The State of South Carolina
In The Court of Appeals

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

Appellate Case No. 2017-001996

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

Appellants

v.

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

Respondents

Reply Brief of Appellants

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Overview

It is a rare class action that does not have absent class members who are unknown. For lawyers new to class actions, perhaps the most difficult concepts to absorb are the duties owed to absent class members and the care needed in defining the class. This appeal presents the court with the rare opportunity to clarify for the bench and bar many procedural and substantive aspects of class action litigation, and to either affirm and clarify, or reject, the various aspects of class action practice in this record which include:

- Class counsel negotiating a fixed fee for themselves simultaneous with a variable recovery for the class, with class recovery subordinate to the fixed fee,[1]
- The fee was agreed to fall within an agreed upon range,[2]
- Seeking a fee award before any class member was even identified, let alone had made a recovery, then seeking no "final fairness hearing," e.g., *Ortiz v. Fibreboard Corporation*, 527 U.S. 815, 849, 119 S.Ct. 2295, 2316 (1999), by which the total attorney fee paid could be reviewed,[3]

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[1] Settlement agreement of Jan. 12, 2007 at page 13, item 6.B (*pro rata* reduction to "each award" if funds insufficient "after the payment of all costs and fees.").

[2] In *Hege v. Aegon USA*, 780 F. Supp. 2d 416, 433 and 435 (D.S.C. 2011), district judge G. Ross. Anderson found that an agreement by which a defendant agreed not to contest a fee award to class counsel within a specified maximum amount represented class counsel placing his own interests above those of the class. In this settlement, the fee overtly took priority over the class recovery, creating a disincentive for counsel to have so many class members that the provision was activated.

[3] A process that would also enable review of class counsel apparently having charged an additional amount of approximately $1 million in fees not authorized by any order, as would discovery which should be permitted as to class counsel. July 18, 2017 Memorandum opposing Summary Judgment as to John Doe 193 at p. 8.

- Class counsel and the Diocese maneuvering the case to a preferred judge through, among other forum shopping methods, re-filing in another circuit (Dorchester) the identical class action complaint pending and settled in the original circuit (Charleston), with service accepted by the Diocese. Forum shopping being one of the nine "red flags" about class counsel misconduct warned against in the Manual for Complex Litigation, Fourth, § 21.61,
- Class counsel failing to obtain written orders which secured the relief they claimed to have secured, particularly pertinent to the issues on this appeal,
- Providing no notice to out-of-state absent members that for the first time on appeal class counsel claims was intended *not* to provide minimum due process for out-of-state class members (respondent lawyer's brief at 34),
- Class counsel failing to disclose to the class his lifelong ties to the Diocese,[4]
- Whether and when a fiduciary duty to absent class members attaches to counsel and the class representative, and
- The point in time when an attorney-client relationship attaches to absent class members.

Note that none of the respondents dispute that the appellants are within the class definitions as proposed to and approved by the trial court, which definitions contain no geographical limit:

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

And:

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[4] Affidavit of Michael Virzi, e.g., attached to the complaint in 2010-CP-10-5520 at ¶ 6.

> The spouse and parents, of all individuals pursuant to the Primary Class and who suffered a loss of the abused individual's consortium, and who as spouses or parents have not previously had any similar claim adjudicated, resolved, or released. (Hereinafter the "Consortium Class.")[5]

E.g., Motion to certify classes filed October 6, 2006 at p. 2; Settlement and Arbitration Agreement, January 12, 2007 at p. 2; Motion to certify classes filed January 17, 2007 at p. 2; Order Certifying Classes signed January 19, 2007 at p. 4; Order Approving Settlement filed July 30, 2007 at Exhibit A.

The class as defined contain no geographic limit. An absent class member is within the class definition whether or not he or she resides in South Carolina, even though to be abused by an agent or employee of the Diocese of Charleston likely required tortious conduct in South Carolina.

Reply Argument

In Reply, the appellants make only these points.

