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. 2020-000804

John Doe, ...Appellant,

v.

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

RETURN TO RESPONDENTS' MOTION TO STRIKE PORTIONS OF APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

For his Return to the Respondents' Motion the Appellant John Doe would show the Court as follows:

The Respondents have moved to strike six documents from Appellant's designation of matter to be included in the Record on Appeal on the ground that they "were not before the Circuit Court when it granted summary judgment to Respondents:

1) Transcript of John Doe's deposition 9/12/19

2) Transcript of Dr. Sally Duffy's deposition 11/26/19

3) Transcript of Dr. Dorothy Whalen's deposition 9/19/19

4) Transcript of Louisa Storen's deposition 11/18/19

5) Louisa Storen's writing of 6/15/16 to Vicar General Msgr. Richard Harris

6) Judge Nicholson's Amended Order on Limited Collateral Review of 5/3/17

in *John Doe 2, et al. v. Bishop of Charleston, et al.*, 2010-CP-10-5520."[1]

BACKGROUND

From the inception of this litigation the Respondents, by counsel, have failed and refused to be honest and forthcoming with Appellant and the Court. It will serve well the interests of justice to point out at least a few examples of what has transpired and is transpiring in the case at bar. I wish it were not so. Consider:

From the 7/17/19 Motion for Partial Summary Judgment Hearing (Transcript of Record)

P6, L17-20

MR. DUKES: The Bishop of Charleston is an ecclesiastical office, it has no presence in civil law. It is strictly a creation of canon law, or of church law, and has no civil law presence.

P7, L8-10

MR. DUKES: …the Bishop of the Diocese of Charleston simply doesn't have a civil law existence.

P12, L16-17; L19-20

MR. DUKES: The Bishop of Charleston, in his official capacity, has no civil law presence.
…it has no capacity to be sued or hailed into Court – into a civil court.

Respondents have argued that there is no such thing as the Bishop of Charleston in his official capacity and that he has no presence at the law. However, the opposite is true; the Diocese lives and functions by many names, whatever suits its desire at the time.

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[1]Respondents' Motion, pp. 1-2.

This issue has been ruled upon by the trial court which issued an Order filed July 24, 2019.

In their Motion for Partial Summary Judgment, filed March 29, 2019, Respondents 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 its July 24, 2019 Order denying Respondents' then request for partial summary judgment:

> 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. (Order)

The Circuit Court correctly determined that the Respondent had been properly joined as a party defendant, further determined that he was a necessary party, and accordingly denied Respondents' Motion for Partial Summary Judgment.

Another example of Respondents, by counsel, failing to be candid with the Court and seeking to mislead is seen in the Respondents, by counsel, representing to the Court, even in the face of *Jeffcoat v. Caine* 261 S.C. 75, 198 S.E.2d 258 (1973), that a fellow circuit judge, Hon. Deadra Jefferson had ruled that Respondents enjoyed absolute charitable immunity, that such was the law in South Carolina, and that the hearing trial judge should follow Judge Jefferson's lead; never revealing what Judge Jefferson's order actually stated, that the Respondents herein **had conceded** that absolute immunity was not the law:

> Accordingly, the Diocese is entitled to judgment as a matter of law on said defense. The Court, therefore, GRANTS the Diocese's Motion for Summary Judgment pursuant to the South Carolina common law Doctrine of Charitable Immunity and enters judgment for the Diocese of Charleston as to all claims against it. **The parties concede that the Doctrine of Charitable Immunity would not apply to an intentional tort such as outrage**. (emphasis added)
> -Judge Jefferson's Order dated January 21, 2003 in *John Doe v. The Diocese of Charleston, et al Case No. 2002-CP-10-0770*

Yet another example of the Respondents' propensity to declare facts and the law to be whatever suits their own purposes at the moment is seen in Respondents unilaterally declaring that information regarding sexual abuse of minors by priests and other agents and officials of the Diocese is "confidential," and that Respondents refused to respond to a large amount of requested discovery based on its own unilateral assertion. No statute, case, or other authority so provides. Respondents even moved for a Confidentiality Order, which motion was denied by the trial court.

