any duty owed by the Lawyer defendants/

3. Did the trial court err in concluding that any resolution with the Diocese for a sexual abuse tort claim precludes a legal malpractice claim against the Lawyer Defendants?

4. Did the trial court err in granting summary judgment on the aiding and abetting breach of fiduciary duty claim against the Diocese?

Standard of Review

Appeal from a grant of summary judgment is reviewed under the same standard applied by the circuit court: there must be no genuine issue of material fact; judgment must be appropriate as a matter of law; and the record, including all inferences which can be reasonably drawn from the record, must be viewed in the light most favorable to the nonmoving party. E.g., *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (S.C. 2002); *Shelton v. LS&K, Inc.*, 374 S.C. 294, 297, 648 S.E.2d 307, 308 (Ct. App. 2007). Where the proof standard is a preponderance of evidence, as it is here, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary

judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Statement of the Case

This appeal questions whether there is any remedy once counsel collaborate to manipulate a class action. The trial court held there is not, and granted summary judgment as to all defendants. The trial court found class counsel owed no duty to absent class members, consequently that the Diocese defendants could not have liability for aiding and abetting that breach.

It is undisputed that the Diocese of Charleston comprises the entire state of South Carolina. Complaint in 2005-CP-10-4913 at ¶ 35. In December 2005, defendants Richter and Haller, through their firm (the "Lawyer defendants"), filed, in Charleston County, a class action complaint against the Diocese of Charleston and its officials (the Diocese defendants) for matters involving sexual abuse. That complaint was assigned case number 2005-CP-10-4913. Complaint.

The plaintiff, the alleged class representative in that action, was an individual identified as John Doe 53. The class he was alleged represent was "a class of other persons similarly situated as victims of priest sexual abuse in South Carolina." Complaint in 2005-CP-10-4913 at ¶ 34. That class complaint acknowledges (at ¶ 36), the number of persons within that class allegation "may exceed the hundreds."

Pertinent to appellant John Doe 193, who alone among the abuse victims in this appeal lives in South Carolina and presents issues of repressed memory of his childhood abuse, in April 2006 the Lawyer defendants filed a complaint in Jasper County against the Diocese of Savannah on behalf of a client who had repressed the memory of his childhood sexual abuse. Complaint,

2006-CP-27-00143; Motion for Summary Judgment in 2006-CP-27-00143, filed November 13, 2009. In other words, class counsel was well-aware that an abuse victim might repress memory of his or her abuse, and that the law in South Carolina provided criteria to address such claims.

SCRCP 23(d) requires a motion to certify a class be made "as soon as practicable" after the class action is filed. No motion was ever made to certify that 2005 Charleston County class action for John Doe 53. Of the few motions that had been filed in that case, none was ever argued or decided.

Instead, the parties discussed, and reached, a class settlement at a mediation held in June 2006. A settlement was reached both for a class comparable to what had been pleaded with John Doe 53 as its representative, and for a class not part of any pleading. That new class was briefly described in the mediation agreement as "spousal &/or parent claims deriving from victims abused." June 14, 2006 handwritten settlement terms at p.2.[1] The settlement explicitly included case 2005-CP-10-4913. 2006 handwritten settlement terms at p. 1.[2]

SCRCP 23(c) provides:

> A class action shall not be 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.

Even after the mediation agreement was reached, no motion was presented in Charleston

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[1] The procedural deviation required the cooperation of the Diocese defendants.

[2] Item 6 of the handwritten settlement terms provided that the claims of four named individuals, one of whom is John Doe 53, were resolved even if the court failed to approve the class settlement. By the terms of the class settlement, those individuals no longer had claims representative of the class.

County, either to certify the classes or to approve the class settlement.[3]

From this point forward, if not before, the Diocese defendants ceased being adverse to its "adversaries" in the settlement classes who were represented by the Lawyer defendants. Had the Diocese defendants remained adverse, they would have filed a motion in Charleston County for review and approval of the settlement in the only class action case then pending.

Instead of seeking court approval for the two classes settled in June 2006 (which would have been submitted to judges then assigned to Charleston County), all counsel put effort into shopping for a judge for class approval and oversight.[4]

The judge chosen had long personal and professional ties to class counsel and was then assigned to Dorchester County. Those extensive ties were never disclosed in any notice to the class, and were disclose publicly only after the fairness hearing and preliminary class approval. Objectors had no opportunity to raise the issues in the fairness hearing. The fairness hearing was March 2007. The disclosures were withheld until July 13, 2007. July 13, 2007 order.

