RECEIVED
FEB 21 2020
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2019-001470

John Doe,.....Respondent,

v.

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

and

Richard Roe,.....Respondent,

v.

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

---

PETITION FOR WRIT OF CERTIORARI

Richard S. Dukes, Jr.
R. Hawthorne Barrett
TURNER PADGET GRAHAM & LANEY, P.A.
40 Calhoun Street, Suite 200 (29401)
Post Office Box 22129
Charleston, South Carolina 29413-2129
Telephone: 843-576-2810
Email: rdukes@turnerpadget.com
tbarrett@turnerpadget.com

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Pursuant to Rule 242, SCACR, the Petitioners, Bishop of Charleston, a Corporation Sole, and the "the Bishop of the Diocese of Charleston, in his official capacity" ("the Diocese") hereby petition this Court to issue a writ of certiorari to the Court of Appeals and to review that Court's decision in this matter. In making this petition, the Diocese respectfully submits that the Court of Appeals erred in dismissing this appeal as interlocutory. The Court filed that Order on December 2, 2019, and the Diocese timely petitioned for rehearing. The Court of Appeals denied rehearing on February 14, 2020, which counsel received on February 18, 2020. This petition is timely under Rule 242(c), SCACR.

STATEMENT OF ISSUES ON APPEAL

1. **Does an Order compelling production of the names of victims of childhood sexual abuse present an exceptional circumstance warranting issuance of a writ of certiorari to review a discovery order?**

2. **Should a contempt order for failing to comply with a discovery order be required before an appeal may be taken to review a discovery order?**

3. **Does an Order disregarding the well-established First Amendment liberties of a religious organization merit immediate appellate review?**

STATEMENT OF THE CASE

These consolidated appeals arise from multiple orders in civil actions brought by the Respondents "John Doe" and "Richard Roe." The Respondents commenced those actions against The Diocese of Charleston, a Corporation Sole[1] and "the Bishop of the Diocese of Charleston, in his official capacity" based on allegations of past sexual abuse. John Doe alleged he was molested by two teachers at Sacred Heart School in 1970 and 1971. Richard Roe alleged he was molested by Fr. Frederick Hopwood in 1954 or 1955.[2] The Diocese timely moved to

[1] The true name of the Corporation Sole is "Bishop of Charleston, a Corporation Sole."

[2] The Doe claims occurred during the time Bishop Ernest Unterkoeffler served as Bishop of Charleston. Bishop Unterkoeffler retired as Bishop in 1990 and died in 1993. The Roe claims occurred during the service of Bishop John Russell who was appointed Bishop of Richmond in 1958. Bishop Russell retired in 1973 and died in 1993. The current Bishop, Bishop Robert Guglielmone, was appointed Bishop of Charleston in 2009.

dismiss the two Complaints based upon common law charitable immunity and the *res judicata* effect of the 2007 class action settlement with (1) all individuals born on or before August 30, 1980 who claim to have been sexually abused as minors by the Diocese of Charleston personnel and (2) those individuals' spouses and parents.

The circuit court heard the motions to dismiss on December 14, 2018, and denied those motions in orders filed on March 4, 2019. The Petitioners then answered the Complaints, raising First Amendment defenses and pleading that "the Bishop of the Diocese of Charleston, in his official capacity" was not a proper party. On March 29, 2019, 14 days after answering the Complaints, the Diocese moved for partial summary judgment seeking dismissal of all claims against "the Bishop of the Diocese of Charleston, in his official capacity." Prior to the hearing on the motions, the Diocese submitted additional authority in support, including the Bylaws of Bishop of Charleston, a Corporation Sole and the deposition testimony of Bishop Robert E. Guglielmone. Both clearly establish for the record that the ecclesiastical office of Bishop of Charleston is not a civil law office and does not have a presence in the civil law arena.

Early in the cases, the Respondents served extensive discovery requests that sought, among other things, information about past victims of sexual abuse. The Petitioners filed a Motion for a Protective Order as to those requests. Subsequently, on April 2, 2019, the Petitioners provided responses to the discovery requests, but objected to the requests for information and documents about past victims of abuse. The Respondents then served additional discovery requests. The Petitioners responded to those requests, but again objected to any and all requests seeking that confidential information and materials. The Petitioners also filed a motion for a protective order that would prevent the release or production of the names of any past sexual abuse victims.

