THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case Nos.: 2010-CP-10-05520, 2010-CP-10-07233, 2012-CP-10-05559, 2013-CP-10-03733, 2013-CP-10-04175, 2013-CP-10-04176, 2015-CP-10-05486, 2016-CP-10-01632

Consolidated as 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 JOINT BRIEF OF RESPONDENTS LAWRENCE E. RICHTER, JR., DAVID J. HALLER, AND RICHTER AND HALLER, LLC

Susan Taylor Wall
Henry W. Frampton IV
GORDON & REES, LLP
40 Calhoun St., Suite 350
Charleston, SC 29401
(843) 714-2503

Attorneys for David. J. Haller

Benjamin C. Bruner
Chelsea J. Clark
BRUNER, POWELL, WALL & MULLINS, LLC
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693

Attorneys for Lawrence E. Richter, Jr. and Richter and Haller, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

TREATISES

STATEMENT OF THE ISSUES ON APPEAL

I. **WHETHER RICHTER & HALLER HAD A DUTY TO PROVIDE NOTICE OF A PROPOSED CLASS ACTION SETTLEMENT TO OUT-OF-STATE INDIVIDUALS WHOSE IDENTITIES WERE UNKNOWN AND UNKNOWABLE, AND WHO WERE NOT BOUND BY THE SETTLEMENT.**

II. **WHETHER UNKNOWN OUT-OF-STATE INDIVIDUALS WHO DID NOT RECEIVE NOTICE OF THE CLASS ACTION SETTLEMENT WERE DAMAGED, WHERE THE SETTLEMENT DID NOT BIND OR PREJUDICE THEM, AND THEY WERE FREE TO BRING THEIR OWN CLAIMS AGAINST THE DIOCESE FOR THE ABUSE THEY SUFFERED.**

III. **WHETHER THE APPELLANT ALLEGING REPRESSED MEMORY WAS PREJUDICED BY THE CLASS ACTION SETTLEMENT THAT OCCURRED DURING THE PERIOD OF REPRESSED MEMORY.**

STATEMENT OF THE CASE

This consolidated appeal relates to a 2007 class action settlement between the victims of clerical sexual abuse and the Catholic Church in South Carolina.[1] The Appellants alleged injuries from sexual abuse, of themselves or of a family member, at the hands of Catholic priests or employees under the auspices of the Diocese of Charleston. (*See* Compls., C/A Nos. 2010-CP-10-05520, 2010-CP-10-07233, 2012-CP-10-05559, 2013-CP-10-03733 (originally filed as 2013-CP-23-01843), 2013-CP-10-04175, 2013-CP-10-04176, 2015-CP-10-05486, and 2016-CP-10-01632.

In the alternative to their sexual abuse claims against the Diocese, the Appellants asserted claims against attorneys Lawrence E. Richter, Jr., David K. Haller, and their former law firm (collectively, "Richter & Haller"), who in 2007 secured a $12 Million class action settlement against the Diocese.

---

[1] Because Appellants' Statement of the Case contains contested matters and few of the details required by Rule 208(b)(1)(c), SCACR, Respondents Richter & Haller provide the following Statement of the Case.

A. The Sexual Abuse Claims.

John Doe 2 and Jane Doe 4

John Doe 2 and Jane Doe 4 alleged they were sexually molested as children by James McCarthy, a priest assigned to Saint William's Catholic Church in Ward, South Carolina, between 1965 and 1971. At the time of the abuse, McCarthy was a Diocesan priest. Both Plaintiffs are non-residents of South Carolina. They filed their lawsuit on July 9, 2010. (Compl., C/A No. 2010-CP-10-05520.)

John Doe 10

John Doe 10 alleged he was sexually molested as a child by Frederick Hopwood while Hopwood was a priest at Saint Mary's Catholic Church in Greenville, South Carolina. John Doe 10 is an adult and non-resident of South Carolina. He filed his lawsuit on September 3, 2010. (Compl., C/A No. 2010-CP-10-07233.)

Jane Doe 11

Jane Doe 11 alleged damages arising from her husband having been sexually molested as a child at the hands of James McCarthy between 1965 and 1971 in Ward, South Carolina. She is an adult and non-resident of South Carolina. She filed her lawsuit ("Jane Doe 11 Case") on August 23, 2012. (Compl.,C/A No. 2012-CP-10-05559.)

John Doe 194 and Father Doe 194

John Doe 194 alleged he was sexually abused as a child by Frederick Hopwood in Charleston, South Carolina while his father was stationed there for military service. (Compl., C/A No. 2013-CP-10-04176.) In conjunction with that lawsuit, Father Doe 194 filed a separate lawsuit the same day alleging his own damages as a parent of John Doe 194. (Compl. C/A No. 2013-CP-10-04175.) Both John Doe 194 and Father Doe 194 are adults residing outside of South Carolina.

John Doe 245 and Father Doe 245

John Doe 245 alleged he was sexually abused as a child by Justin Goodwin while he was a priest at Divine Redeemer in Hanahan, South Carolina. In addition to damages alleged by John Doe 245, Father Doe 245 alleged separate damages as the parent of John Doe 245. Both John Doe 245 and Father Doe 245 are adults living outside of South Carolina. They filed suit on October 12, 2015. (Compl. C/A No. 2015-CP-10-05486.)

John Doe 297

John Doe 297 alleged he was abused as a child by two Catholic priests in Greenville, South Carolina in the 1970's, one named Martin Bangert and the other identified only by the moniker "Jimmy." John Doe 297 alleges he moved away from South Carolina and lived in North Carolina from 1998 to 2014, at which time he moved back to South Carolina. John Doe 297 filed his lawsuit on March 31, 2016. (Compl., C/A No. 2016-CP-10-01632.)

John Doe 193

John Doe 193 is the only repressed memory plaintiff. He alleged he was sexually abused as a child by Michael Kaney, a Diocesan priest in Greenville, South Carolina, prior to Kaney's placement on indefinite leave in 1986. John Doe 193 is an adult and a South Carolina resident. He alleged he repressed any recollection of the abuse until June 2010 when he first began to recall the abuse and communicated it to a mental health professional. John Doe 193 filed suit in Greenville County, South Carolina on April 2, 2013, and the matter was transferred to Charleston County. (Compl., 2013-CP-10-03733 (originally filed under C/A No. 2013-CP-23-01843); Consent Order Changing Venue, June 20, 2013.) On January 16, 2014, Judge Kristi Lea Harrington dismissed John Doe 193's legal malpractice claim. (Order, C/A No. 2013-CP-10-03733, January 22, 2014.) John Doe 193's motion to reconsider was denied, and he never appealed the trial court's decisions. (Order Denying Motions to Alter, Amend, March 27, 2014.) The only claims John Doe 193 has

at issue in this appeal are his breach of fiduciary duty claim against Richter & Haller and his aiding and abetting a breach of fiduciary duty claim against the Diocese Defendants.

B. Procedural History

In response to the complaint filed by John Doe 2 and Jane Doe 4, all defendants filed motions to dismiss. (Order, June 27, 2011 p. 1.) Judge Roger Young granted those motions as to the claims for negligence, fraudulent concealment and unfair trade practices against the Diocese Defendants on statute of limitations grounds. The court declined to dismiss the civil conspiracy claims against all defendants or the professional negligence and breach of fiduciary duty claims against Richter & Haller. *Id.* at 10–11. In addition, Judge Young held, "I have conducted a limited collateral review of the procedures used by the circuit court in the Dorchester County Class action and find the procedures were not designed to ensure notice to any potential class members living outside of the state of South Carolina who were not otherwise given actual notice of the class action and settlement." (Order, June 27, 2011 p. 4.) Judge Young then found the class settlement had no effect on the claims of John Doe 2 and Jane Doe 4. (Order, June 27, 2011 p. 5.) That order was appealed and the appeal was dismissed by this Court as interlocutory. (Order on Appeal.) Appellants have not sought review of that order in this appeal.

On remand, the parties proceeded with discovery. On August 7, 2014, the first six cases on appeal were designated as complex and assigned to Judge J. C. Nicholson, Jr. (Form 4 Order filed August 7, 2014.) The remaining two cases, filed in 2015 and 2016, were later so designated and consolidated with the first six cases.

Based upon the Appellants having asserted their claims in the alternative, and based upon on the Supreme Court's holding in *Hospitality Management Associates v. Shell Oil Co.*, 356 S.C. 644,591 S.E.2d 611 (2004), Richter & Haller requested that Judge Nicholson conduct a limited collateral review of the class action settlement. On October 26, 2016, after numerous hearings and

conferences with counsel, and despite the unwavering and stout opposition from the Diocese Defendants, Judge Nicholson entered an Order on Limited Collateral Review holding the Appellants' abuse claims against the Diocese Defendants were not barred as a result of the class settlement. (Order on Limited Collateral Review, October 26, 2016.) In that order, Judge Nicholson recognized,

> In the Complaints, Plaintiffs specifically allege that their causes of action against the Lawyer Defendants are only pertinent if they, as alleged absent class members in a prior class action, are precluded from pursuing claims against the Diocese Defendants. (*See, e.g.* -5520 Compl. ¶¶ 177, 196.) Thus, the Complaints, by their own terms, present a threshold question: Are Plaintiffs precluded from pursuing claims against the Diocese Defendants?

Id. at 4. Like Judge Young, Judge Nicholson held that the notice plan approved by the class action court was designed to give actual notice to known, identified victims and to give notice by publication to victims within the publication zone. The plan was not designed to reach the Appellants, who lived out-of-state and whose identities were unknown at the time of the settlement. Consequently, the settlement did not bind the Appellants. *Id.* at 4-5.

On the same day he entered the Order on Limited Collateral Review, Judge Nicholson ordered the cases bifurcated to allow the Appellants to present their sexual abuse claims against the Diocese Defendants first. (Order filed October 26, 2016 at 6.) After the sexual abuse claims were disposed of, the trial court would then determine whether the Appellants had viable claims against all defendants for conspiracy and whether the Appellants had viable claims against Richter & Haller for legal malpractice or breach of fiduciary duty. On May 4, 2017, the bifurcation and limited collateral review orders were amended to apply to the most recent cases filed on behalf of John Doe and Father Doe 245 and John Doe 297. (Orders filed May 4, 2017.)