1. **"Best practicable notice" is a function of due process imposed on SCRCP 23.**

In the respondent lawyers' brief at p. 34 they contend that "South Carolina has never adopted the 'best notice practicable' standard" for a class. This argument is patently incorrect, as it is minimal due process, not the wording of SCRCP 23, which imposes on class counsel that notice

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[5] At page 8 of their brief, class counsel relate that the two classes were created in the class settlement. Yet Judge Nicholson ignored the classes as defined in the settlement, as proposed to the court, and as approved by the court, focusing solely on the complaint and an ambiguous allegation about one of the two classes to conclude the classes contained a geographical limit nowhere in the formal definition. The class as approved by the court is what controls and binds class counsel. *Tilley v. Pacesetter Corporation*, 585 S.E.2d 292, 302 (S.C. 2003). Judge Nicholson erred in his analysis.

obligation to absent class members. It is a constitutional requirement. E.g., *Hosp. Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 662, 591 S.E.2d 611, 621 (2004):

> [T]he standard for notice is that it must be "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Shutts,* 472 U.S. at 812, 105 S.Ct. 2965 (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314–15, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

That class counsel still do not understand what due process required for notice to absent class members, and contend both that they were under no obligation to give the best practicable notice and (we are now told) at liberty to deliberately give insufficient notice explains a great deal. With the respondent lawyers' brief, the story behind the lack of out-of-state notice has now changed.[6] To Judge Nicholson, class counsel explained that lack of out-of-state notice was an accommodation to the Bishop's cost objection.[7] Since the notice program was paid out of the settlement fund, the explanation by class counsel makes no sense. Publishing notice of the settlement to class members in *USA Today* would cost the Diocese defendants no additional funds. There was no basis for the Bishop to object to cost.

After that was pointed out, class counsel's story for purposes of this appeal changed. At p. 34 of the respondent lawyers' brief, a new factual explanation is tried: notice for absent class members such as the appellants was *designed* to be constitutionally insufficient so as to not bind them by *res judicata*. It was planned that way, according to the new explanation. A feature, not a bug, as a software engineer might say. That is contradicted not only by the earlier explanation

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[6] The trial court stayed discovery as to class counsel so they have not been deposed about their changing stories.

[7] Set out in detail in the Initial brief at pp. 7-8 and footnote 5.

but also by each defendant having asserted *res judicata* as a defense to various appellants.[8] More fundamentally, it has taken litigation to establish that the appellants are not bound by *res judicata*, but legal challenge has also been needed to clarify that as a matter of law, as held in *Doe v. Bishop*, 407 S.C. 128, ___, 754 S.E.2d 494, 499 (2014), the appellants' claims against the Diocese must now confront those defenses that in the class action had been waived. Lack of notice has precluded the appellants from all chance of the benefits available in the class action. More on this below.[9]

2. **Class counsel failed to secure a written order reflecting the relief represented to have been obtained, a failure which occurred after class certification.** The trial court approved the classes in its order of January 19, 2007. Noted briefly above is the July 13, 2007 transcript of a hearing (that did not include any objectors), in which a representation was made that absent members of the class who "were missed" would be given the same relief as the class.

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[8] For example, each respondent asserted *res judicata* as a defense to John Doe 193. Answer by respondent Haller at ¶ 69; by Richter and Richter & Haller at ¶ 54; by the Diocese at ¶ 65. Haller asserted *res judicata* to out-of-state appellants such as Doe 10 and Doe 194. Although an issue raised by the Diocese was not ruled on by the trial judge, so is not properly before the appellate court, e.g., *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (to preserve issue for appeal "it must be raised to an ruled upon by the trial court."), the Diocese continues to maintain that Doe 4, a Georgia resident, has no claim due to *res judicata*, even as the class counsel respondents argue that anyone out-of-state is supposedly not in the class, and that notice was not intended to apply to anyone outside of South Carolina. Diocese brief at p. 2.

[9] In their brief at p. 14 n. 9 and at pp. 16 – 17, class counsel complain that the class action has been "repeatedly attacked," but refer to cases that involved none of the issues on this appeal. For example, *Ex Parte Doe*, 393 S.C. 147, 711 S.E.2d 892 (2011) was not a challenge to the class action, but an action to compel the Diocese to pay the settlement to which it had agreed. No prior case has involved the issues of this case on behalf of abuse victims who reside out of state. The only related case is *Doe v. Bishop*, 407 S.C. 128, 754 S.E.2d 494 (S.C. 2014), which concluded that there were issues that should proceed as to the class action.