On July 17, 2019, the circuit court conducted a hearing on several pending motions, including the Petitioners' Motions for Summary Judgment and motions by the Respondents to compel production of the materials and information that the Petitioners claimed were confidential. At that hearing, the judge ordered the Petitioners to respond to plaintiffs' overly broad discovery requests and ruled that the Court would hold a hearing on Petitioner's objections to the discovery requests in short order. However, the Court further noted that Petitioner must be prepared to provide full responses to any ruling within 24 hours of that review. The Court also denied summary judgment to "the Bishop of the Diocese of Charleston, in his official capacity," by written order dated July 24, 2019.

The Petitioners filed timely motions asking the circuit court to reconsider and reverse its decisions regarding production of confidential information and materials and the denial of summary judgment. After the denial of those motions, the Petitioners commenced separate appeals. The Respondents moved to dismiss the appeals, claiming the challenged orders were not immediately appealable. The Petitioners filed returns in opposition, which set forth the reasons why the orders are, and must be, subject to immediate appellate review. The Court granted the motions to dismiss in an Order filed on December 2, 2019. In that Order, the Court also consolidated the two appeals.

ARGUMENT

I. The Court should grant certiorari because the discovery order requiring the Petitioners to produce confidential and personal information is immediately appealable inasmuch as an appeal after a final judgment would not provide any meaningful recourse for the Petitioners or innocent victims of sexual abuse impacted by the order.

The circuit court has ordered the Petitioners to produce information and documents (with no redactions or other protections) that are highly confidential, and production of which will

subject the Petitioners, as well as innocent third parties, to immediate harm. Specifically, the order requires the Petitioners to reveal the identities of adults who were sexually abused as children. The circuit court did not enter any sort of protective order regarding these documents which personal identifying information regarding victims of sexual abuse. The Petitioners have a duty, both legal and moral, to keep those names confidential and private, especially where those victims have chosen to guard their identities and to shun any publicity of their past trauma. The challenged order forces the Petitioners to violate that duty, and once that proverbial genie has left the bottle, no appellate review would be of any consequence.

Numerous victims of sexual abuse have come forward over the years and the Petitioners have respected and guarded their anonymity. Most, if not all, of those victims reached some type of confidential resolution with the Petitioners, and many have received psychological counseling to help them deal with their abuse. The fact that victims are encouraged to report past sexual abuse and the counseling and pastoral support provided by Petitioners could be drastically undermined if victims know that their identities will be provided to lawyers, who plan to contact them and ask about their traumatic pasts. Furthermore, complying with this order will force the Petitioners to violate confidentiality provisions in the settlements reached with most, if not all, of those past victims. This would, in turn, subject the Petitioners to the threat of legal actions and damages for that breach. Thus, the order creates a real and immediate threat of harm to the Petitioners.

Simply put, the challenged order must be appealed now if appellate review is to have any meaning. If the Petitioners are forced to comply with that order before appealing, the confidential information will be disclosed. Even if the Court were later to agree with the Petitioners on the merits of their arguments against the order, such a post-disclosure reversal of

the order would be no remedy at all. At that point, the damage would be done and irreversible. In the truest sense, these cases present a "now or never" scenario for purposes of an appeal.

Furthermore, there is ample authority in South Carolina to support the immediate appealability of orders that compel a party to reveal or produce confidential information. As former Chief Justice Toal states in her treatise, "If an order requires a party to turn over documents, which the party feels are privileged or contain proprietary or confidential matters, compliance with the order without the ability to seek immediate appeal renders the protections afforded by the privilege or confidentiality a nullity." Toal, et al. *Appellate Practice in South Carolina* (2nd Ed.) at 94. Unless such an order is immediately appealable, it would be effectively unreviewable on appeal from a final judgment, as a reversal at that late stage would be no relief at all.

The Court of Appeals' decision in *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354, 355 (Ct. App. 2004), is instructive. In *Doe*, a former client sued his attorney and moved to proceed anonymously because the underlying civil action involved allegations of sexual abuse. The circuit court denied that request, and the client appealed. This Court noted that an order is appealable if it "(1) conclusively determines the question, (2) resolves an important question independent of the merits, and (3) is effectively unreviewable on appeal from a final judgment." 362 S.C. at 216, 607 S.E.2d at 356. The Court then held that the challenged order met the appealability criteria because it "ha[d] the effect of revealing [the client's] identity, the very thing he was seeking to keep confidential." *Id.* at 217, 607 S.E.2d at 356.