1. Settlement of Five Cases Against the Diocese.

As trial dates approached for the various cases, John Doe 10, John Doe 194, Father Doe

194, John Doe 245, and Father Doe 245 all settled their claims with the Diocese Defendants. (Stipulation of Dismissal, C/A No. 2010-CP-10-07233, filed May 22, 2017; Stipulation of Dismissal, C/A No. 2013-CP-10-04175, filed July 6, 2017; Stipulation of Dismissal, C/A No. 2013-CP-10-04176, filed July 6, 2017; Stipulation of Dismissal, C/A/ No. 2015-CP-10-05486, filed May 22, 2017.) As to the claims brought against the Diocese by the remaining three Appellants, the Diocese Defendants moved for summary judgment.

2. Voluntary Abandonment of Remaining Sexual Abuse Claims.

On June 28, 2017, Judge Nicholson held a hearing on the Diocese Defendants' motions for summary judgment regarding the remaining five claimants. At that hearing and on the record, Appellants' Counsel voluntarily surrendered the remaining sexual abuse claims, which were asserted on behalf of Jane Doe 11, John Doe 193, and John Doe 297. (Transcript, June 28, 2017, p. 9, line 19 to page 10, line 13.)[2]

3. Voluntary Abandonment of Civil Conspiracy Claims.

On July 20, 2017, Judge Nicholson heard all Respondents' motions for summary judgment on all remaining claims. At the outset of that hearing, Appellants' Counsel voluntarily abandoned the civil conspiracy claims against all defendants. (Transcript, July 20, 2017; Order on Lawyer Defendants' Motions for Summary Judgment, August 11, 2017 p. 3 n. 1; Order Granting Diocese Defendants' Motion for Summary Judgment, C/A No. 2010-CP-10-05520, August 10, 2017; Order Granting Diocese Defendants' Motion for Summary Judgment, C/A No. 2012-CP-10-05559, August 10, 2017; Order Granting Diocese Defendants' Motion for Summary

[2] The sexual abuse claims alleged by John Doe 2 and Jane Doe 4 were dismissed by Judge Young in 2011 on the ground that the statute of limitations ran on their claims. (Order, June 27, 2011.) Those Appellants have not appealed Judge Young's Order in this case.

Judgment, C/A/ No. 2013-CP-10-03733, August 10, 2017; Order Granting Diocese Defendants' Motion for Summary Judgment, C/A No. 2016-CP-10-01632, August 10, 2017.)

4. Summary Judgment and Appeal.

After Appellants' Counsel voluntarily abandoned claims at the two summary judgment hearings, the only remaining claims Appellants had were against Richter & Haller for legal malpractice and breach of fiduciary duty and, for certain Appellants, against the Diocese Defendants for aiding and abetting a breach of fiduciary duty.

On July 10, 2017, Richter & Haller filed a joint Motion for Summary Judgment in all cases. (*See* Omnibus Motion filed July 10, 2017.) On August 10, 2017, the trial court granted summary judgment for the Diocese Defendants on the remaining claims against them. (Order Granting Diocese Defendants' Motion for Summary Judgment, C/A No. 2010-CP-10-05520, August 10, 2017; Order Granting Diocese Defendants' Motion for Summary Judgment, C/A No. 2012-CP-10-05559, August 10, 2017; Order Granting Diocese Defendants' Motion for Summary Judgment, C/A No. 2013-CP-10-03733, August 10, 2017; Order Granting Diocese Defendants' Motion for Summary Judgment, C/A No. 2016-CP-10-01632, August 10, 2017.) The following day, the trial court granted summary judgment to Richter & Haller on all remaining claims in all cases, holding Richter & Haller owed no duty to the Appellants, finding that the Appellants presented no evidence of any breach of duty, and finding that the Appellants could not prove proximate cause because the class settlement had no effect on their claims. (Order Lawyer Defendants' Motions for Summary Judgment.)

The Appellants timely filed a Motion to Reconsider on August 22, 2017, which was denied by Form 4 Order on August 30, 0217. (*See* Form 4 Order filed August 30, 2017.)

This appeal followed.

STATEMENT OF FACTS

Because it is impossible to understand the claims against Richter & Haller without first understanding the details of the underlying class action settlement, Respondents include a Statement of Facts addressing the settlement. Also discussed below are several unusual aspects of the procedural posture of the cases on appeal in light of the Appellants' decision to abandon what had been the core of their cases for nearly a decade: the claims of substantive sexual abuse at the hands of Diocesan priests.

A. The Underlying Class Action Cases.

In 2005, Richter & Haller filed three lawsuits against the Diocese for sexual abuse claims. The first two lawsuits were filed on behalf of individual plaintiffs, John Doe 66 and John Doe 66A, who had been sexually abused by Catholic priests. (Compl., C/A No. 2005-CP-10-02053; Compl., C/A No. 2005-CP-10-03293.) The third lawsuit asserted claims on behalf of John Doe 53, individually and as a representative of other victims in South Carolina. (Compl., C/A No. 2005-CP-10-04913, para 34.) John Doe 53 was an orphan who had been sexually abused by Catholic priests while in the care of the Church.

On June 13 and 14, 2006, six months after the John Doe 53 case was commenced, the parties and attorneys mediated the claims. At mediation, the parties reached a settlement in principle in the amount of $12 million to create two classes of claimants, one for victims and one for spousal or parental claims. (Settlement Agreement, June 14, 2006.) The mediation agreement left open many important issues, including the process for making and determining the value of individual abuse claims.[3]

[3] The only claims conclusively settled at mediation were the individual claims of the named plaintiffs. The parties understood and agreed that settling the class claims would require court approval. Moreover, there was nothing inappropriate about the Diocese committing to sum certain

The parties agreed that working through the complexities of the settlement—which was the first of its kind in South Carolina—would require more judicial attention than was likely to be available in Charleston County given its crowded docket. Thus, the parties agreed to re-file the cases in Dorchester County. This strategy prejudiced no one; rather, it gave the parties the judicial oversight needed to bring the matter to a conclusion for the benefit of sexual abuse victims.

On August 16, 2006, Richter & Haller and three other attorneys representing the plaintiff classes re-filed the class claims in Dorchester County. (Compl., C/A No. 2006-CP-18-01310; Compl., C/A No. 2006-CP-18-01311.) They filed one case on behalf of family members of sex abuse victims and a second case on behalf of the victims themselves. Pursuant to the Supreme Court's Administrative Order of July 26, 2006 (2006-07-26-01), the Chief Administrative Judge of the First Judicial Circuit, the Honorable Diane S. Goodstein, designated the Dorchester County cases as complex and assigned them to herself to administer and oversee. (Order signed October 9, 2006 and filed October 17, 2006.)

There was nothing remotely improper about the complex designation or assignment. Contrary to the bald, uncited statements in the Appellants' brief, nothing in the Supreme Court's Order prohibited a complex designation merely because the parties had reached an agreement in principle to settle. Rather, the Supreme Court's Order gave the Chief Administrative Judge of each circuit wide discretion to determine whether a case was complex and warranted assignment to a single judge. The only requirement was that the Chief Administrative Judge determine that the case "justified special handling." (Order 2006-07-26-01 at p. 1.) It is not surprising that Judge Goodstein determined that working through, finalizing, and implementing the first-of-its-kind

---

settlements for the named plaintiffs to ensure they would not have to return to ordinary litigation if the proposed class settlement was not consummated. The named plaintiffs remained committed to pursuing the class settlement on behalf of the class. The adequacy of their representation was presented to the class action court, approved by the class action court, and never appealed.

class action settlement of sexual abuse claims against the Diocese of Charleston justified special handling and assignment to a single judge who could develop familiarity with the matter and assist in bringing it to final resolution. She reached that conclusion after multiple conferences with counsel on August 21, September 11, September 20, September 25, September 26, and October 6, 2006. (Apps.' Memo. Opp. to Mot. for Summary Judgment as to John Doe 193 at 10; Letter from Richter to Shahid, October 5, 2006.)

Under Judge Goodstein's oversight, the parties finalized the details of the settlement. The settlement Richter & Haller secured enabled victims of sexual abuse and their spouses and parents to participate in a non-adversarial and confidential process by which they would present their claims to a neutral arbitrator, who would then award a recovery within an agreed matrix based upon the type, duration, and severity of abuse. (Settlement and Arbitration Agreement, Ex. A to Order, January 19, 2007.) Victims of sexual abuse could receive up to $200,000, and spouses and parents of victims could receive $20,000.[4] The process was truly non-adversarial, as the Diocese was not allowed to question or cross-examine the victims, nor could the Diocese have a representative present at the arbitration hearing without the claimant's consent. The Diocese also agreed not to raise legal defenses such as lack of notice of an employee's proclivities, lack of negligence, comparative fault, statute of limitations, or charitable immunity.[5] The Diocese was

[4] The settlement amounts took into account the risks posed by the Diocese's legal defenses, including lack of notice, charitable immunity, statute of limitations, and other grounds. Claims of parents and spouses in particular were difficult because spouses married the victims long after the abuse occurred and a parent's right to recover for loss of consortium or loss of services in South Carolina was unclear.

[5] In their Statement of the Case, the Appellants mischaracterize this feature of the settlement as a "waiver" of charitable immunity. The Diocese did not admit liability or otherwise waive any defenses. Rather, to compromise a disputed set of claims, the Diocese agreed to pay a particular amount to the plaintiff class in settlement. This occurs in every settlement. The only difference here is that the arbitration process allowed the Diocese to prevent fraud by identifying claimants

only permitted to submit written evidence challenging whether a claim was *bona fide* when, for example, a claim appeared to be based upon inaccurate facts or alleged abuse by a priest who was never at the alleged location.

On October 6, 2006, Richter & Haller filed a separate, third class action complaint on behalf of John Doe #53, the class representative from the class action complaint filed in Charleston County. (Compl., C/A No. 2006-CP-18-01636.) All three class action complaints alleged claims on behalf of individuals ***in South Carolina*** who were either abused as minors by agents or employees of the Diocese of Charleston or who had spouses or children who had been abused as minors. (Compl., C/A No. 2006-CP-18-01310 ¶¶ 25, 27; Compl., C/A No. 2006-CP-18-01311 ¶ 27 ("Plaintiff brings this action on behalf of himself and as a representative of a class of other persons similarly situated as victims of priest sex abuse *in South Carolina* pursuant to Rule 23 of the South Carolina Rules of Civil Procedure."), ¶ 29 (alleging other victims in South Carolina), ¶ 34 (alleging the class as "individuals . . . *in South Carolina* who were sexually abused . . . "); Compl., C/A No. 2006-CP-18-01636, ¶¶ 34, 36 and 41 (same).)