While the written order has been determined to be limited to provide that relief not to all absent members but to only the "actual notice" class members (victims whose names the Diocese had from their own records), *Doe v. Bishop*, 407 S.C. 128, ___, 754 S.E.2d 494, 499 (2014), the representation made in the hearing included all absent members. The entire representation by class counsel was:

> And what the Diocese has come to is that if anybody has been missed or if there is anybody who responds as a result of these who have been identified to, ***the diocese waives all the same defenses*** that they have given up in this class settlement, consents to the same method of compensation, consents to the same early disposition of that claim, by a same arbitration method, the whole nine yards.

Emphasis added. The "or" after "if anybody has been missed" is significant. "[O]r these who have been identified," refers to what were called the "actual notice" class members. Compare this to the comments of counsel for the Diocese, who says, on p. 14 of the same transcript, "we got the find the other four [referring to the four actual notice persons not located] ***and*** we've got to find ***anybody else*** who has kind of, lack of a better word, comes out of the woodwork." Emphasis added. Each counsel reflected comments that went beyond the "actual notice" individuals. At that point class counsel said nothing about not including in that relief persons with repressed memory, or persons who resided out of state.

The written order has been interpreted to apply to only the actual notice members, I*d.*, not to the alternative "if anybody has been missed" representation made to the trial court. Had the court in *Doe v. Bishop*, ruled otherwise as to the defenses waived in the class action, class counsel would have recovered for absent class members what they claimed in 2007 to have recovered, and their lack of notice would not have altered the options for the appellants by

burdening their claims with the defenses waived in the class action.[10]

Respondent lawyers rightly observe that in 2007 counsel for the appellants, representing other victims, told them almost exactly the omission they were making as to notice to absent class members. Unknown to appellants' counsel in August, 2007, when that notice omission was explained, (a) class counsel intended the omission, they now say, and (b) the trial court had already been assured, in the hearing held on July 13, 2007 (a hearing that neither gave notice to nor included any of the persons who had objected to aspects of the class), that absent class members who were "missed" would enjoy the same options if and when they came forward.

Given that assurance, the trial court might have, but had no reason to, scrutinize the lack of out-of-state notice to a class defined so as include out-of-state residents.[11] However, the

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[10] Class counsel's summary, accepted by the Diocese in that 7/13/07 hearing, was that defenses were "waived." Class counsel now contends (brief at p. 10 and p. 39 n. 14), that no defense was "waived" by the Diocese, the Diocese just "agreed not to raise" certain defenses in the class action (brief at 10). It is a distinction without a difference. The settlement agreement filed January 17, 2007 states, at p. 5, that in the arbitrations the arbiter is not to consider "defenses such as lack of negligence or notice, statute of limitations, and charitable immunity." Voluntarily relinquishing something is what "waiver" means (Black's Law Dictionary, 10th Ed.). That those defenses were waived in the class action is important to this appeal as to the lawyers' conduct, since we now know that the appellants do not benefit from the waiver even though class counsel claimed to have gotten that relief. Compare, *Martin v. Hall*, 326 Fed. Appx. 191, 194 (4th Cir. 2009) (reversing and remanding trial court dismissal of breach of fiduciary duty claim against class counsel by absent class members for his "malfeasance as class counsel.") Appellants each must contend with defenses that should have been waived as to them.

[11] We agree, although it is irrelevant to appellants claims, that the trial court added to the in-state notice that it should also be published in the Florence *Morning News*. All in-state notice is irrelevant to the appellants. Note also that the trial court shortened the time that notice would run from the once a week for six weeks requested to once a week for three weeks. Compare Motion to Certify Classes of October 6, 2006 p. 3 (requesting *USA Today* and six weeks) and January 17, 2007 p. 3 (dropping *USA Today* but requesting six weeks), with the Order approving settlement of July 30, 2007 at p. 12 (three weeks). When *USA Today* was omitted, it was done so without explanation by class counsel, other than the assurance in the July 13, 2007 proceeding that would reasonably have informed the court that out-of-state notice was not an issue.

assurance as to appellants simply was never secured by class counsel in the form of a written order, so the assurance, (made after class certification), failed to secure that relief purported to have been obtained. Even if the trial court intended to protect appellants, the order has been construed to not include that relief to appellants. For that reason, *Doe v. Bishop* also held:

> Should appellants establish on remand that they were denied due process owing to lack of notice ***or because of inadequate representation in the class action*** proceedings, and that the statute of limitations was tolled, they may proceed to further prosecution of their claims.