The judge-shopping challenge was to transfer from Charleston County to Dorchester County a Charleston County class action in which a class settlement had already been reached.

The transfer technique required extensive cooperation from the Diocese defendants.

First, class counsel filed in Dorchester County two new class action cases against the same Diocese defendants, for clients whose claims were within the existing settlement agreement. See complaints in civil action numbers 2006-CP-18-1310 and -1311 (filed August 15, 2006 in Dorchester County. The complaints erroneously identify most of the plaintiffs as

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[3] The procedural deviation required the cooperation of the Diocese defendants.

[4] This procedural deviation also required the cooperation of the Diocese defendants.

defendants.) The Diocese cooperated fully, not only accepting service of those complaints, e.g., Acceptance of service filed 9-6-06 in -1310, but also by agreeing to make no motion to dismiss pursuant to SCRCP 12(b)(8) due to the prior pending class action. No such motion was made.

Second, class counsel redundantly re-filed the identical complaint for John Doe 53, then pending (and settled) in Charleston County so it was duplicated in a filing Dorchester County, so that the identical class action complaint was then pending in both counties simultaneously. The Dorchester County version of the Doe 53 complaint is identical to the Charleston County version but for the county designation. The same day the cloned complaint was filed, class counsel moved in Dorchester County for class certification and settlement approval. Motion filed October 6, 2006. Pertinent to this appeal, in that motion and in later proceedings and orders, the classes were defined (a) without geographic limit, and (b) in a manner so as to provide no accommodation for any abuse victim with repressed memory of his or her childhood abuse. The class proposed for court approval was:

> All individuals born on or before August 30, 1980 who, as minors, were sexually abused at any time by agents or employees of the Diocese of Charleston who have not previously had any similar claim adjudicated, resolved, or released. (hereafter, the "Primary Class."

And:

> The spouse and parents, of all individuals pursuant to the Primary Class and who suffered a loss of the abused individual's consortium, and who as spouses or parents have not previously had any similar claim adjudicated, resolved, or released,

In Dorchester County the three class cases, even though already settled, were designated complex by consent. Order of October 10, 2006 filed October 17, 2006. At that time the

Supreme Court order provided complex designation for cases that could not be settled. Supreme Court Order of July 26, 2006 for complex designation. The circuit court order assigned the cases to the shopped-for judge, completing the judge-shopping process.

Fourth, and finally, class counsel wrote to the administrative judge in Charleston County and sought (and obtained) consent dismissals without prejudice for each of three pending cases against the Diocese, one of which was the Doe 53 class action. Class counsel letter of October 17, 2006; Orders of October 23, 2006 dismissing Charleston cases without prejudice.

The October 6, 2006 motion for preliminary class approval proposed nationwide notice to the class through publication in *USA Today* as well as various papers around South Carolina. Motion at p. 3, item 3a. That proposed notice was consistent with the classes that were defined without geographic limit.

Before any ruling was made on the merits of the October notice, in January 2007, the motion was amended. The 2006 settlement agreement had been developed into a detailed, typed and signed agreement, and that agreement was attached with a different proposed notice program. Although the proposed class definitions had not changed, so still had no geographic limitation, class counsel proposed to eliminate the nationwide notice proposed via *USA Today*. January 17, 2007 motion for class and settlement approval at pages 2 and 3.

In addition, the settlement agreement subordinated the class recovery to a fixed fee for class counsel. The fee took priority over the client recovery.

In 2011, Judge Young had concluded, as to appellants John Doe 2 and Jane Doe 4, who reside out of state, that the class notice program was constitutionally deficient and deprived them of Due Process. June 27, 2011 Order of Judge Young. Judge Nicholson concluded something

similar in his May 2017 order. Each of those orders is predicated on the appellants not receiving Due Process due to the inadequate notice. Each is the law of the case.

