

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, the Respondents, John Doe and Richard Roe, hereby file this Return to the Petition for writ of certiorari. In making this Return, Respondents respectfully submit that the Court of Appeals did not err in dismissing the appeal as interlocutory. This Return is timely under Rule 242(f), SCACR.

STATEMENT OF ISSUES ON APPEAL

- 1. Does an Order requiring responses to written discovery including the identifying of priests of the Diocese of Charleston who are known by the Diocese to be criminals, sex abusers of children, and their victims who are also known to the Petitioners present an exceptional circumstance warranting issuance of a writ of certiorari to review a discovery order?**
- 2. If an issue is not raised before the Court of Appeals should this Court consider it in deciding whether to issue a writ of certiorari?**
- 3. Does the Order denying Petitioners' Motion for Partial Summary Judgment, as upheld by the Court of Appeals, infringe upon Petitioners' free exercise of their religion?**

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 Petitioners on August 8, 2018 (Doe) and August 24, 2018 (Roe) respectively, claiming sexual abuse by Petitioners' agents, priests and teachers. Petitioners (Diocese) moved to dismiss the two Complaints based upon common law charitable immunity and the *res judicata* effect of a 2007 class action settlement.

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 answered the Complaints, asserting various defenses including the First Amendment and 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,” and also claimed reliance upon the deposition testimony of the Bishop.

Early in the cases, the Respondents served discovery requests that sought, among other things, information about past victims of sexual abuse by priests and other agents and employees of the Diocese of Charleston, and the victims of these crimes and witnesses.

The Petitioners filed Motions for a Protective Order as to those requests on March 19, 2019 (Doe and Roe). Subsequently, on April 2, 2019, the Petitioners objected to all requests for information and documents about past victims of abuse, witnesses, and abusing priests. The Respondents then served additional discovery requests on April 8, 2019 (Doe) and May 13, 2019 (Roe). The Petitioners responded to those requests, but again objected to any and all requests seeking the information and materials mentioned above.

On July 17, 2019, the circuit court conducted a hearing on several pending motions, including the Petitioners’ Motions for Partial Summary Judgment and the Respondents’ Motions to Compel production of the materials and information that the Petitioners called confidential. The circuit judge ordered the Petitioners to respond to plaintiffs’ discovery requests, granting Respondents’ respective Motions to Compel. The Court also denied Petitioners’ Motions for Partial Summary Judgment by written orders dated July 24, 2019.

The Petitioners filed motions asking the circuit court to reconsider and reverse its decisions regarding production of various information and materials and the denial of partial summary judgment. After those were denied 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. The Court of Appeals granted Respondents' motions to dismiss in an Order filed on December 2, 2019. In that Order, the Court also consolidated the two appeals. Petitioners moved for reconsideration, which the Court of Appeals denied by Order dated February 14, 2020.

ARGUMENT

I. THE COURT SHOULD DENY CERTIORARI ON THE FIRST GROUND BECAUSE THE COURT OF APPEALS CORRECTLY HELD THAT DISCOVERY ORDERS ARE NOT IMMEDIATELY APPEALABLE.

It is well-settled in South Carolina that an appeal from a discovery order may be pursued once a party refuses to comply with the order and is held in contempt of court. *See, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014); *id.* at 290-91, 762 S.E.2d at 548 (Pleicones, J., concurring in part and dissenting in part) ("On appeal from the contempt order, the contemnor may argue that the contempt finding must be reversed because the underlying discovery order was itself improper."); *see also Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881-82 (1986) (per curiam) ("An order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14-3-330 (1976). . .," and further states "Instead of appealing immediately, [there exist] two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply.")

In the present action the Petitioners are asking the Court to overturn this well-settled rule and establish a new rule permitting an immediate appeal from discovery orders any time a party merely asserts a claim that the information sought is "confidential and personal." Obviously, such

a rule would create chaos. The existing rule -- which provides a party with alternatives of complying with the discovery order or refusing to comply and appealing after he is held in contempt for his failure to comply -- strikes a workable balance between the rights of the party seeking discovery and the rights of the party resisting disclosure. A party resisting disclosure is less likely to assert unfounded, dilatory, or frivolous claims of privilege if he faces the prospect of punishment for contempt rather than merely the loss of an appeal (while gaining the benefit of delay); and a contempt hearing allows for the development of a record by the resisting party to explain why he cannot comply with the discovery order.