In granting the motion to dismiss as to the discovery order, the Court of Appeals cited only *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986), for the proposition that "[a]n order directing a party to participate in discovery is interlocutory and not directly

appealable under S.C. Code §14-3-330." Although *Whetstone* does contain that language, the discovery order in the present appeal is significantly different than the one involved in *Whetstone*. Therefore, that case is readily distinguishable and does not support any decision to dismiss these appeals.

In *Whetstone*, the circuit court ordered a non-party witness to appear for a deposition and to produce certain documents. The Supreme Court dismissed the witness' appeal, stating that a non-party ordered to participate in discovery could either comply with the order, thereby waiving any right to appeal, or refuse to comply, be held in contempt, and then appeal the contempt order. The Court further supported its decision by noting that the witness was a non-party, who could not suffer any "legal injury" (which would create the right to appellate review) unless and until there was a finding of contempt.

Significantly, there is no indication whatsoever that the witness in *Whetstone* claimed the testimony and documents compelled by the order were confidential or privileged. For all the opinion shows, the witness simply did not want to participate in the deposition or to produce the documents. Thus, the Supreme Court was not asked to consider, and made no ruling on, the issue of whether a discovery order is immediately appealable if it compels the production of confidential information.

Petitioners' situation stands in stark contrast to the facts presented in *Hensley v. South Carolina Dep't. of Soc. Svcs.*, Shearhouse Advance Sheets Op. 27941 (Jan. 29, 2020). In that case, this Court determined that the parties had not established that the discovery order actually involved disclosure of confidential information at all. The present case is on par with *Doe v. Howe* as the record clearly reflects Petitioners' effort to protect the identities of victims of sexual

abuse from disclosure and to avoid the possibility of humiliation and social stigmatization resulting from that disclosure.

Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 8, 630 S.E.2d 464, 468 (2006) is likewise instructive. In that case, a company attempted to unseal the divorce records of an employee who admittedly embezzled from it. The lower court entered an order allowing the company to examine the divorce records to inspect the employee's financial representations, and the employee appealed. The Supreme Court concluded that the order "determined a substantial matter forming the whole or part of the family court proceedings in which [the company] sought access to the record of the [employee's] divorce." 369 S.C. at 5, 630 S.E.2d at 466. "Moreover, [the Court] agree[d] with courts which have been included to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure." *Id.* at 8, 630 S.E.2d at 468 (emphasis added). "Compelling a party that disputes an unsealing order to forego an appeal until the conclusion of the underlying litigation would let the cat out of the bag, without any effective way of recapturing it if the [lower] court's directive was ultimately found to be erroneous." *Id.* (quoting *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 9 (1st Cir. 1998)) (emphasis added).[3]

The principles applied in *Doe* and *Ex parte Capital* are also controlling in the present appeals. Just as in those cases, the challenged order requires the production and release of highly confidential information. Whether or not the circuit court should have ordered that production

[3] *See also Knight Publishing Co. v. University of S.C.*, 295 S.C. 31, 367 S.E.2d 20 (1988) ("[a]n order allowing discovery of documents that a newspaper ultimately sought disclosed as the subject of [a] FOIA action was immediately appealable because it in effect determined the action and prevented an appealable judgment."), *overruled on other grounds*, *Simpson v. Sanders*, 314 S.C. 413, 445 S.E.2d 93 (1994).

and release is a question that an appellate court must answer now. Otherwise, the Petitioners will be denied any opportunity for meaningful review of the order. A post-judgment appeal would have been too late in *Doe* and *Ex parte Capital*, and such an appeal would be equally moot here.

The Court of Appeals' brief Order granting the motions to dismiss gives no indication that the Court considered or applied *Doe* and *Ex parte Capital*. The Petitioners respectfully submit that in failing to take those controlling authorities into account, the Court overlooked or misapprehended the key factor that makes the challenged order much more than the granting of a garden variety motion to compel.

This case is parallel to a matter currently before the Court. The Supreme Court has recently granted an extraordinary writ and has requested briefing as to whether a finding of contempt is a necessary prerequisite to appellate review of a discovery order. *See* Order in *Mark C. Mosley v. Christine Alston*, Appellate Case No. 2019-001056 (filed October 3, 2019).[4] Thus, to the extent it relied on a "contempt first" rule in granting the motions to dismiss, the Court of Appeals erred in dismissing Petitioner's appeal and this Court should grant certiorari to review the Court of Appeals' decision.