Yet, by his August 2017 order, Judge Nicholson concluded that appellants were *not* within the class definition, contrary to his own order in May 2017. In doing so, he worked not with the definitions of the class as proposed for court approval or as approved by the court, or as given in the public notices made to the class, but by restricting his view of one paragraph in the class complaints, construing them to "clearly limit" the putative classes to only South Carolina residents. Order at 18. Presumably, then, S.C. residents only at the moment the complaint was filed, even if a victim had later received notice of the class action and submitted a claim. The court found that all plaintiffs other than Doe 193, being out of state residents, "fall outside the class definition." Order at 19.

Judge Nicholson relied on, for example, the phrasing of Doe 53 complaint ¶ 41:

> Plaintiff is entitled to the certification of a class of plaintiffs against the defendant representing all individuals, save those barred by law from asserting an action against the defendants, in South Carolina who were sexually abused and/or otherwise molested by agents or employees of the Catholic Church under the supervision and/or control of the defendants.

By contrast, the classes as defined in the class settlement, in the motion for certification, and in the published notices to the class were construed by Judge Nicholson as having no effect, a ruling which directly contradicted the 2011 order of Judge Young.

Class counsel represented on the record to Judge Nicholson that the class notice "was not intended to reach beyond the borders of South Carolina" (April 10, 2014 hearing transcript at p. 9), not because the class definition was geographically limited but "because the Bishop said, no, that's too expensive." Meaning it was too expensive to advertise the class settlement in *USA*

Today. Class counsel's explanation was that the notice program to the absent members of the class he represented was reduced so as to accommodate an objection from his supposed adversary.[5]

At no point was either the reduced notice program, or any rationale for the reduced notice program, explained in 2007 to the judge overseeing the class action. To the contrary, at a hearing on July 13, 2007, at p. 12, that judge was told by class counsel that the relief obtained for the class fully protected absent class members:

> if anybody has been missed or if there is anybody who responds as a result of these who have been identified to, the diocese waives all the same defenses that they have given up in this class settlement, 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.

However, class counsel obtained no written orders to secure those benefits that class counsel claimed to have obtained for absent class members. Had class counsel done as he claimed, each of the plaintiffs in this appeal would have had relief. In *Doe v. Bishop*, 407 S.C. 128, ___, 754 S.E.2d 494, 499 (S.C. 2014), the Supreme Court determined that the existing written orders in the class action did not extend those benefits to absent class members, significant as for the class action the Diocese waived charitable immunity and the statute of limitations. 2007 Settlement agreement.

The Diocese cooperated in class counsel reducing the notice program to the class, by making no objection to the reduced notice program. The Diocese did not seek to enlarge the geographic scope of the notice to match the class definition, or to explicitly refine the class

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[5] Since the notice program was paid for out of the settlement fund the Diocese had agreed to, the explanation by class counsel makes no sense. Publishing the settlement to class members in *USA Today* cost the Diocese defendants no additional funds.

definition to restrict the class to persons within South Carolina, or to make some provision for persons such as Doe 193 who did not have a memory of their abuse in 2007.

The class action settlement was approved, and notice was ordered in 2007 only in newspapers in and around South Carolina. Order of July 30, 2007 and attachments. A claims period was established. Class counsel's fee was approved to be $2.5 million, and was ordered to be paid (a) before any class member was identified or any claims made, and (b) despite time records showing substantial duplication, exaggeration, questionable cost claims, and literally impossible hourly claims — days of more than 50, 70, 80 and 90 hours. E.g., complaint in Doe 10 and affidavit of Michael Virzi. The fee also came from the settlement fund, meaning class counsel simultaneously negotiated a fixed fee for himself and a variable recovery for the class.

Despite that generous fee order, class counsel apparently charged and collected from class members more than the $2.5 million authorized by the order. To date, class counsel has not had to submit to deposition about the extra fee charged, because the trial court deferred discovery as the lawyer defendants other than interrogatories and document production.

That the class notice was less than nationwide was raised in 2007 by persons who objected to, and opted out of, the class. August 7, 2007 R.59 motion. No change was made in response to objectors' claims, and the objectors negotiated better terms than those available to class members. Class members were not told that objectors get better terms.

The court-approved definition of the class in the notice provided to the class is:

> This action applies to 1) any person born on or before August 30, 1980; 2) who as a minor was sexually abused; 3) at any time by agents or employees of the Diocese of Charleston; 4) of the parent or spouse of any such minor, 5) who have not previously had any similar claim adjudicated, resolved, or released.