That well established procedure was bypassed in this case by the Petitioners filing this interlocutory appeal. And the Petitioners' claim for their refusal to comply with the discovery order at issue in this appeal clearly is unfounded, dilatory, and frivolous. The substance of the Petitioners' claim of privilege is stated on page 8 of their Petition:

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.

There is no evidence in the record that the Petitioners have respected and guarded the anonymity of their past victims, and even if they had done so, such actions by the Petitioners would create no legal basis for refusing to disclose the identities of their past victims to their current victims. There is likewise no evidence in the record that most, if not all, of the Petitioners'

victims reached some type of confidential resolution with the Petitioners; or that if they did, the confidentiality provisions were for the benefit of the victims and not for the purpose of attempting to conceal the sex abuse crimes of Petitioners' priests or other agents or employees; or that such contractual arrangements would create a legal basis for refusing to comply with the Circuit Court's discovery order. And there is no evidence in the record that complying with the discovery order would subject the Petitioners to the threat of legal actions and damages for that breach, creating a real and immediate threat of harm to the Petitioners. In short, there is no factual basis whatsoever in the record for any legally recognized claim of privilege by the Petitioners.

The Petitioners' claim on page 9 of their Petition that "there is ample authority in South Carolina to support the immediate appealability of orders that compel a party to reveal or produce confidential information" is clearly incorrect. The Petitioners cite only two cases as "ample authority" -- *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004), and *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). Both of these decisions were recently analyzed by this Court in *Hensley v. South Carolina Dep't of Soc Svcs.*, Shearhouse Advance Sheets Op. 27941 (Jan. 29, 2020). As for *Doe*, this Court stated:

We disagree with the court of appeals that *Doe* supports an immediate appeal in this case. First, *Doe* is the only case in the jurisprudence of this State in which the need to preserve confidential information was the basis on which an immediate appeal of an otherwise unappealable order was permitted. *Cf. Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 8, 630 S.E.2d 464, 467-68, 469 (2006) (finding an order appealable because it was a final order, but discussing the immediate appealability of interlocutory orders disclosing confidential information). The issue in *Doe* was narrow. The *Doe* court relied on similarly narrow precedent--federal decisions on the identical issue. *There is little in Doe, or in the federal precedent on which it relies, that suggests its reasoning should extend beyond the narrow question of whether a plaintiff may immediately appeal a pretrial order denying the plaintiff the right to proceed anonymously to avoid public disclosure of the fact he was sexually assaulted as a child.* (Emphasis added.)

And as for *Ex parte Capital U-Drive-It*, this Court explained: “Because our decision in *Ex parte Capital U-Drive-It* turned on the fact it was an appeal from a final order, it does not support the immediate appeal of any interlocutory order.”

Furthermore, and particularly applicable to the present appeal, this Court noted in *Hensley* that there was nothing in the existing record to establish whether any confidential information was actually put at risk in the case:

Neither the parties, the circuit court, the court of appeals, nor this Court has any certainty of whether a disclosure of confidential information is even at stake in this case. The amended class certification order requires the Hensleys to prepare a notice for the circuit court's approval that will protect the confidentiality concerns raised by DSS. Until the circuit court has a chance to evaluate the proposed notice and hear from the parties as to how confidential information will be protected--or how it may be compromised--nobody knows whether any confidential information is actually put at risk in this case.

In *Hensley*, there was a statute that protects the confidentiality of certain information related to adoptions:

The factual basis for the court of appeals' holding is that there may be adopted children in the class whose parents made a conscious decision not to tell them they are adopted. The court reasoned that when notice of the class is given to these parents--or to their child if she has reached majority--the child will learn she is adopted. 423 S.C. at 429, 814 S.E.2d at 642. As the court of appeals recognized, the law protects the confidentiality of this information. *See S.C. Code Ann. § 63-9-780(A)-(C)* (2010 & Supp. 2019) (providing all adoption proceedings and proceedings regarding supplemental benefits to adoptive parents are confidential and must be closed, the related court records are confidential and must be sealed, and the related DSS records are confidential and are not subject to inspection, the only exception being "upon court order for good cause shown").

In the present appeal the Petitioners have produced nothing whatsoever to prove that the information they seek to keep secret is protected from disclosure by any statute, rule, or precedent

in this State.¹

II. THE COURT SHOULD DENY CERTIORARI ON THE SECOND GROUND BECAUSE THIS QUESTION WAS NOT RAISED IN THE COURT OF APPEALS AND BECAUSE IT IS WITHOUT MERIT IN ANY EVENT.

