

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2019-001471

RECEIVED

NOV 14 2019

SC Court of Appeals

John Doe,.....Respondent,

v.

The Diocese of Charleston, a Corporation Sole, and
the Bishop of the Diocese of Charleston, in his official capacity,.....Defendants,

Of whom the Bishop of the Diocese of Charleston,
in his official capacity is the.....Appellant.

RESPONDENT’S REPLY TO RETURN TO MOTION TO DISMISS APPEAL

Respondent John Doe, in Reply to the Appellant’s Return to Respondent’s Motion to Dismiss Appeal, would respectfully show the Court as follows:

- I. A REVIEW OF THE APPELLANT’S RETURN INDICATES THAT THE APPELLANT IS CONFUSED AS TO THE IDENTITIES OF THE PARTIES AND THE SCOPE OF THIS APPEAL.

The September 3, 2019 Notice of Appeal in this matter appealed the Circuit Court’s ORDER DENYING DEFENDANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING PLAINTIFF’S MOTION TO COMPEL DISCOVERY, which order was

entered on July 24, 2019. As shown by July 24, 2019 Order of the Circuit (attached to the Notice of Appeal), there are two Defendants in this action, the “Bishop of Charleston, a Corporation Sole,” and the “Bishop of the Diocese of Charleston, in his official capacity.” Only one of these two Defendants, the “Bishop of the Diocese of Charleston, in his official capacity” (also referred to in the Notice of Appeal as both the “Bishop of Charleston, in his *official* capacity” and the “Bishop of Charleston in his *individual* capacity”), has filed a Notice of Appeal (*i.e.*, there is only one Appellant in this appeal, the “Bishop of the Diocese of Charleston, in his official capacity”). The other Defendant, the Bishop of Charleston, a Corporation Sole, has not filed a Notice of Appeal and is therefore not a party to this appeal.

Regardless of whether the Appellant prefers to be called the “Bishop of the Diocese of Charleston, in his official capacity,” or the “Bishop of Charleston, in his official capacity,” or even the “Bishop of Charleston in his individual capacity,” the fact remains that the only thing that has been appealed in this case is the denial of a motion for partial summary judgment, which is not appealable.

II. THE APPELLANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT DEALT SOLELY WITH THE ISSUE OF WHETHER THE APPELLANT IS A PROPER PARTY TO THE ACTION.

A copy of the Appellant’s Motion for Partial Summary Judgment, filed March 29, 2019, is attached hereto as **Exhibit A**. It will be noted in the Appellant’s Motion that he claimed that the “Bishop of the Diocese of Charleston, in his official capacity,” is not a proper party defendant and that the Corporation Sole is the only proper party defendant. However, the Circuit Court rejected this argument, noting in numbered paragraph 2 of the appealed Order:

2. Plaintiff argued that the Bishop is a proper and necessary defendant. The Plaintiff presented numerous public documents from multiple lawsuits and records of real estate transactions bearing directly on this issue. Specifically, it was powerfully and persuasively shown that there is a long precedent of the Diocese being sued in the name of the Bishop, as styled in this Complaint (i.e., “the Bishop of Charleston, in his official capacity”) in South Carolina and within those same cases the Bishop has answered, sought affirmative relief, entered settlement agreements, and in some instances, been afforded relief. The Plaintiff offered proof that the Bishop has conveyed property pursuant to legal instruments recorded in South Carolina and that the Bishop entered into the 2007 class action settlement in his official capacity, having been sued in that name, not objecting, and represented by counsel throughout that matter, and even showed that the very Counsel who made challenge that the Bishop as referenced in the caption is a non-entity and not capable of being sued actually represented and acted for the Bishop when sued using the exact same nomenclature. Further, it was shown that then general counsel for the Diocese brought a suit using the same name as used herein with the Diocese/Bishop in the role of Plaintiff seeking a monetary recovery against various insurance carriers. The Plaintiff also chronicled the Bishop’s actions in this case, which included numerous responses and acts before the issue of the Bishop not being a proper defendant was raised.

The Circuit Court correctly determined that the Appellant had been properly joined as a party defendant and further determined that he was a necessary party, and accordingly denied the Appellant’s Motion for Summary Judgment. As will be seen below, the denial of the Appellant’s motion for partial summary judgment is the only portion of the Circuit Court Order the Appellant has appealed.