On October 6, 2006, Richter & Haller also filed a motion to certify class and for preliminary approval of the class settlement. (Motion, October 6, 2006.) On October 23, 2006, ***after*** having filed the class action complaints and the motion for class certification and preliminary approval of the class settlement in Dorchester County, counsel of record consented to the dismissal of the Charleston County cases without prejudice. (Consent Order of Dismissal Without Prejudice, October 23, 2006.) These dismissals were proper and did not violate Rule 23(c), which prohibits the settlement of a "class action" without approval of the court. At the time of the voluntary

---

who did not appear to be proper members of the plaintiff class (because they were not actually abused).

dismissal, no class had been certified, so the cases were not "class actions" within the meaning of the rule.[6] Moreover, nothing was settled without court approval, as all parties sought and received the approval of the circuit court in Dorchester County.

On January 12, 2007, the Diocese signed the final settlement agreement setting forth the details of the class settlement. (Settlement and Arbitration Agreement, January 12, 2007, Exhibit A to Order Certifying Class and Granting Preliminary Approval of Class Settlement, January 19, 2007.) On January 17, 2007, Richter & Haller filed an amended motion for certification and preliminary approval, which removed the proposal to publish notice in *USA Today*, recognizing the unlikelihood that such notice would actually reach any out-of-state victims. (Amended Motion.)

On January 19, 2007, the class action court concluded the requirements of Rule 23, SCRCP, were satisfied (including the adequacy of class representation by Richter & Haller and the class representatives), granted the motion, and certified the two classes. (Order Certifying Class and Giving Preliminary Approval to Settlement, January 19, 2007.) The court also granted preliminary approval of the settlement, directed a notice plan, and established a deadline for objections. Richter & Haller had secured a $12 Million class settlement from Diocese of Charleston for the benefit of victims of priest sex abuse in South Carolina and their parents and spouses. *Id.*

---

[6] Rule 23(c), SCRCP, perfectly tracks of the language of former Fed. R. Civ. P. 23(e). Because of confusion over counsel's ability to dismiss or compromise cases ***before*** class certification, the Supreme Court of the United States recently revised Fed. R. Civ. P. 23(e) to clarify the matter: "The claims, issues, or defenses of a ***certified*** class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e) (emphasis added). This clarification is correct and should be read into the South Carolina rule. As the new federal rule expressly recognizes, until a class is certified by the court and class members become bound by the class representatives' actions, the case remains an individual matter that cannot prejudice third parties.

With respect to the notice plan, the class action court ordered Richter & Haller to arrange for publication of the settlement in eleven newspapers in general circulation in South Carolina at least once a week for six weeks. The Court also required publication by the Diocese in its publication *Catholic Miscellany*. In addition to court-ordered publication, the settlement was lauded and reported across the country and around the world. *See, e.g., South Carolina Diocese To Settle Claims*, N.Y. Times, Jan. 27, 2007, at A14; *S.C. Case Grows To More Than 80 Victims*, Grand Rapids (Mich.) Press, Sept. 1, 2007, at D8; *S.C. Abuse Claims Number Nearly 80*, Baton Rouge (La.) Advocate, Aug. 21, 2007, at A2; *Church Faces More Sex Abuse Claims*, Bucks County (Pa.) Courier Times, Aug. 20, 2007, at A2; *Diocese Investigated*, Kansas City (Mo.) Star, Mar. 10, 2007, at A9; *S.C. Diocese To Pay $12M To Settle Sex Abuse Claims*, Nat'l L.J., Feb. 5, 2007, at 16; *To The Point*, Investor's Bus. Daily, Jan. 29, 2007, at A02; *Diocese In £6m Child-Sex Payout*, Yorkshire (England) Post, Jan. 27, 2007; *Diocese To Settle Sex Abuse Claims*, St. Louis Post- Dispatch, Jan. 27, 2007, at A23; *$12 Million From Diocese To Settle Sex Abuse Claims*, South Fla. Sun Sentinel, Jan. 27, 2007, at 3A; *Catholic Diocese Prepared To Settle Sex Abuse Claims*, Press of Atlantic City (N.J.), Jan. 27. 2007, at A8; *In The Nation*, Philadelphia Inquirer, Jan. 27, 2007, at A06; *Catholic Diocese Announces Sex Abuse Settlement*, Orlando Sentinel, Jan. 27, 2007, at A10; *Abuse Suits Settled*, Akron (Ohio) Beacon Journal, Jan. 27, 2007, at A3; *Diocese To Settle Claims Of Childhood Sex Abuse*, Deseret Morning News (Salt Lake City, Utah), Jan. 27. 2007, at A03; *Charleston Diocese Settles Sex Abuse Claims Of Suit*, Fort Wayne (Ind.) Journal-Gazette, Jan. 27, 2007, at A5; *Church Pays Out On Pervs*, Mirror (London, England), Jan. 27, 2007, at 2; *Catholic Leaders Earmark $12m For Sex Abuse Suit*, Monterey County (Cal.) Herald, Jan. 27, 2007; *Charleston Diocese to settle sex abuse claims*, NBC News, Jan. 26, 2007, http://www.nbcnews.com/id/16828432/ns/us_news-life/t/charleston-diocese-settle-sex-abuse-claims/#.W5fOk-hKg2w; Diocese of Charleston reaches advance settlement of abuse cases,

Catholic News Agency, Jan. 26, 2007, https://www.catholicnewsagency.com/news/diocese_of_charleston_reaches_advance_settlement_on_abuse_cases; *Judge Orders Investigation Into Abuse; Victims May Get Thousands In Settlement With Diocese*, The Augusta Chronicle (Georgia), March 10, 2007 Saturday, METRO Section; Pg. B02.

Finally, the class action court required actual notice by certified mail, return receipt requested, to any victim whose identity was known. The list of class members entitled to actual notice was necessarily developed from Diocesan records, primarily from records of complaints and sex abuse accusations. The class action court took its obligation to direct notice seriously. At a March 9, 2007 hearing, the class action court expressed her "grave concern" that reports of priest sex abuse were hidden somewhere "or undisclosed or secret." (Transcript, March 9, 2007, pp. 174–175.) As a result, the court ordered First Circuit Solicitor David Pascoe to conduct an investigation, which the court required to be concluded before the settlement would be approved. *Id.* "Because if it is true that which has been argued that there are children who have been abused and been undisclosed, and their only remedy is to receive newspaper publication and then to come forward, that is insufficient in my mind because those would be names that would be known and they are entitled to more attention than that." (Transcript, March 9, 2007, p. 176.) The class action court also directed Mr. Pascoe "to conduct an investigation into a document entitled, 'INSTRUCTION' which plaintiffs claim was the basis for how sexual abuse allegations were to be handled by the Diocese."[7] (Order Approving Settlement, July 30, 2007, p. 2.)

[7] At the March 9, 2009 hearing, the class action court also heard multiple objections to the proposed settlement filed by Appellants' Counsel. Each objection was discussed at length and overruled in the Order approving the settlement. (Order Approving Settlement at 5–10.) After settling the objectors' claims, Appellants' Counsel nonetheless filed an appeal related to those claims complaining about the administration of the class action. The Supreme Court of South Carolina dismissed that appeal on June 13, 2011. *Doe v. Bishop of Charleston*, Op. No. 26984 (S.C. Sup. Ct., June 13, 2011).

The class action was unusual insofar as no one knew or could know the number of potential class members, their identities, or where or how to find them. The Diocese reported—and the Solicitor agreed—that the Diocesan records contained only 20 reported victims. *Id.* It was suspected that there existed many more victims, but there was no obvious or practical way to know how many Diocesan priests had sexually abused children through the years or how many children they had abused. The victims could be anyone, living anywhere in the world. Any attempt at a global (or even national) notice program would be guaranteed to miss people because there was no way to predict who the victims might be, what publications they might read, or what other media, if any, would reach all of them.

Recognizing the impossibility of providing meaningful notice to unknown victims who lived outside of South Carolina, it was never Richter & Haller's intent to bind or prejudice victims who did not receive actual notice and lived outside the area of notice by publication. It was always their intent that such victims could bring their own abuse cases and that the South Carolina class action should not impair or impede their claims in any way. Judge Goodstein plainly adopted this approach by directing notice in a limited geographic area (even though Judge Goodstein had before her proposals that both included and did not include *USA Today*) and thereby avoiding any credible argument that notice was intended to be global or national in scope. Notably, Judge Nicholson also recognized that the intent was not to bind individuals outside of the notice area. (Order filed October 26, 2016 at 4–5.)

On July 30, 2007, after Mr. Pascoe completed his investigation and reported to the court, and after an investigator hired by Richter & Haller had also performed an investigation, and after the settlement was noticed as required, and after holding a second fairness hearing, and after the various objections to the settlement had been resolved or decided, only then did the class action court approve the settlement as fair and reasonable. (Order Approving Settlement, July 30, 2007.)

Appellants' Counsel, Mr. Meyers, filed an objection to the final order approving settlement arguing, among other things,

> 7. Notice. Notice should be posted in more than just South Carolina. Some national vehicle for notice should exist, to accommodate the reality that persons may move from the State. This is another aspect in which the proposed order appears to be designed to minimize the impact on the Diocese rather than to maximize the recovery for the victims. Publication in either the USA Today or The New York Times would seem appropriate if the parties truly were interested in giving notice to potential class members.

(Objections to Proposed Order, August 1, 2007 at 5.) The class action court received that objection, as well as Mr. Meyers' subsequent Motion to Alter or Amend, and still maintained the notice plan. (Order, August 31, 2007.)

The settlement enabled 121 victims, spouses, and parents to recover a total of $7,615,000 for their injuries. (Letter to Judge Goodstein with final accounting, March 10, 2008.) The settlement, which was the result of four years of work by Richter & Haller, was praised at the time as a "good thing", even by Appellants' Counsel.

> Your Honor, I do want to start by acknowledging the positive development by both the diocese and class counsel in even bringing the resolution this far. I do have concerns about it, but I really want to commend both the diocese and class counsel for generating what has brought us here today. It's a good thing. It's a good thing for the organization, it's a good thing for the people they have served and the interest they attempted to serve in the first place.