Many other examples are available, but the point is clear, so Appellant will pause for now.

It may be helpful to the Court to first review the extraordinary efforts the Respondents have made in this case to avoid the disclosure of relevant evidence and then to argue that the Appellant has failed to come forward with the very evidence the Respondents have hidden and refused to produce, even when ordered to do so.

On July 24, 2019, the Circuit Court entered an Order in this case granting Appellant's Motion to Compel Discovery. Rather than comply with that Order, the Respondents improperly filed a meritless interlocutory appeal of the pre trial discovery order. See Exhibit A, attached. This Court duly dismissed the Respondents' appeal. See Exhibit B, attached. The Respondents then petitioned for rehearing, which this Court also denied. See Exhibit C, attached. Thereafter, the Respondents petitioned for *certiorari*, where the matter remains pending. The Respondents have never produced the ordered discovery. At the summary judgment hearing and Appellant's motion to reconsider hearing the trial court fully knew of the impediment the Respondents petition for *certiorari* created for Appellant.

Despite the fact that the Respondents had refused to comply with the Circuit Court's order compelling discovery, on December 12, 2019 the Respondents were permitted to move forward with a hearing on several motions for summary judgment. This in the face of Appellant's counsel specifically advising the court that Appellant could not fully or properly defend against Respondents' motions because ordered discovery responses were still not made by Respondents.

From the 12/12/19 Summary Judgment Hearing (Transcript of Record)

P54, L6-16

MR. RICHTER: Well, Judge, there's a lot about Doe that's not yet taken care of.

THE COURT: Yeah, but I'm not taking up any of the motions for summary judgment as to any of those specific causes of action.

MR. RICHTER: I understand that, but we have motions you granted – you granted our motions to compel. But your orders – you issued two orders that said Plaintiff's Motion to Compel is granted. Those – those orders have been disregarded and we need – we need those enforced so that we can get that material to work it with.

P57, L18-P58, L2; L9-12

MR. DUKES: And we appealed that order.

THE COURT: Right.

MR. DUKES: And that's still up on appeal.

THE COURT: All right.

MR. DUKES: We filed a motion for a rehearing the other day.

THE COURT: Okay.

MR. RICHTER: Those orders have been – those appeals have been ruled on and the Court of Appeals has dismissed –

MR. DUKES: We have just filed a motion for rehearing with the Court of Appeals. The remittitur has not come back to the Court, so you don't have jurisdiction over it.

From the 2/18/20 Hearing (Transcript of Record)

P5, L10-16

MR. RICHTER: Your order was appealed by the Diocese. And the Court of Appeals dismissed the appeal on the basis that it was not a directly appealable matter. It's a pretrial discovery matter, not directly appealable.

Mr. Dukes moved for a rehearing in the Court of Appeals. The Court of Appeals has now issued its order dismissing or denying the motion for rehearing.

P6, L12-17; P6, L23-P7, L1

MR. DUKES: The remittitur has not come back from the Court of Appeals. We will be petitioning for a cert on that order. That's our right. So that matter is out of your hands. You no longer have jurisdiction of it until it's remitted from the Court of Appeals.

THE COURT: All right.

MR. RICHTER: The reason I called this to your attention, Your Honor, is that I was forced to defend in the Doe matter the Diocese's motion for summary judgment, and did so.

From the 4/6/20 59(e) Hearing (Transcript of Record)

P7, L22 – P8, L4; P8, L11- P9, L6

THE COURT: I just want you to argue the motion to reconsider based on the order that I signed as to charitable immunity. Okay?

MR. RICHTER: Yes, sir. Based on the order that you signed to charitable immunity, we could not receive a fair hearing in the matter because, in part, of the lack of discovery responses which Your Honor had ordered....

...you ordered that it come to us unredacted.

Now, why might that matter? Because the motion that you made us go forward in and defend, a motion for summary judgment is a dispositive motion. And to do that, fundamental fairness requires that we have the benefit of the fullest ability to defend against the dispositive motion.