III. IN HIS INITIAL BRIEF FILED IN THIS APPEAL, THE APPELLANT HAS RAISED ONLY TWO ISSUES, BOTH DEALING ONLY WITH THE DENIAL OF SUMMARY JUDGMENT AS TO WHETHER HE IS A PROPER PARTY DEFENDANT.

In the Statement of Issues on Appeal on page 1 in his Initial Brief, the Appellant has raised only two issues in this appeal:

1. Did the Circuit Court err in denying summary judgment to the ecclesiastical office of Bishop of Charleston where that decision violates the Religion Clauses of the First Amendment, as incorporated to the States under the Fourteenth Amendment?

2. Did the Circuit Court err in refusing to dismiss claims against the ecclesiastical office of Bishop of Charleston, which has no presence in civil law, where that decision violated the well-established precedent of the United States Supreme Court?

In his Initial Brief, the Appellant contends that “the Bishop *of the Diocese* of Charleston, in his official capacity,” is not a proper party. (Initial Brief, p. 2) The Initial Brief goes on to argue that “Respondents’ claims against ‘the Bishop *of the Diocese* of Charleston, in his official capacity’ implicate the legal presence of the Bishop of Charleston in the temporal world.” (Initial Brief, p. 5)

- IV. THE APPELLANT CANNOT INJECT ADDITIONAL ISSUES INTO THIS APPEAL BY WAY OF HIS RETURN TO THE MOTION TO DISMISS THE APPEAL OR BY ANY OTHER MEANS.

The Appellant’s attempt to inject additional issues into this appeal by way of his Return is not permitted under the rules of appellate procedure. Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal. Rule 208(b)(1), SCACR; *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14 (2000). All issues must be presented and argued in the initial briefs; no new arguments may be made in the final briefs. Rule 211(b), SCACR. Moreover, an appellant may not use the reply brief as a vehicle to argue issues not argued in the appellant’s brief. *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989). Additionally, an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant’s brief. *In re: Bruce O*, 311 S.C. 514, 429 S.E.2d 858 (Ct. App. 1993).

- V. THE ONLY ISSUE BEFORE THIS COURT AT THIS TIME IS WHETHER THE CIRCUIT COURT’S ORDER DENYING THE APPELLANT’S MOTION FOR SUMMARY JUDGMENT IS IMMEDIATELY APPEALABLE.

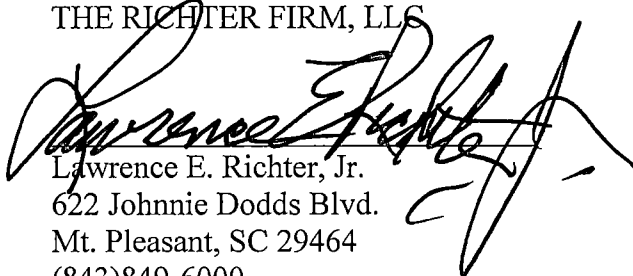
As previously stated in Respondent’s Motion to Dismiss Appeal, an order denying summary judgment is not appealable. The denial of summary judgment does not finally determine

anything about the merits of the case and does not have the effect of striking any defense. *Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994); *Olson v. Faculty House of Carolina, Inc.*, 354 S.C.161, 168, 580 S.E.440, 444 (2003) (“[T]he denial of [a motion for] summary judgment is not appealable, even after the final judgment.”); *Brown v. Sojourner (In re Estate of Brown)*, 424 S.C. 589, 818 S.E.2d 770 (S.C. App. 2018); *Vicary v. Town of Awendaw*, 427 S.C. 48, 828 S.E.2d 229 (Ct. App. 2019).

Accordingly, Respondent respectfully asks that this appeal be dismissed.

Respectfully submitted,

THE RICHTER FIRM, LLC



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ATTORNEY FOR RESPONDENT

Mt. Pleasant, South Carolina

November 11, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2018-CP-10-3929

John Doe,

Plaintiff,

vs.

The Diocese of Charleston, a Corporation
Sole, and The Bishop of the Diocese of
Charleston, in his official capacity,

Defendants.

**MOTION FOR PARTIAL SUMMARY
JUDGMENT AS TO "THE BISHOP OF
THE DIOCESE OF CHARLESTON, IN HIS
OFFICIAL CAPACITY"**

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JULIE J. GIBSON
CLERK OF COURT
BY

Defendant Bishop of Charleston, a Corporation Sole (incorrectly identified in the Complaint as "the Diocese of Charleston, a Corporation Sole" hereby moves pursuant to Rule 56 for an order dismissing "the Bishop of the Diocese of Charleston, in his official capacity." As grounds, Defendants state as follows:

1. The defendant styled "Bishop of the Diocese of Charleston, in his official capacity" is not a real party in interest, and is not a proper defendant.