As Judge Nicholson recognized, 2017 order at 19, other than Doe 193, who resides in South Carolina and whose memory of his abuse occurred after the class action claims process was concluded, the appellants each reside outside of South Carolina so had no opportunity to get notice of the class.

As noted above, no final order has ever been entered in the class action, and no post-award fairness hearing has been conducted, to consider if class counsel, as suggested by Michael Virzi, in fact charged a fee greater fee than was authorized by the court.[6] The court has not permitted the deposition of class counsel.

The circumstances of John Doe 193 is typical of many class members in terms of timing. He was born April 30, 1953 (Dep. at 20). He resides in South Carolina but had no recollection of his abuse until 2010. He was abused between ages 10 and 14, Dep. at 99, which translates to abuse between 1963 and 1967, a time period when the Diocese enjoyed almost complete immunity. Being unable to participate in the class action, for which charitable immunity was waived, prohibits him from any relief, even though he could overcome a statute of limitations defense. Other appellants share similar problems, meaning their claims fail against the Diocese if brought outside the class action, on either charitable immunity or limitations grounds. By getting no notice of the class action, they are barred from any recovery.

John Doe 10, John Doe 194 and his father, and John Doe 245 and his father, each reached partial resolutions with the Diocese, explicitly preserving claims against the Lawyer defendants pursuant to S.C Code § 15-38-50. Without reviewing any of those agreements, Judge

[6] It appears that class counsel charged each class member they represented an additional 10%, for an apparent overpayment to themselves by class counsel of approximately $1 million. Discovery has not yet been permitted sufficient to establish that distribution.

Nicholson determined that § 15-38-50 did not apply, and that those partial settlements prohibited any further recovery, finding only "one loss — the abuse at the hands of the Diocese." Order at 10. The court held as a matter of law that the legal malpractice claim was the same injury as the sexual abuse, so imposed on the plaintiffs a *res judicata* effect of the settlements.

A post-trial motion was made and denied. This appeal followed.

Argument

1. The trial court erred in disregarding the holdings of *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984), and finding that class counsel assumed no fiduciary obligation to absent class members

a. upon pleading a class action, or
b. upon reaching a class settlement, or
c. upon court approval of a class settlement

This appeal turns largely on whether the trial court erred as a matter of law in interpreting, and disregarding, the holdings of *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984), as to both breach of the attorney-client relationship and breach of fiduciary duty.

Premium Investment Corp. v. Green, 283 S.C. 484, ___, 324 S.E.2d 72, 76 (Ct. App. 1984): (internal citations omitted, emphases added) held:

> a plaintiff who sues on behalf of a class ***and the attorney representing the class assume a fiduciary obligation to absent members of the class, including the obligation to inform them of proposed compromises of the group action.*** The class representative also surrenders the right to settle the action in return for individual gain, alone.
>
> If the class representative ***or class counsel*** breaches the fiduciary duties he assumes and receives and retains benefits flowing from the breach, he holds what he receives upon a constructive trust for the class. This is true although the

> benefit received by the class representative is not at the expense of the class. Under no circumstances will the fiduciary be permitted to profit from a breach of his duty as fiduciary.

See also, *Tilley v. Pacesetter Corporation*, 355 S.C. 381, ___, 585 S.E.2d 292, 302 (2003) (class definition "a strategy choice" that the parties and class counsel "have to live with.").

Premium Investment holds that upon *pleading* a class action, class counsel assumes fiduciary duties to absent members of the class. Upon class *certification*, class counsel assumes an attorney-client relationship with class members, present and absent. *See generally* Manual for Complex Litigation, Fourth § 21.33 ("Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel."); Restatement (Third) of Law Governing Lawyers § 99 cmt. l (2000) ("[A]ccording to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class ..."); *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982) ("Without question the unnamed class members, once the class has been certified, are 'represented by' the class counsel.")

Summary Judgment should not have been granted as to the professional negligence claim. We have no quarrel with the general conclusion in Judge Nicholson's August 2017 order that an attorney-client relationship is formed between class counsel and absent class members when a class is certified, August 2017 order at 11 – 12, or that the attorney-client relationship in this class began for absent class members when the class was given preliminary certification on January 19, 2007. August 2017 order at 12.