(Transcript, March 9, 2007 page 32, lines 4 through 15.)

Subsequently, however, the fairness and administration of the settlement was repeatedly attacked to no avail. Those efforts included multiple appeals, retaliatory grievances against attorneys and a well-respected circuit court judge, sworn statements and petitions to the South Carolina Supreme Court, and numerous other filings. In each tribunal, the allegations of collusion, conspiracy, and other unlawful conduct have been dismissed. (*See, e.g.*, Petition for Original Jurisdiction and supporting affidavit, December 17, 2008 (alleging collusion that included all

counsel of record, the Diocese of Charleston, and Judge Goodstein)); *Doe v. Bishop of Charleston*, Op. No. 26984 (S.C. Sup. Ct., June 13, 2011); *Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494 (2013); Order in C/A No. 2009-CP-10-07752 filed September 8, 2010 (dismissing claims against Richter & Haller).)

B. Voluntary Abandonment of Sexual Abuse and Conspiracy Claims.

Since the filing of Case -05520 in 2010, these cases have been, first and foremost, about sexual abuse committed by Diocesan priests. Indeed, as noted above, Judge Nicholson recognized in his Order on Limited Collateral Review that the Appellants themselves admitted in their complaints "their causes of action against the Lawyer Defendants are only pertinent if they, as alleged absent class members in a prior class action, are precluded from pursuing claims against the Diocese Defendants." (Order on Limited Collateral Review at 4.)

Appellants' Counsel voluntarily abandoned his clients' substantive sexual abuse claims on the eve of trial after eight years of litigation. (Transcript, July 20, 2007, page 7, lines 12 to 23.) Appellants' Counsel's statement that he could not come up with a single argument against the application of charitable immunity is suspicious after his long history of prosecuting sexual abuse claims. Furthermore, the position does not square with the state of South Carolina law, as explained more fully below, or with Mr. Meyers' current and continued pursuit of other claims against the Diocese on behalf of in-state John and Jane Doe claims. (*See, e.g.*, Complaints and Stipulations of Dismissal in C/A No. 2015-CP-10-03287 & -03288.)

It is equally suspicious that, shortly after abandoning the sexual abuse claims, Appellants' Counsel abandoned his clients' conspiracy claims, even though the Appellants had pursued those claims for eight years. Indeed, Appellants' brief on appeal, at its core, is premised upon alleged collusion and judge-shopping as part of a claimed conspiracy that never existed. The end result of these odd machinations was to effectively abandon the Appellants' cases against the Diocese

Defendants and give the appearance that the Appellants were left without a legal remedy unless they recovered from Richter & Haller. Whatever strategy or gamesmanship may be in play here, it is important to recognize that the Diocese Defendants were not adjudged to be without liability in a fair and adversarial process; rather, the claims for sexual abuse were voluntarily abandoned by Appellants' Counsel.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007). Under Rule 56(c), summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

SUMMARY OF ARGUMENT

In 2007, on behalf of victims of sexual abuse and their parents and spouses, class counsel secured a substantial and highly favorable settlement with the Diocese of Charleston. The settlement obtained numerous benefits for class members, including:

- Creating a $12 million dollar settlement fund;
- Forcing the Diocese to conduct a search of its records for the identities of potential victims, overseen by the First Circuit Solicitor;
- Allowing class members to recover via a non-adversarial process by which they told their stories ***without*** having to confront their abuser or be subjected to cross-examination; and
- Avoiding, on behalf of class members, the legal uncertainty and extreme emotional distress associated with litigating sexual abuse claims.

The settlement was a great achievement in light of the significant factual and legal hurdles to asserting past sexual abuse claims in South Carolina and the superiority of handling these claims through a class settlement process with a matrix rather than individual litigation.

The class action vehicle, however, raised the significant conundrum of how to give notice to unidentified and unidentifiable victims. The Diocese's records of sexual abuse reports were shockingly thin. Moreover, the abuse happened as many as 50 years before the class action was filed, and most often cases of sexual abuse—particularly in that timeframe—were reported to no one. The settlement funds were limited, and there was no obvious or practical way to find and give notice to a totally unknown and unknowable number of unidentified people who may have been victimized by South Carolina Diocesan priests decades ago.

The class action court solved this problem in an eminently reasonable way. The court directed written notice by certified mail, return receipt requested, to all victims who could be identified, notice by publication in and around South Carolina, and notice by the Diocese in its newsletter. In addition, media outlets far and wide covered and reported on the settlement. Because notice was not specifically published outside of South Carolina, the settlement did not bind victims outside of South Carolina who did not receive notice, thus ensuring that the settlement would not inadvertently harm any out-of-state victims and that those victims would remain free to bring their own claims. Had notice been published outside of South Carolina, out-of-state victims would still have been missed, but there would have been significant risk that those victims were nonetheless bound by the *res judicata* effects of the class action and barred from pursuing their own claims.

The Appellants' claim that class counsel breached duties to them and harmed them grossly misapprehends the duties attendant to serving as class counsel. There is no duty under South Carolina law that class counsel ensure that every member of a putative class be given notice.

Indeed, no such duty could be fulfilled, particularly in a case like this one where class members were unidentifiable. Rather, under Rule 23, SCRCP, it is the duty of the class action court to direct notice in the way that it deems most practical and appropriate under the circumstances.[8] It is likewise the duty of class counsel to pursue the best interests of the class as a whole. Here, the class action court and class counsel fulfilled those duties. Class counsel advocated for, and the class action court directed, notice in a manner that was appropriate under the circumstances. The notice plan struck an entirely reasonable balance of preserving settlement funds for victims (*i.e.*, not spending inordinate amounts of money on an ill-fated attempt at global notice), notifying victims who could be found, and avoiding harm to the individual claims of out-of-state victims who could not be found or who, like John Doe 193, were incapable of asserting a claim at the time. Because there is no evidence that class counsel breached any duties to the Appellants, summary judgment was appropriate and should be affirmed.

Likewise, there is no evidence that class counsel proximately caused harm to any Appellant. As an initial matter, class counsel could not proximately harm the Appellants because the notice plan was determined and directed by the class action court, not class counsel. Moreover, it is logically impossible for class counsel to harm the Appellants when the class action cases had no legal effect whatsoever on the Appellants' claims. In their complaints, the Appellants themselves admitted that their claims against class counsel would only be viable if they were barred from suing the Diocese by the *res judicata* effects of the class action. They were not so barred, as the circuit court ruled, and therefore their claims against class counsel are, in their own words, "irrelevant." Several of the Appellants have recovered from the Diocese. The inability of the remaining Appellants to recover against the Diocese stems from their own delay in bringing

[8] The applicable provisions of Rule 23, SCRCP, exist today as they did in 2005. The only amendment to Rule 23 was in 2016 to add Paragraph (e) relating to disposition of residual funds.

their claims and from Appellants' Counsel's baffling refusal to even argue against the application of charitable immunity. Richter & Haller are simply not the cause of any harm to the Appellants.

Furthermore, beyond these shortcomings, the Appellants have not come forward with a shred of evidence that any alternative notice plan would have reached them and resulted in their participating in the class action settlement. This gaping hole in the Record is, by itself, fatal to the Appellants' claims and compels affirmance of the circuit court's summary judgment order.

Finally, as to the one Appellant (John Doe 193) who suffered from a repressed memory at the time of the class action, it is simply not possible, as a matter of law, for class counsel to have harmed him. By definition, John Doe 193 could not have asserted his claim at the time of the class action settlement, could not have received meaningful notice of a class action, and could not have been bound thereby, as he had no recollection of his abuse. In addition, any suggestion that class counsel should have created a hold-back for future repressed memory victims ignores the fundamental impossibility of giving those victims their due process right to object to or opt out of any settlement affecting their rights and disregards the conflict of interest such a holdback would create within the class. Repressed memory victims are fully protected by South Carolina law, which allows them to bring suit once their memory resurfaces, and there is nothing that class counsel did—or could have done—to harm them.

For all of these reasons, the circuit court's order granting summary judgment in favor of class counsel should be affirmed.

ARGUMENT

I. RICHTER & HALLER HAD NO DUTY TO NOTIFY UNKNOWN, UNIDENTIFIABLE, OUT-OF-STATE INDIVIDUALS OF A PROPOSED CLASS ACTION SETTLEMENT THAT DID NOT BIND THEM.

The Appellants' claims against Richter & Haller are based on two principal errors in understanding class actions.

First, the Appellants contend that Richter & Haller had some overarching duty to ensure that every unknown, unidentifiable, out-of-state abuse victim received notice of the class action, even though there was no way to accomplish such a feat and even though the class action would not bind them. That contention is incorrect. Under Rule 23, class counsel have a duty to act in the best interests of the class as a whole, not to insist upon notice in any particular manner. Here, class counsel, working in tandem with the class action court, fully discharged their duty to the class by recommending a notice plan that reasonably and pragmatically solved the myriad problems created by the Diocese's failure to keep meaningful records of the sexual abuse committed by its priests and the reality that no available notice plan could ever hope to find and notify all of the Diocese's out-of-state victims. The notice plan adopted by the class action court did not and was never intended to bind or prejudice the rights of victims living out-of-state who did not receive notice.

Second, the Appellants contend that the mere filing of a class action saddled Richter & Haller with some broad, amorphous set of duties to the class. That is also wrong. Class counsel have no duties to absent unknown class members like the Appellants until and unless a class is certified. Because the Appellants have not articulated a post-certification breach of duty, their claims fail as a matter of law.

A. The Notice Plan Directed by the Class Action Court Was Reasonable and Appropriate.

The Appellants' core contention appears to be that Richter & Haller are somehow responsible for the class action court failing to direct "appropriate" notice to the class in the underlying class action. That contention fails for myriad reasons. As an initial matter, under Rule 23, class counsel do not control or direct notice to the class. Rather, the Rule provides that when the settlement of a certified class action is *proposed*, "notice of the proposed dismissal or compromise shall be given to all members of the class **in such manner as the court directs**." Rule 23(c), SCRCP (emphasis added). Thus, Rule 23 places responsibility for directing the manner of notice with the class action court.