Part of the way we do that is by developing the case. We learn who witnesses are. We learn what writings exist. We learn all of those kinds of things, and then we have those available to us to utilize.

But in this case, although this was not the first motion filed, Mr. Dukes was very anxious to get to a summary judgment motion, a dispositive motion, with the case in its current posture. That means with us in our current posture of ability to develop the case, including factual issues, and

with our ability to defend thereby such a motion.

P14, L18 – P15, L2

MR. RICHTER: So from September of '18 to May of '19, we were trying to get answers. Part of this came before you. Again, I don't mean to go over plowed ground. Then they supplemented in August of '19, and in September and in October of '19 they supplemented.

Now, when they did that, they ignored the rules. Rule 33 specifically requires that the person answering the interrogatories must do so under oath and sign them.

P16, L20-P17, L1

MR. RICHTER: Part of what he said is summary judgment would abate the need to rule on any of these motions if Your Honor were to grant any of them. That's the reason we were asking to be heard on all of the discovery matters so that we could have whatever we're going to have to have the ability to defend ourselves fully.

P17, L15-22

THE COURT: So what's your position as to that, Mr. Richter? That I didn't allow you to hear the discovery motions and therefore not be able to fully, I guess, uncover all of the discovery and summary judgment was too premature? Is that your argument.

MR. RICHTER: Yes. That's part of the argument, Your Honor, but it's more than that.

At the December 12, 2019 hearing on the Respondents' individual motions for summary judgment, the Respondents elected to argue three of their motions: (1) the motion for summary judgment as to all claims based upon the common law doctrine of Charitable Immunity; (2) the motion for summary judgment as to all claims based upon the statute of limitations/lack of

admissible evidence of repressed memory; and (3) the motion for summary judgment based upon *res judicata* effect of 2007 Class Action Settlement.[2]

At the December 12, 2019 summary judgment hearing, counsel for the Appellant outlined evidence in response to each of these motions which was far more than the scintilla necessary to establish a genuine issue to be resolved by a jury. This included references to the six items now objected to by the Respondents. Just as Respondents' counsel did throughout, and prior to Appellant's counsel so doing, without objection, Appellant relied on depositions which were no differently "before the Circuit Court" than the items Respondents now seek to strike from the Record on Appeal.

From the 12/12/19 Summary Judgment Hearing (Transcript of Record)
Regarding deposition testimony

P18, L20-25

MR. DUKES: …In fact, the Plaintiff testified about – because I asked him, "Do you think anybody intended for Hartnett and Brooks to harm you?" And he said, "My heart says no. I've never known any bad, bad people in the church. But I would rather not had to remember this and sit here and talk about it like that."

P43, L17-21

MR. RICHTER: In any event, the idea that there are no issues of contested fact simply escapes me. And I represent to Your Honor we adopt all of the depositions, all of the written discovery, we rely on all of that as part of our – our argument here.

P50, L12-16

MR. RICHTER: I would like to incorporate all of the depositions

[2]See Appellant's Reply Brief, pp. 2 and 3, for further particulars concerning how the events of this hearing unfolded.

that have been taken in these cases as part of – as part of our records in support of our argument that, again, all the authorities that you'll read talk about the use of those in all the pleadings in the matter.

From the 4/6/20 59(e) Hearing (Transcript of Record)
Regarding deposition testimony

P11, L20-25

MR. RICHTER: …Mr. Dukes on multiple occasions quoted to you and argued… from the depositions of the plaintiffs' various witnesses, a couple of experts, plus the plaintiff himself. Now, that is what happened.

P12, L3-13; L16-20

MR. RICHTER: Mr. Dukes says to you, in fact, the plaintiff testified, because I asked him, do you think anybody intended for Hartman [Hartnett] and Brooks to harm you?

And he said, quote, my heart says no. I've never known any bad, bad people in the church, but I would rather not be here to remember this and sit here and talk about it like that.

Mr. Dukes goes on and says, but he said he doesn't have any evidence that anybody intended for him to be harmed.