Judge Nicholson found there could be no attorney-client breach as to the change in the notice program because the changes to the notice program occurred before the January 19, 2007

certification. August 2017 order at 12. That holding necessarily determines that what matters is not when the notice program is *adopted*, pre- or post- certification, only whether it is *proposed* pre- or post-certification.

If indeed Class Counsel's attorney-client obligation to the absent members of the class, hence to appellants, began in January, then everything that got approved after that duty began was significant for Class Counsel's duties to the class. *Each* member of the class, known and unknown. That duty is why Prof. Virzi's affidavit finds a problem not just with reducing the notice program but in other actions with class counsel contributing $100,000 from the class settlement pool to resolve claims of opt-out members, Virzi affidavit at ¶¶ 7(H) and 7(I), failing to secure by written order the benefits claimed to have been obtained for absent class members such as appellants and negotiating a fixed fee for themselves while simultaneously negotiating a variable recovery for the class members. Virzi affidavit, January 2007 settlement agreement at p. 13.

The reduced notice program was proposed before January 19 but was not adopted until after January 19, 2007. By that time Class Counsel was six months into an attorney-client relationship with the appellants and other absent members of the class. That notice necessarily cannot be "the best practicable" notice for absent class members, as demanded by SCRCP 23, *Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.,* 356 S.C. 644, 653–54, 591 S.E.2d 611, 616 (2004), when the notice program omits a nationwide option for which funds were available. See also, *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 533 (1992) ("The specific grants of power in Rule 23(d), SCRCP are directed towards notifying the absent parties of the pending litigation.")

When the notice program was established in the July 30, 2007 order, an attorney-client relationship with appellants existed. On August 7, 2017, the lack of nationwide notice was explicitly raised by objectors to the class action. Class counsel, then in an attorney-client relationship with these absent class member appellants, took no action to change the knowingly inadequate notice program. When the reduced notice program was implemented later in 2007, Class Counsel's act of professional negligence as to these appellants occurred.

Because the modification to the notice program occurred between October 2006 and January, 2007, before class certification, Judge Nicholson determined there could be no professional negligence. But the holding omits that the inadequacy issue was raised after certification and class counsel took no action, which we contend is an error of law. Class counsel themselves proposed disadvantaging their own absent class clients by reducing the notice program. A lawyer may not act against the interest of his clients. E.g., *Hege v. Aegon USA*, 780 F. Supp. 2d 416, 432 (D.S.C. 2011) ("An attorney for the class must be loyal to each member of it, and not act based on interests antagonistic towards it.") *Hege* found "ample evidence that Class Counsel placed their own interests above those of the class they purported to represent." 780 F.Supp. 2d at 435. Judge Nicholson erred as a matter of law in dismissing the professional negligence claim.

Summary judgment should not have been granted as to the breach of fiduciary duty claim. In multiple places, Judge Nicholson's August 2017 order for some reason inverts the import of *Premium Investment* and states the appellants' claims exactly backwards. E.g., at p. 11 and 14, the order claims that the appellants contend an attorney-client relationship was formed "at the time the lawyers filed the class action complaints." August 2017 order at 11. The

proper sequence, and the appellants' contentions stated accurately, is that a fiduciary duty was assumed upon Class Counsel pleading the class action, and the attorney-client relationship began by operation of law when the class was certified, in January 2007. That has always been the appellants' claim.

Judge Nicholson disregarded the fiduciary obligations from *Premium Investment* as it being "a constructive class certification case that predated Rule 23, SCRCP." Order at 14. The order distinguishes this class action as "an actual certification case." At Order at 15, Judge Nicholson limits *Premium Investment* to meaning that duties to absent class members arise "with the constructive certification of the class." At p. 16 his order states overtly, and incorrectly, that *Premium Investment* does not "stand for the proposition that the filing of a class action complaint gives rise to fiduciary duties to unnamed and unidentified class members." The holding is an error of law.

Assumed fiduciary duty to absent class members upon pleading a class is precisely what *Premium Investment* actually held, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984) — that when counsel pleads a class action, counsel assumes a fiduciary duty to absent members of the class he pled:

> a plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class, including the obligation to inform them of proposed compromises of the group action.