Here, the class action court actively and properly determined the manner of notice. Far from rubber-stamping a proposed notice plan, the class action court added a newspaper to the list of publications to be used for notice. In addition to ordering notice to be published for six weeks in eleven newspapers in general circulation in South Carolina, and in addition to publication in the *Catholic Miscellany*, the court ordered that notice be provided by certified mail, return receipt requested, to known or suspected victims, who became known as the "actual notice class". A document entitled "Instruction"[9] from the Catholic church relating to how accusations of sexual abuse were to be secretly handled, combined with inconsistent facts and the inability for the parties or the court to truly know the number of abusive priests or the number of victims, led the class action court to direct First Circuit Solicitor David Pascoe to conduct an investigation. The class action court delayed approval of the class settlement for months while awaiting Mr. Pascoe's results. In short, the class action court made it clear that it was directing the mode and manner of

[9] Also known as the *Crimen Solicitationis*.

notice, that it took that obligation seriously, and that it discharged that obligation with the utmost care and concern for the interests of the class.[10]

The transcripts leave no doubt that the circuit court properly, carefully and deliberately exercised its discretion in designing the notice plan to avoid prejudice to the rights and claims of the Appellants, who (save for John Doe 193) resided out-of-state and who were not within the "actual notice class." Once the court adopted the notice plan in its January 19, 2007 Order, Richter & Haller had no discretion or authority under Rule 23 to deviate from the manner of notice directed by the class action court. Moreover, as courts across the country have held, basic principles of issue preclusion prohibit the Appellants in this matter on appeal from now collaterally attacking the class action court's decision on notice, or any other decision of the class action court, via a legal malpractice action. *Koehler v. Brody*, 483 F.3d 590, 599 (8th Cir. 2007) (affirming dismissal of malpractice claim brought by absent class member against class counsel on issue preclusion

---

[10] Further discrediting the Appellants' argument that the settlement was reached secretly and in violation of Rule 23 is the fact that the class action court held a fairness hearing on March 9, 2007, during which numerous objectors—including Appellants' Counsel—appeared and were heard. Indeed, during that hearing, Appellants' Counsel told the class action court,

> Your Honor, I do want to start by acknowledging the positive development by both the diocese and class counsel in even bringing the resolution this far. I do have concerns about it, but I really want to commend both the diocese and class counsel for generating what has brought us here today. It's a good thing. It's a good thing for the organization, it's a good thing for the people they have served and the interest they attempted to serve in the first place.

(Transcript, March 9, 2007 page 32, lines 4 through 15.) None of the errors Appellants' Counsel now assigns to Richter & Haller in this appeal were raised when he filed objections on behalf of John Does A through N. As an officer of the court and as counsel for those objectors, Appellants' Counsel had an obligation to raise his claimed suspicions of collusion, judge-shopping, and fraud on the court early, often, and loudly. *See* ALI, *Civil Practice and Litigation Techniques in Federal and State Courts* (December 1, 2003), available on Westlaw at SJ-035 ALI-ABA 1207 (noting "it is appropriate to impose on the objector a fiduciary duty to the class similar to the duty assumed by a named class representative"). Appellants' Counsel did not do so for the simple reason that there was no collusion; there was no judge-shopping; and there was no fraud on the court.

grounds); *Thomas v. Powell*, 247 F.3d 260, 264 (D.C. Cir. 2001) (enjoining state malpractice action against class counsel because relevant issues had already been decided in federal class action); *Laskey v. UAW*, 638 F.2d 954, 957 (6th Cir. 1981); *Martorana v. Marlin & Saltzman*, 96 Cal. Rptr. 3d 172, 177 (Cal. Ct. App. 2009) (noting "the allegation that Class Counsel drafted the procedures, without more, cannot form the basis of a breach of the duty.").

It would be antithetical to reason and to the logic behind Rule 23 to hold that class counsel could breach duties to the class ***by following the class action court's determination of appropriate notice***. *See, e.g., Martorana,* 96 Cal. Rptr. 3d at 177. As the court in *Premium Investment Corp. v. Green*, 282 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984), articulated, in pre-Rule 23 practice, little guidance was offered for class certification, and it was up to class counsel to determine and give notice to the class. Rule 23(c), SCRCP, supplanted that practice by requiring that the *court*, not the parties or their counsel, determine the appropriate means and manner of giving notice. Rule 23(c), SCRCP. For this reason alone, class counsel cannot be held to have breached any duties with respect to notice as a matter of law.

Furthermore, class counsel generally have no duty to insist upon global or national notice because a local tort requires only local notice. *See Tylka v. Gerber Products Co.*, 182 F.R.D. 573,578 (N.D. Ill. 1998) (holding notice limited to geographic area where class members were likely to be found was reasonable); *see also Zimmer Paper Products Inc. v. Berger & Montague, P.C.*, 758 F. 2d 86, 93 (3d Cir. 1985) (class counsel did not breach fiduciary duty to class members in following customary and court approved procedure for providing notice of settlement through first-class mail and publication). Class counsel have no duty to provide notice in any particular manner other than what the court orders, and certainly have no duty to ensure that each individual,

absent class member receives notice.[11] *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 56 (1st Cir. 2004) (noting that absent class members are not "entitled to individual notice," but rather "notice . . . reasonably calculated to reach [them]"); *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir. 1987) ("While notice must be adequate, it is not necessary that each member of the class actually receive that notice.").

Here, the class action court and class counsel recognized there was no practical or feasible way to give notice to unidentified victims living anywhere in the world outside of South Carolina who may have been abused by an employee of the Diocese of Charleston any time before 1980. By lifting the geographical limitation on the class definition but limiting the notice plan to South Carolina (other than the actual notice class), the class action court molded a settlement in which out-of-state abuse victims *could* participate if they received notice but were not bound or prejudiced if they did not. Stated differently, the class settlement had no effect on these Appellants and others who did not receive notice; they were in the same position after the settlement as they were before, and they were always free to bring their own claims against the Diocese of Charleston.

The notice plan, therefore, was reasonable and in the best interest of the class because of the sensitive nature of the claims, the difficulty in locating victims, and the sheer impossibility of designing a notice plan that would actually reach the unidentified, unknown, out-of-state abuse victims who could be living anywhere in the world. The expense of any such plan would unfairly and improperly reduce the recovery for victims who were in-state and those out-of-state who could

[11] South Carolina has never adopted the "best notice practicable" standard outlined in Appellants' brief. That language derives from former Fed. R. Civ. 23(c) and was **NOT** incorporated into Rule 23(c), SCRCP. Instead, the General Assembly left decisions concerning notice to the discretion of the trial court by promulgating the requirement that notice "shall be given to all member of the class in such manner as the court directs. Rule 23(c), SCRCP. Moreover, for the reasons set forth in the main text, the notice plan adopted by the class action court in this matter was the best practical solution to the problem that most class member could not be identified or found.

be identified and would make claims. It was therefore entirely reasonable for class counsel to conclude—with the class action court's agreement and approval—that the interests of the class were best served by *not binding* unidentified out-of-state individuals or prejudicing their claims.

Again, this case presented a difficult and unusual situation where the true size of the classes and the identities of the class members were unknowable. The parties had no mailing list, no call list, and no account list. They had no definitive list of all the children whom Diocesan priests had abused or molested over the years. They did not even have a definitive list of the names of the priests who perpetrated the crimes against those children. The only thing they had was the record of accusations and complaints maintained by the Diocese of Charleston. Thorough investigations not only by the First Circuit Solicitor (upon order of the class action court) but also by a private investigator (hired by Richter & Haller) revealed the identities of victims, all of whom, save four, were located and provided notice.

Through their professional judgment, class counsel obtained the best practicable outcome for the class: counsel worked in tandem with the class action court to ensure that actual notice went to everyone who could be identified and found; counsel worked with the class action court to ensure that notice was published in and around South Carolina (the place of the tort); and counsel worked with the class action court to ensure that the class action would not bind or prejudice out-of-state victims who could not reasonably be found or notified.

More fundamentally, the Appellants have not presented even a scintilla of evidence that a national notice plan, which they now claim should have been negotiated, would have reached them without subverting the interests of the classes. The record is totally devoid of any evidence that any of the Appellants in these lawsuits would have seen and responded to notice published in *USA Today* or anywhere else. They have presented no expert testimony that a global or national notice plan would have actually reached more class members in a cost-effective manner. And not one of

the Appellants has offered testimony that he or she would have received and responded to any particular publication or advertisement in any medium. Indeed, if the extensive press coverage of the settlement cited in the Statement of Facts did not reach the Appellants, then it is hard to image what kind of notice plan would have. Thus, the Appellants have failed in their burden of proof to demonstrate how the notice plan damaged them.

Consistent with Rule 23, the class action court approved the settlement only after proper notice was given, after a fairness hearing, after Mr. Pascoe reported the results of his investigation to the court, after the objectors' claims (including those filed by Appellant's Counsel) had been either resolved or decided, and after the court determined the settlement was fair and reasonable to the class. For these reasons, the trial court did not err in finding Richter & Haller breached no duty to the Appellants.

B. The Mere Filing of a Putative Class Action Did Not Create Duties to The Appellants.

Appellants contend Richter & Haller assumed broad fiduciary duties to them as members of the putative classes.[12] Their claim that a fiduciary duty existed before certification is incorrect for two reasons. First, the class action complaints limited the putative class to South Carolina residents. Second and more fundamentally, substantive duties the Appellants now allege were owed to the absent class members arise only upon certification, and the acts and omissions the Appellants assign to Richter & Haller occurred prior to certification.

Appellants were not class representatives, nor did they engage Richter & Haller when the class actions were filed or when the class settlement was negotiated and approved. While the Appellants apparently contend Richter & Haller undertook to represent them, the class complaints

[12] Appellants concede there was no attorney-client relationship prior to certification. (Apps.' Br. p. 12.)

demonstrate otherwise. The putative class was defined as: "all individuals, save for 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 employee of [the Diocese]." (Compl., 2006-CP-18-01311, ¶ 34; *see also* Compl., 2006-CP-18-01310 ¶ 27 ("Plaintiffs are informed and believe that the number of other individuals *in South Carolina* who fall within the definition of the class . . . "); Compl., 2006-CP-18-01311 ¶ 27 ("Plaintiff brings this action on behalf of himself and as a representative of a class of other persons similarly situated as victims of priest sex abuse *in South Carolina* pursuant to Rule 23 of the South Carolina Rules of Civil Procedure."), ¶ 29 ("Plaintiff is informed and believes that the number of other individuals *in South Carolina* have been the victims . . ."), ¶ 34 ("Plaintiff is entitled to the certification of a class of plaintiffs against the defendant representing all individuals . . . *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."); Compl., 2006-CP-18-1636 ¶¶ 34, 36 and 41 (same).)