But that happens later on as well as to two other witnesses, Dr. Duffy, who is a psychologist, and the lady Ms. Wayland [Whalen], who the dioceses sent John Doe to for treatment – diagnosis and treatment.

P12, L25 – P13, L11

MR. RICHTER: …we incorporate into the record and rely on – did it twice actually in the hearing, and I would be glad to quote from the transcript to show you where that

exists. But we did it twice and did so without objection.

Now, I didn't object to Mr. Dukes relying on deposition testimony because I thought he might – that I might want to rely on deposition testimony, and I did. And he did it; Your Honor allowed him to do it. We incorporated it; he didn't object in any way whatsoever.

P13, L19-22

MR. RICHTER: ...you let it in for the defense and so we took the very same tact and we're entitled to be treated the very same way the defense was in that regard.

P24, L20-P25, L4; P25, L6-13

MR. RICHTER: ...all of the depositions, and I'll show you in the record where I specifically said that I incorporate all of the discovery and depositions, filings, whatever, in all of these cases, the three subject cases specifically said that in the record to you without any – without any objection.

On page 43, I represent to Your Honor we adopt all of the depositions, all of the written discovery; we rely on all of that as part of our argument here.

And then again at another page, page 50, I again state, I would like to incorporate all of the depositions that have been taken in these cases, these plural cases, as part of our record in support of our argument that this is at the actual argument of the motion itself, and all of the pleadings, as I say, specifically in these cases.

A particularly compelling point is that on June 15, 2016 Louisa Storen, the Victim Assistance Coordinator of the Diocese, the diocesan intake person for sex abuse cases, wrote a letter to Vicar General Msgr. Richard D. Harris, who heads up the handling of sex abuse claims

against the Diocese. The Vicar General is second in command to the Bishop. Ms. Storen's writing was hidden by Respondents and has still not been produced by them, and was only produced by Ms. Storen on November 18, 2019, the date of her deposition, pursuant to a subpoena *duces tecum*. The Victim Assistance Coordinator for the Diocese of Charleston's writing names two other victims of Doe's perpetrators. The names of these two child victims, who are witnesses, have been redacted and, together with their whereabouts, have been hidden from Appellant; and didn't the Respondents make any records about this, investigate, or even write those child victims a letter of apology? No such documents have been produced by Respondents. Ms. Storen's writing reads in part:

> Other pertinent information include (sic): …two other boys were abused by these same teachers. Their names are [redacted] and [redacted]. …Mr. Hartnett in fact did die of Aids. (Storen writing)

From the 4/6/20 59(e) Hearing (Transcript of Record)
Regarding Louisa Storen's writing of 6/15/16)

P23, L3-6; P23, L17-18; L20-24

MR. RICHTER: And in that letter, among other things
she says, other pertinent information include…
…that two other boys were abused by these same
teachers. Their names are blank and blank.

…Point being that
wasn't produced to us….

I'm arguing that we were entitled to these things
and we didn't get them.

I would have, of course, interviewed
those two people upon finding who they were, and I
will when I find out who they are.

P24, L6-8; L10-13

MR. RICHTER: …this is simply another example of why

going forward when we asked not to go forward was prejudicial to us.
...It's a
diocese document that they didn't produce to us.
It's an important document that they didn't produce to us.

Further, Respondents are clearly incorrect when they state in their Motion to Strike that Judge Nicholson's order was not "before the Circuit Court when it granted summary judgment to Respondents." On July 16, 2019, Appellant filed his Memorandum in Support of his Motion for Limited Collateral Review, to which Exhibit B was Judge Nicholson's Amended Order on Limited Collateral Review of 5/3/17 in *John Doe 2, et al. v. Bishop of Charleston, et al.*, 2010-CP-10-5520.[3] It is also important to note that Appellant's Notice of and Motion for Limited Collateral Review filed on July 5, 2019 was never scheduled or heard prior to the December 12, 2019 Circuit Court hearing and subsequent ruling on Respondents' motion for summary judgment. And, of course, it is important that Respondents were still attempting to justify their refusal to comply with ordered discovery both at the time of the summary judgment hearing December 12, 2019, the Rule 59 reconsideration hearing on April 6, 2020, and still pursuing the appeal of an interlocutory matter which this Court has twice said was improper. So Respondents moved upstream a little, changed bait, and cast again, seeking a writ of *certiorari*, but still no fish. The trial judge was made aware of the appellate status of this matter.