Nothing about SCRCP 23 has changed this concept.[7] Indeed, the commentary to SCRCP 23(d)

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[7] As argued at the hearing by the Lawyer defendants, Premium Investment was to be discounted solely because it was decided before the Rules of Civil Procedure became effective on July 1, 1985. Hearing transcript. . Mr. Bruner argued that *Premium Investment* is limited to its specific facts, and is a "minority rule," and Ms. Wall argued that the case is not applicable because the case was decided in 1984, preceding the 1985 adoption of the Rules of Civil

reinforces the identical point:

> This Rule requires those seeking to maintain an action on behalf of a class to notify members of the class of the pendency of the action.

That obligation is on "those seeking to maintain," not just on "certified" class actions. As reflected in the Ethics Watch article by Professor Freeman from September 2007, discussing both *Premium Investment* and *Green*:

> In essence, the Supreme Court in Green held that a fiduciary obligation is owed by class counsel to putative class members so long as the case is postured as a class action regardless of whether a formal certification order has been issued.

Professor Freeman advised "so long as the caption claims the case is a class action, unless and until the class certification motion is denied or the class is decertified, class counsel must assume that a duty of loyalty and fair dealing is owed to absent class members." Id.

This fiduciary duty to absent members of a class is even more compelling where, as here, a class settlement was reached before certification. By the settlement, class counsel assumed the duty of purporting to structure relief for persons within the class. Class counsel chose how to define that class for which he sought relief.

Nor is the fiduciary duty assumed complicated as the August 2017 order (at p. 16) suggest that it is. The duty merely requires Class Counsel to provide notice and mechanisms of relief commensurate with the class defined, so that anyone in the class definition who is interested in participating in the relief can do so. Exactly what counsel in *Premium Investment* failed to do.

A breach of fiduciary duty has three elements. (A) the existence of a fiduciary duty, (B) a breach of that duty owed to the plaintiffs by the defendants, and (C) damages proximately

resulting from the wrongful conduct. *RFT Mgmt. Co. v. Tinsley & Adams LLP*, 399 S.C. 335-336, 732 S.E.2d 166, 173 (2012). The fiduciary duty was assumed when Class Counsel pled a class action and identified appellants as within the class they chose to define. That duty was breached when Class Counsel intentionally reduced the notice program below the "best practicable" standard required. And as a result, each appellant had to confront the defenses that the Diocese had waived in the class action, specifically the defenses of charitable immunity and the statute of limitations, each of which was waived in the class action, and which would have been waived for the appellants had Class Counsel obtained that relief in a written order as he claimed to have obtained it in the July, 2007 hearing, or had Class Counsel given notice calculated to inform the appellants, instead of adjusting the notice to make it impossible for the appellants to receive notice.

Judge Nicholson erred as a matter of law in granting summary judgment for the breach of fiduciary duty claim by the appellants, who were among the absent members that Class Counsel chose to undertake to represent.

2. The trial court erred in holding that the plaintiffs other than Doe 193 fell outside the class definition (Order p. 19) and that Doe 193 was "not an intended beneficiary" (Order at p. 20) of any duty owed by the Lawyer defendants.

In *Doe v. Bishop*, 407 S.C. 128,754 S.E.2d 494, 501 (S.C. 2014), the S.C Supreme Court reversed dismissal of the appellants' claims because no "limited collateral review" had been done of their claim that the class action failed to give them Due Process by lack of notice. The Supreme Court necessarily found them within the class definition in holding:

> Should appellants establish on remand that they were denied due process owing to lack of notice or because of inadequate representation in the class

> action proceedings, and that the statute of limitations was tolled, they may proceed to further prosecution of their claims.

Doe v. Bishop, 407 S.C. 128,754 S.E.2d 494, 501 (S.C. 2014). Due process analysis through limited collateral review applies only to an absent class member. It would not apply to a person who was outside the class definition.

When Judge Nicholson performed his own limited collateral review, in May 2017, he concluded that the appellants had been deprived of Due Process by the notice program. May 2017 order. That order was not appealed and is consistent with the implicit holding in *Doe v. Bishop* that as absent class member appellants were entitled to limited collateral review because they were within the class definition.

But now Judge Nicholson has contradicted both the Supreme Court and his own prior ruling in his August 2017 order that the appellants were not within the class definition. This is an error of law. It is "absent class members" that are entitled to due process. *Hospitality Management Associates, Inc. v. Shell Oil Co.*, 356 S.C. 644, 660, 591 S.E.2d 611, 619 (2004). Strangers to the litigation are not entitled to limited collateral review.