Plaintiff's Complaint contends that "The Bishop of the Diocese of Charleston . . . is sued in his official capacity. The Bishop is ultimately responsible for the priests and other employed by the Diocese. Bishop is the successor in interest to his predecessors in his official position." Unlike a government agency, which by law must be sued in the name of the agency head, the law does not require the Roman Catholic Diocese of Charleston, or the Corporation Sole, to be sued in the name of its titular head. No statute or Rule mandates that the individual holding the office of Bishop of Charleston, be sued in his official capacity.

Furthermore, there is no basis under South Carolina law for Plaintiff's claim that "Bishop is the successor in interest to his predecessors in his official position." Whether, and to what extent any individual bishop may be held liable for the acts of another would require the Court to look to Canon Law and the allocation of power and authority within a hierarchical church and to



make civil determinations regarding the doctrines of the Catholic Church. Yet that very inquiry to reconcile whether a Bishop can be held responsible for acts taken by his predecessor is absolutely prohibited by the First Amendment.¹ A civil court is not permitted to reconcile competing interpretations of church law or church decisions, for doing so would constitute a civil determination of religious doctrine and would violate the Establishment Clause.² There is no neutral way for the Court to determine whether a subsequent Bishop is responsible for the decisions of his predecessor.

In short, determination of whether a Catholic bishop is the successor-in-interest to his predecessors such that he is civilly liable for the predecessor's acts cannot be ruled on without violating the Church's First Amendment rights. It is beyond question that the Catholic Church is hierarchical and that its ecclesiastical decisions may not be undermined or disturbed by a civil court. Even the inquiry into whether one bishop may be individually liable for the acts of another would tread on the Church's First Amendment rights. The parties would have to introduce expert testimony on Canon Law, and the Court would have to research and make decisions regarding questions of Church doctrine. There is no simple, religion-neutral way to decide the question.

Because the Court is prohibited from even drawing on the Catholic Church's ecclesiastical decisions, matters of Canon Law, or Catholic doctrine, it will be unable to decide questions of successor liability.

Thus, pursuant to Rule 17, "the Bishop of Charleston, in his official capacity" is *not* a real party in interest and should be dismissed as a party-defendant.

Importantly, Plaintiff has not identified *what person* he contends may be liable to him, or why. He has brought suit against an unnamed officeholder – not a person who may have done or

¹ *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

² *Id.* at 709.

not done something. Plaintiff has not sued a party at all – there is no basis for holding an official title or position responsible for any action by any individual. The office of the Bishop of Charleston is not a real party in interest and must be dismissed from the case. *See also* Rule 8(a), SCRCPC (setting forth that a Plaintiff’s pleading must “contain a short and plain statement of the facts showing that the pleader is entitled to relief”).

2. The amorphous “Bishop of the Diocese of Charleston, in his official capacity” does not have the capacity to be sued.

“The capacity of a party to sue or be sued shall be determined by the law of this State.” Rule 17, SCRCPC. Plaintiff has not actually sued an identifiable person who may be liable to him – and he has not named as a defendant any person with the capacity sue or be sued. Rather, plaintiff has named an office or an ecclesiastical position. The office itself does not have capacity to be sued as provided under Rule 17, SCRCPC. The acts described in the Complaint occurred decades ago during the administration of Bishop Ernest Unterkoefler, who died in 1991. Bishop Unterkoefler cannot be sued, in his official capacity or otherwise, at this point. There is no genuine issue of material fact that “the Bishop of the Diocese of Charleston, in his official capacity” has no capacity to be sued under Rule 17 and should be dismissed from the action.

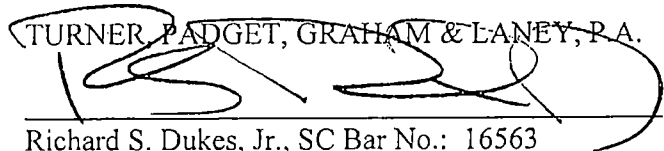
3. The Corporation Sole is the only proper party, and the only party with the capacity to be sued.