From the 7/17/19 Hearing (Transcript of Record)
Regarding Judge Nicholson's Amended Order on Limited Collateral Review of 5/3/17 in *John Doe 2, et al. v. Bishop of Charleston, et al.*, 2010-CP-10-5520

P76, L22 – P78, L8

MS. IVEY: (of The Richter) ...the question of whether a repressed memory victim who had not recalled at

[3]See Appellant's Reply Brief, p.12, for further particulars concerning Judge Nicholson's Amended Order on Limited Collateral Review.

Firm, LLC)

the time of the class notice, claim can be precluded by the prior class settlement, has already been considered by Judge Nicholson in the case of John Doe 193. And it's been ruled on that as a matter of due process a repressed memory victim, like John Doe 193 and like the plaintiff's (sic) here, cannot be bound to the class.

I've presented to the Court by way of exhibits to the memorandum on limited collateral review. The first exhibit is the motion for limited collateral review that was brought in John Doe 193, just so that this – that Your Honor can see exactly how that question was presented. It was presented to Judge Nicholson – the question was posed as follows. They asked Judge Nicholson to find that the settlement reached therein does not preclude John Doe 193 who alleges that he repressed memory – memory of his sexual abuse until June 2010 – from bringing claims against the Diocesan defendant for sexual abuse at the hands of priests. Judge Nicholson then conducted a limited collateral review with respect to John Doe 193 under Hospitality Management Associates versus Shell Oil, 356 South Carolina 644, 2004. And Judge Nicholson answered. And I quote, (as read), "As to plaintiff John Doe 193 who alleges that he lived in South Carolina, but had a repressed memory at the time of class notice, that it would be inconsistent with due process to bind him to the class action settlement if he, in fact, had a repressed memory of sexual abuse at the time the notice was published. Therefore, if he can prove a repressed memory by a preponderance of the evidence he will not be bound to the class action settlement. This order does not address the merits of whether John Doe 193, in fact, had a repressed memory as he has alleged." And that quote is taken from Judge Nicholson's amended order on limited collateral review, it was issued on May 4, 2017. It's Exhibit B to plaintiff's memorandum.[4]

From the 12/12/19 Summary Judgment Hearing (Transcript of Record)
Regarding Judge Nicholson's Amended Order on Limited Collateral Review of 5/3/17 in *John Doe 2, et al. v. Bishop of Charleston, et al.*, 2010-CP-10-5520

P26, L5-14

[4] The referenced orders of Judges Jefferson and Nicholson are from cases not involving the John Doe Plaintiff/Appellant herein and were issued by circuit court trial judges in each.

THE COURT: All right.
Let's move to Defendant's motion for summary judgment as to the evidence of repressed memory.

MR. DUKES: This is an alternative, Your Honor, it would also affect all the claims brought by Plaintiff Doe.

THE COURT: Well, this is the one that I think Judge Nicholson was contemplating back around eight years ago or so.

MR. DUKES: Right.

P45, L1-4

MR. DUKES: Judge Nicholson was planning to conduct an evidentiary hearing back in 2017 to determine whether a repressed memory plaintiff would be bound by the class action settlement.

On January 9, 2020, the Circuit Court entered its summary judgment order, granting summary judgment only on the Respondents' Charitable Immunity motion.

On January 16, 2020, Appellant filed his Rule 59 motion.

On February 18, 2020 the Court instructed the parties that it was only considering and only ruling based upon the grounds of charitable immunity.

From the 2/18/20 hearing (Transcript of Record)

P8, L9-20

THE COURT: I read it, which I told you to submit an order solely on –

MR. DUKES: On charitable immunity.