3. The trial court erred in concluding that any resolution with the Diocese for a sexual abuse tort claim precludes a legal malpractice claim against the Lawyer Defendants

In the August 2017 order at pp. 8 – 10, Judge Nicholson found that no damage was caused by the Lawyer defendants (pp. 8 - 9), and that the only "loss" was the sexual abuse (p. 10), so no claims could be maintained by those appellants who resided out of state, so could not

participate in the class action for lack of notice.

The appellants were disadvantaged by the lawyers in making any claim against the Diocese because the lack of notice means they are required to state their claims outside of the framework of the class action, where significant defenses such as charitable immunity and the statute of limitations were waived. For these appellants, having to operate outside the class action, their claims against the Diocese must confront those defenses, whereas with notice commensurate with the class definition the appellants each would have had the opportunity to pursue the claims in the class.

The injuries, one tort the other an act of professional negligence, are not the same injury. They are not "indivisible," as put in *Smith v. Tiffany*, 419 S.C. 548, 553, 799 S.E.2d 479, 481 (S.C. 2017). One is a tort arising from personal physical injury, the other is an economic injury derived from a breach of a professional obligation voluntarily assumed.

Judge Nicholson erred as a matter of law in determining that S.C Code § 15-38-50 did not apply and that the partial resolution with the Diocese defendants constituted a single indivisible injury which relieved the Lawyer defendants from liability.

4. **The trial court erred in granting summary judgment on the aiding and abetting breach of fiduciary duty claim against the Diocese.**

Aiding and abetting a breach of fiduciary duty has three elements. *Gordon v. Busbee*, 397 S.C. 119, 133, 723 S.E.2d 822, 830 (S.C. App. 2012):

> "The elements for a cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach."

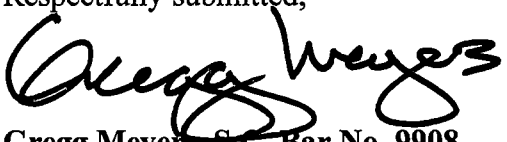
Future Group, II v. Nationsbank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996).

As set out above, the Diocese was a full participant in observing Class Counsel judge-shopping and then changing (by agreement) the notice program for the absent members of the class. The entire context of the class action was a settlement; the Diocese defendants had to agree or object at each point. The parties had ceased to be adverse after the mediation agreement, and the Diocese consented to modifying the notice program without objection, and without pursuing the objection to the notice program even when it was made by objectors, and even though it was in the interest of the Diocese defendants to have the broadest possible notice. The defendants collaborated to make the notice program less effective. By definition, the notice provided to the class was *not* "the best practicable." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965 (1985), because a readily available method of nationwide notice was proposed, with funding provided, but was then deliberately eliminated by cooperation of all defendants.

Conclusion

For the reasons set forth above, the order of Judge Nicholson should be reversed and the case remanded for further proceedings.

Respectfully submitted,



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The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-001996

John Doe 2 and Jane Doe 4, John Doe 10, Jane Doe 11, John Doe 193, Father Doe 194, John Doe 194, John Doe 245 and Father Doe 245, and John Doe 297,

Appellants

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,

Respondents

Proof of Service

I hereby affirm that I have served upon counsel for the defendant/respondent a copy of

Appellant's Initial Brief and Designation

By placing a copy of the documents in the United States mail, first-class postage pre-paid, addressed to:

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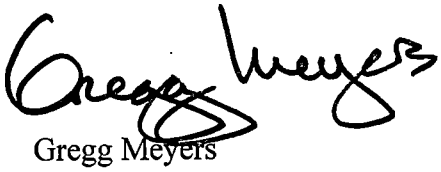
Done March 30, 2018



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March 30, 2018

Hon. Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Appellate case no. 2017-001996,
Doe 2 et al v. Bishop of Charleston et al.

Dear Ms. Kitchings:

Pursuant to SCACR 208 and 209, enclosed please find a copy of:

A proof of service,
An initial brief of appellant, and
Appellant's designation of matter to be included in the record.

Please file these documents with the court. Thank you very much.

Sincerely,

Gregg Meyers

Enclosures:
Proof of Service
Initial Brief
Designation

C: counsel of record

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SC Court of Appeals

The South Carolina Court of Appeals
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1220 Senate Street
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