754 S.E.2d 494, 501 (S.C. 2014) (emphasis added).[12]

Because the modification to the notice program occurred between October 2006 and January 2007, before the January 19, 2007 class certification, Judge Nicholson determined there could be no professional negligence (and no breach of fiduciary duty), implicitly concluding that only at certification are there any obligations to absent members of the class. The court's holding omits both that the issues of class counsel's inadequacy as to the appellants occurred both before certification (the proposed notice program) and after certification (failing to secure the relief claimed in July 2007). We contend that is an error of law. But it is also an error of law for Judge Nicholson to presume that there is no fiduciary obligation assumed when one pleads a class action, which initiates obligations to absent class members by both counsel and the putative class representatives, as the *Green* cases hold. The more fundamental error of law was for Judge Nicholson to use the complaint as the class definition when the definition was later expanded,

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[12] After the class action court received into the record of the class action information about the collaborative forum shopping by class counsel and the Diocese, class counsels' grotesque time records, and evidence of other misconduct issues there followed years of inaction by the court and then, in 2013, an order by which the class action judge recused herself, for no stated reason. Recusal order of January 24, 2013.

formalized, proposed, and certified on January 19, 2007.[13]

We now know that class counsel themselves intended to disadvantage their own absent class clients by reducing the notice program intentionally. A lawyer may not act against the interest of his clients. E.g., *Hege v. Aegon USA*, 780 F. Supp. 2d 416, 432 (D.S.C. 2011) ("An attorney for the class must be loyal to each member of it, and not act based on interests antagonistic towards it.") *Hege* found "ample evidence that Class Counsel placed their own interests above those of the class they purported to represent." 780 F.Supp. 2d at 435. Judge Nicholson erred as a matter of law in dismissing the professional negligence claims and breach of fiduciary duty claims.

3. **Class counsels' duty in a class action is to give the best practicable notice.** Class counsel's duty is not to "find everyone," as the respondent lawyers' brief incorrectly contends at p. 20 is the standard urged by appellants, but to give the best practicable notice to the class defined, as noted above is required by due process. *Hosp. Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 662, 591 S.E.2d 611, 621 (2004).[14]

There is great utility in the court clarifying for bench and bar the obligations of class

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[13] In their brief at p. 32 class counsel contend that these issues are raised for the "first time" on appeal, but they are issues that are included in the affidavit of Michael Virzi that are attached to the complaints. E.g., Virzi Affidavit in, e.g., 2010-CP-10-5520.

[14] Class counsel alternatively contends, brief at 35, that there is no proximate cause of harm unless the appellants can "prove" that out-of-state would have reached them. See also, brief at 40. Neither is the proper standard. The burden class counsel assumes when undertaking a class action is to give the best practicable notice. Class counsel admits that was not done, and admits it was intentional. Class counsel has breached their duties to appellants, and it is undisputed that appellants have lost the benefits of the class action as a result. For example, the benefit of the waived defenses. The only defense to that disadvantage would be if class counsel had given the best notice practicable, which class counsel says they deliberately did not do.

counsel and the class representatives. Do the holdings of *Premium Investment Corp. v. Green*, 283 S.C. 484, ___, 324 S.E.2d 72, 76 (Ct. App. 1984), and *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987), continue to apply? They should. Many cases[15] relate that obligation to the absent class as a fiduciary duty that arises at pleading, which requires class counsel understand those obligations when they are assumed. Or to clarify that there are no obligations, permitting class actions to be pleaded for effect, to alter negotiating leverage, and to enhance counsel's fee and personal gain of the putative class representative, only to drop the class treatment and claim when it suited the plaintiff. In other words, the court would affirm that the very conduct for which *Green* was sanctioned would not be permitted. *In re Green,* 291 S.C. 523, 354 S.E.2d 557 (1987).

Respondents' view, that the pleading obligations of the *Green* cases have been implicitly abandoned by the Rules of Civil Procedure, as the trial court determined, will enable such manipulations if Judge Nicholson is affirmed. We contend the holdings of the *Green* cases should instead be reaffirmed, explicitly, and this case remanded for further proceedings leaving intact the breach of duty causes of action against class counsel and the aiding and abetting claims against the Diocese.