II. A party resisting an order compelling production of confidential information regarding victims of sexual abuse as minors should not be required to be held in contempt in order to appeal the discovery order.

Under the Court of Appeals' ruling, the only way Petitioners could effectively challenge a discovery order would be to subject themselves to an order finding them in contempt. However, it would seem holding a party in contempt for seeking to protect the identities of victims of sexual abuse would be inconsistent with the very purpose of the contempt power. Contempt is an extreme remedy with a specific purpose. "Courts exercise contempt power . . . to

[4] A copy of the Order is attached as an exhibit to this petition.

punish those who show disrespect for the court or its orders, and to enforce its judgments." 17 Am. Jur 2d Contempt § 4. Contempt normally is reserved for willful acts with bad purpose behind them – either to defy the law, or to fail to do something the law requires. *See State v. Bevilacqua,* 316 S.C. 122 447 S.E.2d 213, 217 (Ct. App. 1994). In contrast to the criminal nature of a contempt citation, a litigant seeking to protect the identities of victims of childhood sexual abuse is not engaging in lawless behavior and is not seeking to undermine the administration of justice. There is no "bad purpose" behind following the wishes of victims to remain anonymous. Thus contempt would seem inappropriate and a direct appeal more efficient and just.

By the same token, requiring a "contempt framework" for review of discovery orders, undermines the purpose of the contempt authority. If parties are required to sustain contempt findings and sanctions in order to seek appellate review, then risking contempt becomes more a tactical procedure available to the parties rather than an ultimate punishment to be levied by the courts. The court's authority is thereby weakened.

Rather than undermining and weakening the judiciary's powerful contempt authority, the better course is to recognize an immediate appeal when a discovery order requires a party to reveal the identities of victims of sexual abuse.

III. The denial of the summary judgment motion is immediately appealable because it impacts the Petitioners' substantial rights under the First Amendment to the United States Constitution.

In light of the clear authority supporting immediate appellate review of the discovery orders in these cases, the Court need not conduct a thorough review of the reasons why the denials of the summary judgment motions are immediately appealable. Rather, the Court can simply review those orders in conjunction with the discovery orders, regardless of the former's

appealability. "An order not immediately appealable will nonetheless be considered if there is an appealable issue before the appellate court, and a ruling on appeal will avoid unnecessary litigation." Toal, et al. *Appellate Practice in South Carolina* (2nd Ed.) at 88 (citing *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998)).

The circuit court's orders ignore the very fundamental freedom of religion enjoyed by religions and enshrined into the First Amendment's Free Exercise and Establishment clauses. The circuit court's decision overturns both the Church's determinations of how the Catholic Church exists in the civil, rather than the ecclesiastical, context. This constitutes a veritable attack on the Church's First Amendment rights and causes the Court to engage in an impermissible inquiry into canon law and Church doctrine. The ruling stands in stark contrast to nearly 150 years' of precedent that civil courts must accept, and give full effect to, the decisions of religious organizations regarding how the church will be organized and structured. The Petitioners have demonstrated beyond any conceivable doubt or dispute that the Diocese of Charleston operates in civil law as the Corporation Sole, and that Corporation Sole is the only proper defendant in this action.

As with the order to produce confidential material regarding victims of sexual abuse, the circuit court's denial of summary judgment to the ecclesiastical office of Bishop is more than it seems. The substance of the challenged ruling means that an ecclesiastical office, and just the office not an individual holding that office, is being forced to engage with the civil law even though the ecclesiastical office does not have any civil law presence. The diocesan bylaws distinctly and expressly spell out that the Bishop of Charleston is <u>not</u> a civil law title, and "Bishop of Charleston, a Corporation Sole" is <u>the one and only</u> civil law entity with the legal name of "Bishop of Charleston." The circuit court's decision reorders the allocation of both

ecclesiastical and civil authority and constitutes governmental establishment of religion – determining how a church must function under state authority. This is true regardless of whether or not the circuit court intended that result.

Thus denial of summary judgment to the ecclesiastical office of Bishop of Charleston, which exists only in canon law, erroneously trod on the First Amendment rights of the Roman Catholic Diocese. The circuit court ignored the Church's own determinations regarding its presence in civil law, as well as the state's own law recognizing the Corporation Sole and the civil law presence of the Bishop of Charleston and the Catholic Diocese. In doing so, the circuit court engaged in its own reordering of the Catholic Diocese and interfered in a realm in which the civil government has no proper role.