The Appellants, all of whom except John Doe 193 (repressed memory) were non-residents when the class complaints were filed, fell outside the class definitions and, therefore, were not members of either putative class. Rather, they were complete strangers to the litigation. *See Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols.*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010) (citing *Pye v. Estate of Fox,* 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006); *Stiles v. Onorato,* 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995); and *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986) ("Generally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client. . . Further, an attorney owes no duty to a non-client unless he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.") (quotations omitted)); *see also* ABA Model Rule 1.7

(unnamed members of the class are ordinarily not considered clients for purposes of determining whether representation of one client will be directly adverse to another).

More fundamentally, class counsel have no substantive duties to anyone but the plaintiffs named in the complaint until a class is certified. Under Rule 23, SCRCP, an action may not be maintained as a class action until and unless the named plaintiff demonstrates—*and the court finds*—that the action satisfies the Rule 23 requirements of numerosity, commonality, typicality, adequate representation, and a sufficient amount in controversy. Rule 23(a), SCRCP. ***Simply calling a case a class action, without anything more, does not make it so.*** Rather, "[p]roponents of the class certification have the burden of proving these prerequisites of class certification have been met." *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990). To certify a class, "[i]t is imperative **the court apply a rigorous analysis** to assure the prerequisites of Rule 23(a) have been satisfied." *Id.* (emphasis added).

It is therefore unsurprising that the majority rule is that, prior to certification, there is no attorney-client relationship between counsel for the named plaintiff and the putative class. *Bobryk v. Durand Glass Mfg. Co.*, No. 12-cv-5360 (NLH/JS), 2013 U.S. Dist. LEXIS 145758, at *29-31 (D.N.J. Oct. 9, 2013) (noting "the majority of case law that holds that the attorney-client relationship with putative class members 'does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.'"); *Palumbo v. Tele-Communications, Inc.*, 157 F.R.D. 129, 133 (D.D.C. 1994) (stating class certification confers status of litigant on absent class members and creates attorney-client relationship with class counsel); *Garret v. Metro Life Ins. Co.*, No. 95-CIV-2406, 1996 WL 325725, at *6 (S.D.N.Y. June 12, 1996) ("before class certification, the putative class members are not 'represented' by the class counsel."); *Formento v. Joyce*, 522 N.E.2d 312 (Ill. App. Ct. 1988) (finding that defendant attorneys owed no duty to plaintiffs, the unnamed members of an uncertified class action);

Restatement (Third) of the Law Governing Lawyers § 99 cmt. 1 ("[P]rior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients"); *Resnick v. Am. 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."); *Gillespie v. Scherr,* 987 S.W. 2d 129 (Tex. App. 1998) ("[W]e have found no case finding an implied attorney-client relationship to exist before class certification between an attorney who files the class action and any unnamed class members").

The majority rule makes sense because, at any stage prior to certification, the class definition is not fixed; rather, it can be narrowed or expanded without difficulty. 3 H. Newberg, *Class Actions* § 5050 (1977); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 415, (1980). In their brief, the Appellants concede no attorney-client relationship existed prior to class certification. (Apps.' Br. at 12.) The same logic applies to fiduciary duties: until there is a class, there are no fiduciary obligations between class counsel and the absent class members.

Contrary to the Appellants' argument, nothing in *Premium Investment* suggests otherwise. The holding in *Premium Investment* illustrates that fiduciary duties attach upon certification. The *Premium Investment* court bemoaned the lack of guidance about class certification and administration in pre-Rule 23 civil procedure. Recognizing the lack of clarity as to what constituted class certification, the Court of Appeals concluded that, in the *Premium Investment* case, there had been a "constructive certification" because the entry of judgment vested rights in the class members. The trial court specifically identified and ordered relief in favor of the absent class members. Because there was a "constructive certification," fiduciary duties attached to class counsel.

With the advent of Rule 23, SCRCP, however, the confusion about when and how a class is certified addressed by *Premium Investment* became a thing of the past. Rule 23 now clarifies

that certification occurs upon the trial court making a finding that all of the Rule 23(a) prerequisites are met. Indeed, the order Judge Goodstein issued on January 19, 2007 certifying the classes and granting preliminary approval of the settlement pursuant to Rule 23 established a clear date for certification. Without any confusion as to whether or when a class was certified—which were the only real issues addressed in *Premium Investment*—the *Premium Investment* decision is largely inapposite for the analysis here. In contrast to that case, the record in this case clearly shows the claims were settled fairly and reasonably with proper notice, adequacy of representation, and court approval as required by Rule 23, SCRCP.

In this case, the timing of class certification matters because the only concrete complaints that Appellants have articulated, even viewed in the light most favorable to them, occurred *before* the class was certified. Specifically, they take issue with the decision to file an amended proposed notice plan that did not include *USA Today*. Both the original proposal and the amended proposal were filed ***before*** a class was certified and thus ***before any duties attached.*** Lacking any allegation or evidence of negligence ***after*** certification, the circuit court properly concluded that the Appellants' claims failed as a matter of law.

C. Upon Certification, There Was No Duty to Provide Notice to Unidentified and Unidentifiable Out-of-State Individuals.

The Appellants now argue for the first time in their appellate brief that the trial court erred in granting summary judgment for Richter & Haller on the legal malpractice claims because class counsel failed to negotiate for a broader notice plan ***after*** class certification. Specifically, the Appellants argue, "The reduced notice program was proposed before January 19, 2007 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." (Apps.' Br. at 12.) That issue is not preserved for review because the Appellants failed to raise it to the

trial court.[13] *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (discussion of principle that issues not raised to the trial court are not preserved for appeal). Nowhere in their six-and-a-half page memorandum in opposition to summary judgment or in counsel's arguments to the trial court did the Appellants raise any act or omission after class certification that supported their legal malpractice claims. (*See* Appellants' Memo. Opposing Motions for Summary Judgment (arguing the filing of the class action complaints triggered duties under *Premium Investment* and the settlements with the Diocese Defendants did not affect the claims against Richter & Haller).) In fact, contrary to what they now argue to this Court, Appellants' Counsel argued to the trial court that the attorney-client relationship was created on July 30, 2007 when the class action court entered an order giving final approval to the settlement. (*Id.* at 15; Transcript of July 20, 2017 Hearing, page 15, lines 9 to 12 (arguing "final certification doesn't occur until the summer of 2007, that's when the attorney-client relationship is imposed on them.") Appellant's Counsel further stated the class action court's January 19, 2007 Order only gave *preliminary* class certification. *Id.* Now, without pointing to any evidence, the Appellants have shifted and claim the attorney-client relationship arose and was breached prior to July 30, 2007, a tactic that the Appellate Court rules do not allow. *See, e.g.*, *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (explaining that appellate preservation requires that the trial court have the opportunity to properly consider all facts and arguments).

Moreover, the undisputed facts belie the Appellants' new contention on appeal. Contrary to the Appellants' argument, the notice plan in the class action court's January 19, 2007 Order *was* immediately adopted and followed. That plan required notice of the pendency of the action, the proposed settlement, the details of the upcoming fairness hearing, and a web site with details of

[13] In addition, the argument is meritless as to John Doe 193 because his legal malpractice claim was already dismissed for failure to file an expert affidavit and was not appealed. (Order

the cases. (Order Giving Preliminary Approval to Class Settlement, January 19, 2007 at 8; and Notice at Exhibit B.) Separate and distinct from that was the notice plan the class action court adopted in its final Order Approving Settlement, which required notice that the settlement had been approved and provided information on how to submit claims. (Order Approving Settlement, July 30, 2007 at 11-12 and Exhibit A.) The latter notice plan was also followed. As discussed above, South Carolina has never adopted the "best notice practicable" standard, which is the foundation of the Appellants' argument. Instead, decisions concerning notice are left to the broad discretion of the trial court. Rule 23(c), SCRCP (requiring that notice "shall be given to all member of the class in such manner as the court directs."). The trial court reasonably and properly exercised its discretion not to embark on an ill-fated attempt at global or national notice, which would inevitably have missed large numbers of victims while potentially barring them from bringing their own actions against the Diocese.

Finally, Appellants' Counsel raised these same concerns with the class action court on behalf of fourteen Doe claimants, and the class action court declined to broaden the notice plan. Appellants' Counsel contended:

> 7. Notice. Notice should be posted in more than just South Carolina. Some national vehicle for notice should exist, to accommodate the reality that persons may move from the State. This is another aspect in which the proposed order appears to be designed to minimize the impact on the Diocese rather than to maximize the recovery for the victims. Publication in either the USA Today or The New York Times would seem appropriate if the parties truly were interested in giving notice to potential class members.

(Objections to Proposed Order, August 1, 2007 at 5.) Appellants' Counsel also objected to Richter & Haller's fee. *Id.* at 5–6. The class action court received the objections, as well as Appellants' Counsel's subsequent Motion to Alter or Amend, in which counsel again opposed class counsel's fee. (Memorandum in Support of Motion to Alter or Amend, August 22, 2007.) The class action court declined to amend either the notice plan or the fee award. (Order, August 31, 2007.)

II. RICHTER & HALLER DID NOT PROXIMATELY CAUSE DAMAGE TO OUT-OF-STATE INDIVIDUALS WHO DID NOT RECEIVE NOTICE.

As Judge Nicholson recognized in granting summary judgment, the Appellants failed to articulate any damages proximately caused by Richter & Haller. That absence of proof is *undisputed* in the record for at least three reasons. ***First***, the Appellants alleged in their complaints that there would be no harm if they were not barred from pursuing claims against the Diocese by the *res judicata* effects of the prior class action and they were not so barred. ***Second***, because the notice plan was decided and directed by the class action court—after considering objections to the notice plan—Richter & Haller are not the proximate cause of any alleged damage caused by inadequate notice. ***Third***, the Appellants were not harmed by class counsel because they were at all times free to pursue their own claims against the Diocese, including filing their own class action lawsuits. Nothing Richter & Haller did or did not do affected that right. ***Fourth***, the record is devoid of any evidence that any other notice plan would have resulted in a better result for any Appellant. Therefore, the Appellants cannot establish any damages proximately caused by Richter & Haller. *See RFT Mgmt. Co. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 732 S.E. 2d 166 (2012) (establishing damages and proximate cause are necessary elements to claims for legal malpractice and for breach of fiduciary duty).