The court should clarify for the bench and the bar the obligations on class counsel and the class representatives that arise at filing, at class definition, and at certification. We contend

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[15] The United States Supreme Court articulated the fiduciary obligation not later than 1949, *Cohen v Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549, 69 S.Ct. 1221, 1227 (1949) ("a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated.").

those should be construed as we have urged, overruling the trial court's use, for example, of an allegation of the complaint when there are formal class definitions that were later proposed and then adopted. And, since despite *Hospitality Management*, class counsel still does not recognize it, and disputes it, and admits to having intentionally proposed (with the full cooperation of the Diocese) a deliberately lesser notice while assuring the trial court that the best practicable notice originally proposed was not needed, the court should also reiterate that due process requires the best practicable notice be given to absent members of the class, and cannot, as a strategy, be disregarded.

Class counsel's obligation is to invite to participate in the class as many absent class members as can reasonably be invited, through the best practicable notice, so absent class members have a reasonable chance to become aware of the class action and to review his or her options about whether or not to participate: precisely the options which appellants were deprived all chance of by class counsel. That we are now told that deprivation was a deliberate tactic, to adopt lesser notice as a device to "benefit" out-of-state victims, to deliberately keep them unaware of the benefits class counsel had otherwise obtained for the class, is a strategy which should be. Respondents take their victims as they now find them, which after considerable effort and litigation by appellants have avoided having their claims entirely defeated by *res judicata*, as respondents have all urged in various ways, but now have to face the Diocese without the class agreement to not assert a variety of defenses the Diocese is now free to assert. The appellants are all disadvantaged by that intentional tactic of class counsel who chose to include them in the class as defined but then deliberately excluded them from any chance of notice and the

opportunity to participate.[16]

4. **Since the Diocese was entitled to assert defenses it had waived in the class action, those defense had to be confronted by appellants**. Given the full range of defenses which *Doe v. Bishop* entitles the Diocese to assert, some appellants did, but others did not, have a good faith factual argument by which to oppose a given defense. Class counsel suggests it is "baffling" (brief at 21), "inexplicable" (brief at 40 and 43) and "suspicious" (brief at 17) that appellants' counsel acknowledged to the trial court, as part of counsel's duty of candor to the court, that once *Doe v. Bishop* stripped from appellants the protection of the defenses waived in the class action, certain clients had no good faith argument to offset certain defenses. Those clients who had a good faith factual basis to oppose those defenses reached a partial settlement with the Diocese, although the settlements which were compromised because of those defenses. Those settlements preserved all claims against the respondent lawyers. As addressed in the initial brief, Judge Nicholson erred in regarding as identical the divergent injuries from the personal assault of the sexual abuse compared to the breach of professional duty and by finding those partial settlements could not preserve any claims against the lawyers. We contend that was an error of law.

5. **Persons other than the trial court are obligated to protect the interest of absent class members**. All respondents claim that the class action court alone has the obligation

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[16] Respondents quote only a portion of the allegations of paragraph 23 of the complaint in 2010-CP-10-5520. The rest of the allegation states, "If the court finds that the plaintiffs are precluded for any reasons, including the res judicata effect of the class action, charitable immunity, of by the statute of limitations, ... then those claims are properly made against those who conspired against them as well as the Richter defendants who failed to properly represent them." One injury is a personal injury. The other is a breach of duty injury.

to protect the rights of absent class members, and from that argue that if the class action court's orders are complied with then they can have no liability to absent class members. While we agree the court is also obligated to protecting the interest of absent class members,[17] that obligation is not exclusive to the court.[18] Nor is there a rationale for making the obligations different in federal court than in state court. If only the court, not the parties or counsel, had any obligation then neither *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) nor *Premium Investment Corp. v. Green,* 283 S.C. 484, 324 S.E.2d 72 (Ct. App. 1984) would ever have existed. Nor does *In re Green,* decided in 1987, undertake any analysis suggesting its rationale would be changed in any way under the Rules of Civil Procedure adopted two years before it was decided, and there is no reason that adopting the rules changed the due process obligations of class counsel or the ethical obligations of counsel and parties to the court and other parties. Nor can we find any South Carolina state case other than the *Green* cases that discuss class counsel's obligations at pleading and at certification. It is useful for the court to organize and articulate those obligations or, as urged by class counsel, to declare plainly that there are no such obligations, to enable all lawyers to know that the obligations apparently required by the *Green* cases may be ignored. But those obligation ought to be reaffirmed.

On this record, the trial court was disadvantaged in protecting absent class members

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[17] E.g., *Runion v. Shelter*, 98 F.R.D. 313, 318 (D.S.C. 1983) (district court "acts as a fiduciary who must serve as a guardian of the rights of absent class members," even prior to certification); *Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978) (absent class members have substantial due process rights even before certification).