The Petitioners acknowledge they had a well-settled avenue for pursuing an appeal by first refusing to comply with the discovery order and appealing a contempt order. However, they now argue this procedure should not be followed, as least not where there is a claim that “confidential information regarding victims of sexual abuse as minors” is involved. This argument was not raised in the Court of Appeals. “Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Rule 242(d)(2), SCACR. At any rate, as previously noted, there is no record establishing that legally privileged information is even at risk in this case. There is nothing but the Petitioners’ bald assertion that the information it was required to produce in the discovery order is “confidential and personal.” No party may simply declare that the information it has is confidential and refuse to comply with a lawful discovery order, particularly where the information

¹The Petitioners also seek to delay dismissal of this action on the ground that on October 3, 2019, this Court granted an extraordinary writ to review a discovery order of the Circuit Court in *Mark C. Mosley v. Christine Alston*, Appellate Case No. 2019-001056 (filed October 3, 2019). (Petition, p. 12) Among other things, the order granting the writ directed the parties to brief whether a contempt order for failing to comply with a discovery order should be required before an appeal may be taken to review a discovery order; and if a contempt order is not required, what limitations should be placed on the ability to take an immediate appeal from a discovery order. The Petitioners’ request based on the *Mosley* order is without merit. The Petitioners never sought an extraordinary writ to review the Circuit Court’s discovery order, and this Court’s January 29, 2020 decision in *Hensley* demonstrates that it did not intend in its October 3, 2019 order in *Mosely* to put all appeals of discovery orders on hold until *Mosely* is decided.

in the refusing party's possession, and long hidden, is evidence of heinous crimes of child molestation.

III. THE COURT OF APPEALS DID NOT ERR IN DISMISSING THE PETITIONERS' APPEAL OF AN ORDER DENYING THEIR MOTION FOR SUMMARY JUDGMENT.

The Petitioners first attempt to side-step the well settled rule that an order denying a summary judgment order is not appealable by contending that "an order not immediately appealable will nonetheless be considered if there is an appealable issue before the appellate court." (Petition, p. 14). However, the Court of Appeals was correct -- there are no other appealable issues before the appellate court.

The second argument made by the Petitioners is that their motion for summary judgment was premised on their claim that "the Bishop of the Diocese of Charleston, in his official capacity" is not the proper entity to be named in this litigation. According to the Petitioners, "The substance of the challenged ruling means that an ecclesiastical office, and just the office and 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." (Petition, p. 14). This fact in turn, so the argument runs, somehow adversely affects the Petitioners' First Amendment rights. (Petition, p. 16). Yet not more than four years ago "the Bishop of the Diocese of Charleston, in his official capacity" voluntarily engaged with the civil law by bringing an action against the church's insurer, the Century Indemnity Company, seeking reimbursement from Century for \$11.5 million paid to settle claims arising from sexual abuse of minors by the Diocese's clergy. *See Bishop of Charleston v. Century Indem. Co.*, 225 F.Supp.3d 554, 558 (D. S.C. 2016):

Plaintiffs the Bishop of Charleston as a corporation sole and the Bishop of the Diocese of Charleston in his official capacity (together, the "Diocese") seek reimbursement from Century for \$11.5 million paid to settle claims arising from

sexual abuse of minors by the Diocese's clergy. The abuse at issue occurred over the approximate period 1943 to 1986. (Am. Compl. Ex. 1, Dkt. No. 1-1 at 18-22.) The settlements of claims arising from that abuse occurred between 1994 and the present, including a multimillion-dollar settlement of three class actions (which also settled three individual actions), executed on January 12, 2007. (Id.; Settlement and Arbitration Agreement, Dkt. No. 71-1.)

Respondents reject the claim that Petitioners don't exist, have no presence in the civil law. At motion hearing the trial judge poignantly and firmly addressed this issue and promptly laid it to rest in the July 24, 2019 Order as follows:

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 (was) 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.