In 1880, the South Carolina General Assembly passed Act 264 to establish “Bishop of Charleston, a Corporation Sole” as the corporate entity of the Roman Catholic Church in South Carolina. The statute authorized the Corporation Sole to transact business, hold and dispose of real and personal property, and, importantly, “to sue and be sued, plead and be impleaded, answer and be answered unto, in any Court in this State.”³ The presence of an unnamed and

³ Act 264, December 13, 1880 (17 Stat. 321).

unidentifiable "Bishop of the Diocese of Charleston, in his official capacity" is unnecessary to the resolution of Plaintiff's claims.

The Corporation sole is not like a government agency where, by statute, the head of the agency must be named as the defendant in his or her official capacity. Rather, the Corporation Sole is, by statute, a body corporate that can sue and be sued just as any corporation, LLC, or nonprofit corporation can. It is not necessary in most circumstances to sue the officers, directors or board members of a corporate entity in their "official capacity," and it is not necessary here.

TURNER, PADGET, GRAHAM & LANEY, P.A.


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March 29, 2019

ATTORNEYS FOR DEFENDANTS

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2018-CP-10-3929

John Doe,

Plaintiff,

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Defendants.

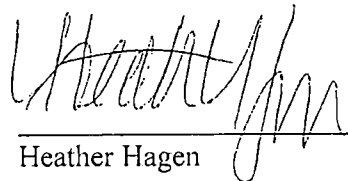
CERTIFICATE OF SERVICE

2019 MAR 29 PM 1:07
JULIE J. GENTILE
CLERK OF COURT
BY _____

I hereby certify that this 29th day of March, 2019, a copy of *Motion for Partial Summary Judgment as to "the Bishop of the Diocese of Charleston, in his official capacity"* has been served upon other counsel of record by placing same in the United States Mail, postage prepaid, to:

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Attorneys for Plaintiff



Heather Hagen

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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Bentley D. Price, Circuit Court Judge

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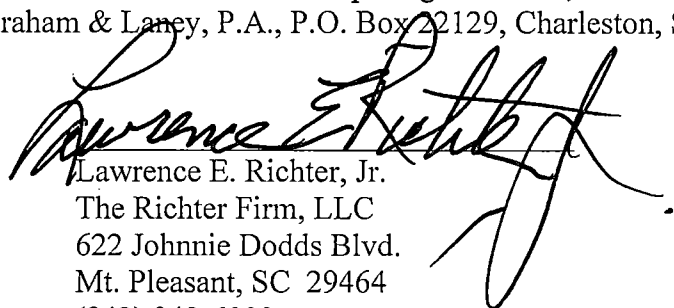
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The Diocese of Charleston, a Corporation Sole, and
the Bishop of the Diocese of Charleston, in his official capacity,.....Defendants,

Of whom the Bishop of the Diocese of Charleston,
in his official capacity is the.....Appellant.

PROOF OF SERVICE

I certify that I have this 11th day of November, 2019 served a copy of Respondent's Reply to Return to Motion to Dismiss Appeal on counsel for Defendants and Appellant by causing it to be deposited in the United States mail with sufficient postage attached, addressed to: Richard S. Dukes, Jr., Turner Padgett Graham & Laney, P.A., P.O. Box 22129, Charleston, SC 29413.



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November 11, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

In Re: John Doe v. Bishop of Charleston
Appellate Case No. 2019-001471

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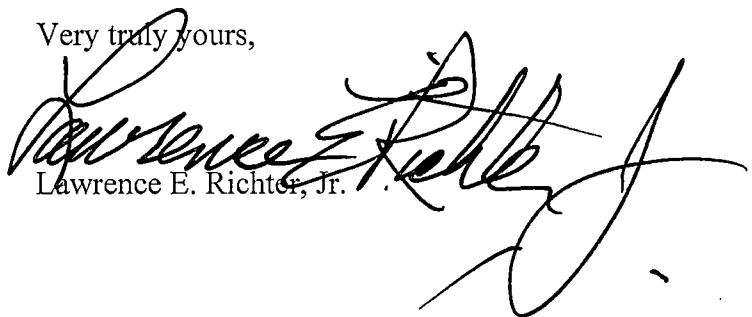
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Respondent's Reply to Return to Motion to Dismiss Appeal, together with a Proof of Service, in regard to the above-referenced matter. Please file the original and necessary copies and return the file-stamped copy to our office in the enclosed, self-addressed, stamped envelope. By copy of this letter to Richard S. Dukes, Jr., attorney for the Appellant, I am serving him with a copy of the same.

With best regards, I am

Very truly yours,


Lawrence E. Richter, Jr.

LER/lwh
Enclosures

cc: Richard S. Dukes, Jr.



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