A. The Appellants Admitted from the Outset that the Ability to Pursue Claims Against the Diocese Would Obviate any Claims Against Richter & Haller.

In their complaints, the Appellants specifically alleged that the claims against class counsel would be obviated if they were not barred by *res judicata* from pursuing claims against the Diocese. The complaint filed by John Doe 2 and Jane Doe 4 is typical of the others:

> 23. **If the Diocese agrees, or the court finds, that the plaintiffs are not precluded by the class action from bringing claims against the Diocese**, either because the state court's ruling left room for persons not receiving notice or because the deliberate restrictions on notice clearly failed to comply with plaintiffs' due process rights, **then the causes of action against the Richter defendants** who, for a fee,

> abandoned their clients, and those who conspired against them through the class action, **are irrelevant because plaintiffs can make their claims against the Diocese.**

(Compl., C/A No. 2010-CP-10- 5520, ¶ 23) (emphasis added).

It is axiomatic that "[t]he allegations, statement or admissions contained in a pleading are conclusive as against the pleader." *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964). It therefore follows that a party "cannot subsequently take a position contradictory of, or inconsistent with, his pleadings." *Id.; see also Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("[P]arties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action."). Here, the pleadings admit that the Appellants have no claims against Richter & Haller if they are not bound by the class action settlement. Because Judge Young and Judge Nicholson concluded that they were not so bound, the trial court properly granted summary judgment on the claims against Richter & Haller.

B. Richter & Haller Did Not Direct Notice and Thus Did Not Proximately Cause Harm to The Appellants.

While it is alleged that Richter & Haller failed to negotiate for a broader notice plan, none of the Appellants alleges Richter & Haller played any active role in preventing them from making claims against the Diocese. As discussed above in detail, under Rule 23(c), it is the class action court that ultimately directs the manner of notice to the class, not class counsel. The Appellants do not allege Richter & Haller failed to follow the court-ordered notice plan, nor do they allege Richter & Haller provided them with the wrong claim deadline date. In fact, the Appellants, whose

existence and identities were unknown at all times prior to the filing of the cases at bar, had no contact at all with Richter & Haller. Class counsel, therefore, could not have proximately caused them any harm allegedly derived from the manner of notice. *See, e.g., Zimmer Paper Products,* 758 F.2d at 90-93 *and Martorana,* 96 Cal. Rptr.3d at 178-81.

C. The Appellants Were Not Damaged by Richter & Haller Because They Were at all Times Free to Pursue Their Claims Against the Diocese.

Perhaps the most glaring hole in the Appellants' argument is the fact that they have been free at all times to assert their own claims against the Diocese Defendants and pursue their own settlements that avoid the Diocese's various defenses. Nothing that was done (or not done) in the class action harmed the Appellants in any way.

It is undisputed that all of the out-of-state victims have admitted that they never suffered from repressed memories, they knew they were victims, and they were capable of bringing their own claims against the Diocese at any time. Of course, they and their individual abusers were the only people who knew their identities and knew they had claims. Richter & Haller had neither knowledge of their identities nor any practicable means of discovering who they were, save those identified through the Solicitor's investigation. It is well-settled that plaintiffs in South Carolina have a duty to act with diligence in bringing their claims. *See, e.g., Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 397, 593 S.E.2d 183, 188 (Ct. App. 2004) (a party must act with some promptness where the facts and circumstances place them on notice that a claim might exist). Judge Young held John Doe 2 and Jane Doe 4 failed to do that because the statute of limitations ran at the latest in 1992. (Order, June 27, 2011 at 7.) As a matter of law, Richter & Haller cannot be held responsible for the fact that Appellants knew they had claims for decades and chose not to act on them.

In his Order on Limited Collateral Review in this case, Judge Nicholson confirmed that **the prior class action had no effect whatsoever on Appellants' claims against the Diocese**. That result was by the design of the class action court and Richter & Haller, which never intended for the class action to prejudice the claims of any unidentified and unknown out-of-state victim.

Perhaps the most puzzling aspect of these cases is that, after settling five cases with the Diocese, Appellants' Counsel then surrendered the remaining substantive claims against the Diocese on the record. There was no reason to concede charitable immunity because the doctrine of charitable immunity was never absolute in South Carolina and certainly not absolute in these cases. The South Carolina Supreme Court has held that the doctrine does not avoid liability for the intentional acts of a charity's employees or torts that occurred when a charity was engaged in commercial activity. *See, e.g.*, *Jeffcoat v. Caine*, 261 S.C. 75, 80, 198 S.E.2d 258, 260 (1973) (refusing to extend charitable immunity to intentional torts); *Eisenhardt v. State Agricultural & Mech. Soc'y*, 235 S.C. 305, 313–14, 111 S.E.2d 568, 573 (1959) (charitable immunity does not apply to commercial activities). Notably, the Supreme Court has **never** decided whether the doctrine covers grossly negligent or reckless acts like those alleged against the Diocese.

In all of these cases, the Appellants alleged that the Diocese knew about the abusers' proclivities and concealed them. Rather than remove the abusers, the Diocese simply moved them to other parishes, continuing to place the abusers in positions to commit the same egregious sexual abuse of minors. (Compl., 2010-CP-10-05520, ¶¶ 27–28, 30–58.) The South Carolina Supreme Court has never decided whether such repugnant and willfully reckless behavior would qualify for charitable immunity.

Furthermore, the best evidence that charitable immunity is not an absolute bar is that the Diocese continues to settle cases with abuse victims. They settled the underlying class actions despite the potential for a charitable immunity defense, and the Diocese settled many of the cases

now on appeal as recently as last summer. (Stipulation of Dismissal, 2010-CP-10-07233, filed May 22, 2017; Stipulation of Dismissal, 2013-CP-10-04175, filed July 6, 2017; Stipulation of Dismissal, 2013-CP-10-04176, filed July 6, 2017; Stipulation of Dismissal, 2015-CP-10-05486, filed May 22, 2017.) Appellants' Counsel continues to file and settle cases on behalf of Doe claimants who lived in-state during the class action but did not participate in the settlement. (*See, e.g.*, Compls. and Stipulations of Dismissal in C/A Nos. 2015-CP-10-03287 & -03288.) Plainly, the Diocese recognizes that the charitable immunity defense has risks and limitations and is highly unlikely to provide the Diocese with any cover against victims of abuse.[14]

Several compelling legal arguments suggest charitable immunity would not have applied to the Appellants' sexual abuse claims. Even in the doctrine's heyday (which has long passed), the South Carolina Supreme Court did not blindly apply charitable immunity; rather, the Court routinely engaged in a serious weighing of the public policy reasons for the doctrine against the need for recovery in the case before them. Indeed, even in *Decker v. Bishop of Charleston*, 247 S.C. 317, 147 S.E.2d 264 (1966), a routine slip-and-fall involving simple negligence against the Diocese, the Supreme Court only applied charitable immunity after an extended discussion of the public policy benefits and detriments to doing so. *Id.* at 321-27, 147 S.E.2d at 266–69. While the Court often applied the doctrine to simple negligence, it was far more circumspect in cases involving intentional misconduct or other egregious behavior. Here, the reasoning in *Jeffcoat* is far more applicable to the Diocese's long and sordid history of covering up for pedophilic priests and subjecting their parishioners to known predators than is the reasoning in *Decker*, which merely exempted the church from liability for a slip-and-fall. In light of the case law, therefore, the

[14] The class action settlement did not accomplish anything special with respect to charitable immunity. The Diocese did not "waive" the defense; rather, the Diocese agreed to pay victims without litigating **any** of their defenses, which is what happens in every settlement. (Settlement and Arbitration Agreement at 5.)

Appellants had a strong likelihood of prevailing on charitable immunity—and most certainly prevailing at summary judgment—thus making the voluntary surrender of the abuse claims suspicious.

Contrary to the position the Appellants now take, Richter & Haller did not harm them. Richter & Haller did their best under the circumstances to ensure that the class action would not prejudice unidentified and unknown out-of-state individuals who could not practicably be identified or reached, and that goal was accomplished. The Appellants who did not settle with the Diocese were left without a recovery *only* because of their own attorney's inexplicable decision to voluntarily relinquish their claims.

D. The Appellants Have Presented No Evidence that an Alternative Notice Plan Would Have Reached Them.

The Record is totally devoid of any evidence that, if the class action court had directed notice in some other manner, any of the Appellants would have received notice and participated in the class action settlement. The Appellants have never put forward an alternative notice plan that they claim would have prevented the alleged harm, and none of the Appellants testified that any such alternative plan would have reached them. Without evidence in the Record demonstrating that an alternative plan would have reached these victims, there is no basis to conclude that the class action court's notice plan proximately caused any harm to the Appellants.

In sum, class counsel did not inflict harm on the Appellants. To the contrary, class counsel did their best under the circumstances presented to ensure that the class action would not harm unidentified and unknown out-of-state individuals who could not practicably be identified or reached. The Appellants on appeal who did not settle with the Diocese are left without a recovery only because of their own lawyer's inexplicable decision to voluntarily relinquish their claims against the Diocese or their own failure to assert their claims over a decade sooner.

III. RICHTER & HALLER HAD NO DUTY TO—AND COULD NOT HARM—VICTIMS SUFFERING FROM REPRESSED MEMORY AT THE TIME OF THE CLASS ACTION SETTLEMENT.

The Appellants contend that the trial court erred in holding Richter & Haller owed John Doe 193 no duty. Under the law, Richter & Haller neither had nor breached a fiduciary duty to John Doe 193, who claims to have had a repressed memory of abuse at the time of the class action settlement.[15]

South Carolina law unequivocally protects individuals who suffer a repressed memory of childhood sexual abuse. *Moriarty v. Garden Sanctuary of Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000). Under *Moriarty*, the statute of limitations does not run during the period in which the individual's memory is repressed because they cannot recall the abuse. *Id.* at 326, 534 S.E.2d at 675. Thus, individuals with repressed memories are given the full three-year statute of limitations to bring their claims ***once the memory of abuse re-surfaces***.