[18] E.g., *Runion v. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983) ("The class representative must voluntarily accept a fiduciary obligation towards all the members of the putative class."); *Martin v. Ball*, 326 Fed. Appx. 191 (4th Cir. 2009) (remanding breach of fiduciary duty case brought against class counsel for his "malfeasance as class counsel.")

given the representations made to the court by all respondents.

6. **The special circumstances of Doe 193**. If preserving rights for persons such as Doe 193 was impossible, as class counsel now claims, it would have been simple to define the classes to not include him and others like him. Instead, he was included in the definition. And when class counsel discussed in July 2007 to have solved the problem of (as put by class counsel) people "missed" who later (as put by the Diocese) "come out of the woodwork," class counsel should have secured those rights in a written order but failed to do so.

The class is defined, essentially, as persons born before August 30, 1980 who were sexually abused by Diocesan personnel. In other words, the class has a limited life span. Repressed memory claims are relatively rare, so there are not ever likely to be many such claims. As class counsel's brief discloses, sufficient funds remained after the class action arbitration processes to accommodate a claim for John Doe 193, had class counsel properly secured the benefits they claimed to have secured for him. His interest could have been protected in the class. His issue with class counsel is not notice. It is class counsel having failed to secure for him the rights that after certification class counsel claimed to have secured, and assuming duties to him which were breached.

7. **"Additional sustaining grounds" are not properly at issue on tis appeal**. The Diocese contends, brief at pp. 4 - 5 n. 6, that additional grounds to sustain the trial court lurk in various filings of the Diocese. As noted above, none of those additional grounds was ruled on by the trial court, so are not preserved for appeal. Only the actual rulings of the trial court are before the appellate court.

8. **"Judicial attention" does not justify the "cloned class action" technique for forum shopping**. As noted above, forum shopping is one of the "red flags" identified in the Manual for Complex Litigation, Fourth, § 21.61 indicating potential misconduct by class counsel.[19]

Class counsel contends that "judicial attention" supported re-filing the identical class action in Dorchester County as a means to effectuate their undisputed forum shopping. E.g., brief at pp. 8 and 9. The goal of "judicial attention" is, of course, different from the means used to achieve that goal. This appeal concerns both. Shopping for a particular judge required collaboration of counsel for both the class and the Diocese. Since complex designation in any county would have achieved "judicial attention" from a single judge, this court should plainly reject the "cloned class action" forum shopping technique. The complex case order already permits a case to be assigned by the administrative judge "to a judge assigned to the circuit or an adjoining circuit." Class counsel could have proposed the "judicial attention" theory directly, to the administrative judge in Charleston, where the class action settlement was reached and where the only class action case was pending when the settlement was reached. But of course from Charleston, the adjoining circuit in the Ninth Judicial Circuit is Berkeley County, and what class counsel wanted was a particular judge from Dorchester County with close social and professional ties to class counsel (Order of July 13, 2007, recording that those ties were disclosed to the Diocese, but nothing indicates they were disclosed to the class). So the "cloned class action" technique — refiling the identical class action in Dorchester County — was used

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[19] Notice that class counsel makes no attempt to justify in any way other indicators that class counsel's interest was the first priority of the class action, such as the patently distorted time records, negotiating a fixed fee for themselves but a variable recovery for the class, or charging

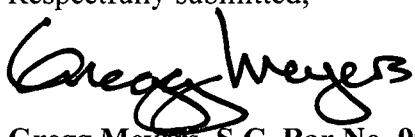
instead.

If the "cloned class action" technique is an appropriate forum shopping device, it should be made available to all lawyers in South Carolina. We contend it should be plainly rejected, as it reflects class counsel's manipulation of the class action for his own benefit and is but one aspect of improper collaboration by the Diocese that is part of its aiding and abetting class counsel in breaching fiduciary duties to the appellants.

Conclusion

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

Respectfully submitted,



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Proof of Service

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

Appellant's Reply Brief and Supplemental Designation of Matter to be Included In the Record

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

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October 22, 2018

Via First Class Mail:
Hon. Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
PO Box 11629
Columbia, SC 29211

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

Dear Ms. Kitchings:

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

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

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

Sincerely,

Gregg Meyers

Enclosures:
Proof of Service
Initial Brief
Designation

cc: counsel of record

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