Although it is true that the denial of a summary judgment motion is generally not appealable, the preceding discussion demonstrates that these orders are more than just summary judgment denials. Granted, the orders are called denials of the Petitioners' summary judgment motions, but that label is not determinative. It is not the name or the type of an order that matters for purposes of appealability, but rather the order's overall impact. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). In *Morrow*, the Supreme Court concluded that an order was immediately appealable, regardless of what it was called, because it implicated the appellant's substantial rights.[5] As the Court stated, "Our review of the trial court order is not constrained by how the order is styled." *Id.* at 539, 773 S.E.2d at 147 (emphasis added). The Court further cited *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 479 (Ct. App. 2011), for the proposition that "an appellate court should look to

[5] Specifically, the order granted a request to bifurcate trial proceedings. The plaintiffs argued, and the Supreme Court agreed, that the order was immediately appealable because it impacted the plaintiffs' ability to pursue their direct liability claims against a corporate defendant.

the effect of an interlocutory order to determine its appealability." *Id.* at 540, 773 S.E.2d at 147 (emphasis added).

Here, the effect of the challenged ruling is not merely to force the Petitioners to reassert a certain defense at a later stage of the proceedings.[6] Rather, the effect is to have the civil government intrude upon the internal structure and affairs of a religious institution. This is a violation of the Petitioners' First Amendment protections – an issue, it is worth noting, that has nothing to do with the Respondents' claims or how they are eventually decided. The Petitioners have established a legitimate civil law presence for responding to cases such as this one; the Respondents and the circuit court simply ignored that decision and named an improper entity. Again, by doing so, the circuit court violated the Petitioners' constitutional rights, which are not only substantial, but also fundamental. Therefore, the circuit court's decision is far more than a typical denial of a summary judgment motion, and it is immediately appealable.

CONCLUSION

Both issues raised in this appeal involve orders that are immediately appealable. Yet, even if the Court were to determine that the ruling on the Petitioners' summary judgment issue was not independently appealable at this time, it should nevertheless allow the entire appeal to proceed. The clearly established case law supports the appealability of the order forcing the Petitioners to disclose highly confidential information, and considering the other issue on appeal would promote judicial efficiency. For these reasons, the Court should grant the Petitioners' petition, reverse the dismissal stated in the Order of December 2, 2019, and allow the entire appeal to proceed in the normal course.

---

[6] The general rule against appellate review of a summary judgment denial stems from the fact that the moving party has later opportunities to reassert the grounds that supported the summary judgment motion.

Respectfully submitted,

Richard S. Dukes, Jr. (SC Bar No. 16563)
R. Hawthorne Barrett (SC Bar No. 16973)
TURNER PADGET GRAHAM & LANEY, P.A.
40 Calhoun Street, Suite 200 (29401)
Post Office Box 22129
Charleston, South Carolina 29413-2129
Telephone: 843-576-2810
Email: rdukes@turnerpadget.com
tbarrett@turnerpadget.com

ATTORNEYS FOR PETITIONERS

February 21, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

FEB 21 2020

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2019-001470

John Doe,.....Respondent,

v.

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

and

Richard Roe,.....Respondent,

v.

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

---

PROOF OF SERVICE

The undersigned, an attorney in this matter of the Appellant certifies that I have this 21st day of February, 2020, served copies of the **Petition for Writ of Certiorari and Appendix** upon all counsel for the Respondents (listed below) by causing them to be deposited in the United States mail with sufficient postage attached, addressed to:

Larry E. Richter, Jr.
The Richter Firm, LLC
622 Johnnie Dodds Boulevard
Mount Pleasant, SC 29464

TURNER PADGET GRAHAM & LANEY, P.A.

for Richard S. Dukes, Jr. (SC Bar No. 16563)
R. Hawthorne Barrett (SC Bar No. 16973)
TURNER PADGET GRAHAM & LANEY, P.A.
40 Calhoun Street, Suite 200 (29401)
Post Office Box 22129
Charleston, South Carolina 29413-2129
Telephone: 843-576-2810
Email: rdukes@turnerpadget.com
tbarrett@turnerpadget.com

ATTORNEYS FOR PETITIONERS

February 21, 2020