Here, John Doe 193 testified that he was sexually abused as a child by Father Kaney, an employee of the Diocese. (John Doe 193, page 12, line 11 to page 15, line 6.) He further testified that he suffered a repressed memory of the abuse and that his memories only began re-surfacing in 2010. (John Doe 193, page 11, line 19 to page 12, line 10.) Thus, John Doe 193 had no memory of the sexual abuse at the time the class action settlement was noticed. Although John Doe 193 lived in South Carolina at the time, any notice plan was meaningless to him because he did not know he had been abused. *See Moriarty*, 334 S.C. at 167 (quoting *Doe v. Roe,* 191 Ariz. 313, 955 P.2d 951 (1998)) ("A victim whose memory is inaccessible lacks conscious awareness of the event and thus cannot know the facts giving rise to the cause.").

---

[15] As noted in the Statement of the Case, the only claim by John Doe 193 against Richter & Haller is for breach of fiduciary duty. His legal malpractice claim was dismissed for failure to file a supporting affidavit.

John Doe 193 has no claim against class counsel because the class settlement could not and did not include victims suffering from repressed memory claims. First, to include possible future claims in the settlement would have created a conflict between the existing claimants and future claimants. *See Georgine v. Amchem Prods.*, 83 F.3d 610, 630–31 (3d Cir. 1996) (finding no adequacy of representation due to "salient conflict" between "the presently injured" who were suffering from injuries due to asbestos exposure and "future plaintiffs" who had been exposed to asbestos but not yet suffered injuries); and *Amchem Prods. v. Windsor*, 521 U.S. 591, 606 (1997) (affirming *Georgine* and noting "disparity between the currently injured and exposure-only categories of plaintiffs[.]"). The class representatives could not have negotiated a settlement covering potential, future claims of victims such as John Doe 193 and still satisfy the adequacy of representation prong under Rule 23, SCRCP.

The argument that the class action settlement in 2006 should have held back funds for individuals with a repressed memory is spurious. There was no way to reserve settlement funds for repressed memory claims that would be consistent with due process and fairness to the entire class. For example:

- Participants in a class action have due process rights to object to the fairness of the proposed settlement and to opt out of the proposed settlement. *See Hosp. Mgmt. Assocs. v. Shell Oil Co.*, 356 S.C. 644, 654, 591 S.E.2d 611, 616 (2004). By definition, neither right could be meaningfully extended to individuals with repressed memories because they cannot recall the abuse and thus cannot exercise either right at the time of settlement;

- Even if the right to opt out were deferred until the (unknown) time in the future when the abuse is remembered (which could be decades after the settlement, causing insurmountable problems in allocating and holding back settlement funds in an amount that could not be calculated because the number of repressed memory victims could never be known), the right to object would still be compromised because the class action court would have to approve the settlement years—perhaps even decades—before an individual's memory of abuse re-surfaced. At the point the memory re-surfaced, there would be no way to meaningfully consider an objection to

the settlement, as the vast majority of the funds would already have been disbursed; and

- There was (indeed, there remains) no way of knowing how many repressed memory victims exist or the degree of harm each suffered, so there could be no way to determine an appropriate amount to hold back for such victims from the settlement fund. Holding back too little would be unfair to the repressed memory victims because they would receive smaller recoveries than other members of the class. Likewise, holding back too much would be unfair to the victims with intact memories because they would receive less money based upon a pure hypothetical without any basis in fact, of the number and severity of future claims.

The only workable means to preserve the rights of repressed memory victims is what John Doe 193 received: repressed memory victims are not bound or otherwise prejudiced by a class settlement. Like the other Appellants, John Doe 193 was free to bring his claims against the Diocese when his dissociative amnesia subsided and he regained his memory, and he could have instituted and settled his own claim.

No class notice plan could have reached individuals suffering from repressed memories of their abuse. John Doe 193 did not begin to recall his abuse until three years after final approval of the settlement. It is therefore entirely proper under the law that Judge Nicholson held that the class action settlement did not bind John Doe 193. (Order on Lawyer Defendants' Motion for Summary Judgment at 7–8.) Because the class action had no effect whatsoever on John Doe 193's claims against the Diocese, John Doe 193 cannot establish proximate cause or damages, two critical elements of his claims against Richter & Haller. Moreover, Richter & Haller cannot have owed John Doe 193 any duties because his repressed memory prevented them from representing or assisting him.

In this case, the sexual abuse claims of John Doe 193 against the Diocese were not found to be barred by any defense the Diocese raised. Rather, his sexual abuse claims were voluntarily and inexplicably surrendered by his counsel. Therefore, John Doe 193's inability to recover from

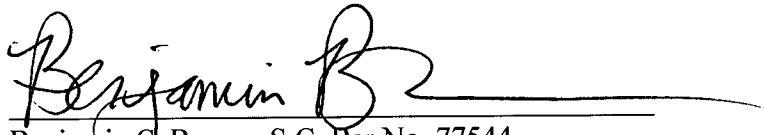
the Diocese Defendants, the parties responsible for the harm he suffered, had nothing whatsoever to do with Richter & Haller.

CONCLUSION

The Appellants contend on appeal that the trial court erred in granting Richter & Haller summary judgment. Notwithstanding the various complaints the Appellants have about how the class settlement was handled over ten years ago, the Appellants failed to establish any duty was owed or was breached prior to class certification, any duty was owed or was breached after class certification, or any damages suffered as a proximate result of the class settlement. Furthermore, the Appellants are bound by their own pleadings, which state their claims against Richter & Haller are irrelevant if the Appellants are not bound by the class settlement. Having determined the Appellants are not bound and, therefore, the class settlement had no effect on the Appellants' claims, the trial court properly applied the law and granted Richter & Haller summary judgment. Accordingly, the trial court's order granting summary judgment should be affirmed on these or any other grounds appearing in the Record.

[SIGNATURES ON FOLLOWING PAGE]

Susan Taylor Wall, S.C. Bar No. 5799
Henry W. Frampton IV, S.C. Bar No. 75314
GORDON & REES, LLP
40 Calhoun St., Suite 350
Charleston, SC 29401
(843) 714-2506
Attorneys for David. J. Haller



Benjamin C. Bruner, S.C. Bar No. 77544
Chelsea J. Clark, S.C. Bar No. 102211
BRUNER, POWELL, WALL & MULLINS, LLC
Post Office Box 61110
Columbia, South Carolina 29260
803-252-7693
Attorneys for Lawrence E. Richter, Jr. and Richter and Haller, LLC

October 10, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case Nos.: 2010-CP-10-05520, 2010-CP-10-07233, 2012-CP-10-05559, 2013-CP-10-03733, 2013-CP-10-04175, 2013-CP-10-04176, 2015-CP-10-05486, 2016-CP-10-01632

Consolidated as 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.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Initial Joint Brief of Respondents Lawrence E. Richter, Jr., David J. Haller and Richter and Haller, LLC, complies with Rule 208, SCACR.

Benjamin O. Bruner, Esquire

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case Nos.: 2010-CP-10-05520, 2010-CP-10-07233,
2012-CP-10-05559, 2013-CP-10-03733, 2013-CP-10-04175,
2013-CP-10-04176, 2015-CP-10-05486, 2016-CP-10-01632

Consolidated as 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, Bridget S. Steele, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for Respondents Lawrence E. Richter, Jr., Richter & Haller, LLC, do hereby certify that I have served a copy of the attached *Initial Joint Brief of Respondents Lawrence E. Richter, Jr., David J. Haller, and Richter And Haller, LLC* and the *Respondents Lawrence E. Richter, Jr.; David J. Haller; and Richter And Haller, LLC's Designation of Matter To Be Included In The Record On Appeal* by e-mail and by depositing a copy of it in the U.S. Mail, postage prepaid, on October 10, 2018, addressed to the following:

Gregg E. Meyers, Esquire
Pierce Herns Sloan & Wilson LLC
321 East Bay Street
Charleston, SC 29401
Attorney for Appellants

Richard S. Dukes, Esquire
Brian James Kern, Esquire
Turner Padget Graham & Laney, PA
PO Box 22129
Charleston, SC 29413-2129
Attorneys for Diocese Defendants

Susan Taylor Wall, Esquire
Henry Wilkins Frampton, IV, Esquire
Gordon & Rees LLP
170 Meeting Street, Suite 110
Charleston, SC 29401
Attorneys for David K. Haller

October 10, 2018

Bridget S. Steele

BRUNER, POWELL, WALL & MULLINS, LLC

ATTORNEYS AND COUNSELORS AT LAW
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SOUTH CAROLINA 29260-1110
TELEPHONE 803-252-7693
FAX 803-254-5719
WWW.BRUNERPOWELL.COM

WARREN C. POWELL, JR., P.A.*
HENRY P. WALL
E. WADE MULLINS III, P.A.
WESLEY D. PEEL, P.A.
JOEY R. FLOYD, P.A.
BENJAMIN C. BRUNER, P.A.

JAMES L. BRUNER (RETIRED)
BRIAN P. ROBINSON, P.A.**

CAITLIN C. HEYWARD
CHELSEA J. CLARK
STEVEN R. SPREEUWERS

* ALSO ADMITTED IN DISTRICT OF COLUMBIA
** OF COUNSEL

AUTHOR'S E-MAIL: BBRUNER@BRUNERPOWELL.COM

October 10, 2018

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: ***Doe v. The Bishop of Charleston, et al.***
Appellate Case No.: 2017-001996
Bruner Powell File No.: 3716134.200

Dear Ms. Kitchings:

Please find enclosed for filing in the appeal the original and one (1) copy each of the *Initial Joint Brief of Respondents Lawrence E. Richter, Jr., David J. Haller, and Richter And Haller, LLC* and the *Respondents Lawrence E. Richter, Jr.; David J. Haller; and Richter And Haller, LLC's Designation of Matter To Be Included In The Record On Appeal*, together with certificates of counsel and proof of service on other attorneys of record.

Sincerely,

Benjamin C. Bruner

BCB/gh
Enclosures

cc: Gregg E. Meyers, Esquire
Richard S. Dukes, Jr., Esquire
Brian James Kern, Esquire
Susan Taylor Wall, Esquire
Henry Wilkins Frampton, IV, Esquire