There are many cases in the public records which make clear that the nomenclature Petitioners now seek to hide behind has over a long period of time been utilized by claimants against Petitioners, and by Petitioners themselves in defending, seeking relief by motion, and even instituting suit for money damages, all in the same names used in the underlying suits as follows: 2004-CP-10-3654, 2009-CP-10-6694, 2014-CP-10-1283, 2009-CP-10-6694, 2009-CP-10-8054, 2009-CP-10-8055, 2009-CP-10-8056, 2010-CP-10-5520, 2012-CP-10-5559, 2013-CP-10-3733, 2014-CP-10-2130, and 2016-CP-10-1632 in Charleston County alone. In addition,

Petitioners entered into a multimillion-dollar Settlement and Arbitration Agreement in Dorchester County case numbers 2006-CP-18-1310, 2006-CP-18-1311, and 2006-CP-18-1636 with the then bishop signing as “the Bishop of Charleston, in his official capacity and for the Bishop of Charleston, a Corporation Sole,” copies of page 1 and the signature page attached as **Exhibit A** hereto. Also, the trial court order of July 24, 2019 deals with this matter directly.

The Petitioners cannot have it both ways. If, as the Petitioners now claim, it is somehow a violation of “canon law” for “the Bishop of the Diocese of Charleston, in his official capacity” to engage in civil law, then the Petitioners themselves have violated such canon law on numerous occasions. The argument is frivolous.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Petition be denied.

Respectfully submitted,

THE RICHTER FIRM, LLC



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ATTORNEY FOR RESPONDENTS

March 20, 2020

EXHIBIT A

ELECTRONICALLY FILED - 2007 Feb 07 3:38 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004208

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO SECTION 15-48-10, CODE OF LAWS OF SOUTH CAROLINA (1976).

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE No. 06-CP-18-1310
CASE No. 06-CP-18-1311
CASE No. 06-CP-18-1636

John Doe #53, John Doe 66, John Doe 66A,)
John Doe 67, Jane Doe 1 and Jane Doe 2)
and Rachel Roe individually and)
as representatives of classes of people)
similarly situated,)

Plaintiffs,

vs.

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

Defendants.

FILED-RECORDED
2007 JAN 17 PM 3:25
SHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

SETTLEMENT AND ARBITRATION
AGREEMENT

This Settlement and Arbitration Agreement (hereinafter "the Agreement") is made this 12th day of January, 2007, by and between the John Doe #53, John Doe 66, John Doe 66A, John Doe 67, individually and as representatives of a class of other persons similarly situated as victims of sex abuse allegedly committed by agents or employees of the defendants in this action, and/or Jane Doe 1, Jane Doe 2, and Rachel Roe, individually and as representatives of parents or spouses who have suffered a loss of consortium as a result of sexual abuse upon John Doe #53, John Doe 66, John Doe 66A, and John 67 or members of their class, and The Bishop of Charleston, A Corporation Sole, and The Bishop of the Diocese of Charleston in his official capacity (hereinafter "the Diocese"). This Agreement may be signed in counterparts. This Agreement represents the formal "Settlement and

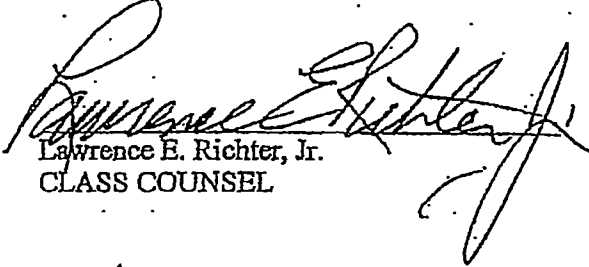
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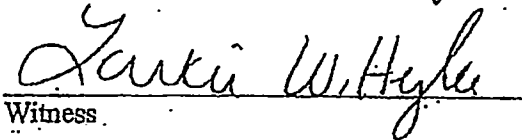
EXHIBIT
A
PENGAD 800-881-8888

claims have not been assigned, encumbered, or transferred. Where applicable herein, the masculine gender shall include the feminine gender and the feminine gender shall include the masculine gender.

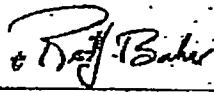
Executed this 12 day of January, 2007.

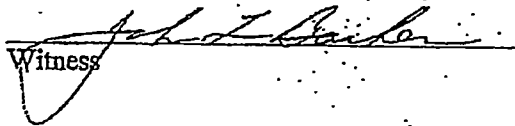
FOR THE CLASSES:


Lawrence E. Richter, Jr.
CLASS COUNSEL


Witness

FOR THE DEFENDANTS:


The Most Rev. Robert J. Baker
THE BISHOP OF CHARLESTON, IN HIS
OFFICIAL CAPACITY AND FOR THE
BISHOP OF CHARLESTON, A
CORPORATION SOLE


Witness