THE COURT: Correct. I didn't care about anything about repressed memory. I didn't have anything to do with anything – I wasn't even considering that, even though I read them. But that's why I ordered the orders to be specific, solely to that issue, because you made a motion for summary judgment on, I think, about seven different –

MR. DUKES: Seven or eight.

THE COURT: Yeah, seven or eight different causes.
And I said I wanted on just that one.

Although the Circuit Court had not ruled on any of the Respondents' other motions for summary judgment, Appellant anticipated, correctly as it turns out, that on appeal the Respondents would essentially abandon their meritless Charitable Immunity argument (absolute immunity, even for intentional acts) and unfairly attempt to persuade this Court to affirm on one or more of their unheard motions as additional sustaining grounds. Accordingly, on February 14, 2020, while Appellant's Rule 59 motion was pending and jurisdiction remained in the Circuit Court, Appellant followed up on presenting the evidence he had referenced and adopted without objection during the December 12, 2019 summary judgment hearing, by filing in the Circuit Court the first five items listed by the Respondents' Motion to Strike, as Appellant's Notice of Fourth Supplemental Filing. Of course, the sixth item Respondents seek to strike, Judge Nicholson's Amended Order on Limited Collateral Review of 5/3/17 in *John Doe 2, et al. v. Bishop of Charleston, et al.*, 2010-CP-10-5520, was already in the record at the time of the December 12, 2019 hearing.

Appellant's Rule 59 motion was not heard until April 6, 2020, and was not ruled on until May 11, 2020.

MEMORANDUM WITH CITATION OF AUTHORITIES IN SUPPORT OF RETURN

Rule 240(c)(2), SCACR, requires that every motion must include a memorandum with citation of authorities in support of the motion:

> **Rule 240(c) Form and Content of Motions and Petitions.** All motions or petitions filed in an appellate court shall be in writing, shall state the grounds thereof, and shall comply with the requirements of Rule 267. The pages of the motion or petition and all supporting documents shall be consecutively numbered. Each

motion or petition shall include the following:

> **(2)** A memorandum with citation of authorities in support of the motion.

Also, SCACR 240(g) further provides for abandonment of the noncomplying Motion to Strike:

> **Rule 240(g) Failure to Comply.** Failure of the moving party to perform any act required by this Rule may be deemed an abandonment of the motion or petition.

Nowhere in the Respondents' motion is there a memorandum with citation of authorities in support of the motion, and Appellant should not be required to research the matter for them or guess at what they may have had in mind. Accordingly, the Respondents' motion should be deemed abandoned.

In any event, the Appellant is aware of only two limitations on what may be included in the Record on Appeal. The first is Rule 210(c), SCACR, which provides in part, "The Record shall not, however, include matter which was not presented to the lower court or tribunal." Rule 210(c) does not specify exactly at what point in the lower court proceedings the matter has to be *presented* to be eligible for inclusion in the Record on Appeal. The second is Rule 210(g), SCACR, which requires an appellant or his counsel to certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material. Because the Record on Appeal has not yet been prepared for filing, the time for making this certification has not yet arrived.

In this case both the Circuit Court and the Respondents were put on notice at the December 12, 2019 summary judgment hearing of the existence and relevance of the items the Respondents now object to. This was done as Respondents' counsel earlier in the hearing had done, and there

was no objection. The trial court ruled in favor of Respondents granting summary judgment based solely on their claim of "absolute immunity."

The Circuit Court maintained its original conclusion in his May 11, 2020 ruling that Charitable Immunity defeated each and every one of the Appellant's causes of action, even claims based on intentional acts and contract claims.

All preceding actions in the case, such as orders pending motions, non-compliance with orders of the trial judge, and appellate undertakings, are in the record of the case already made before the summary judgment hearing. The hearing court is knowledgeable of such. Many such references have been made by Appellant in his initial brief and reply brief heretofore submitted and so are not restated and are relied upon without reprinting that relevant matter here.

Of signal import, the trial court's order compelling Respondents to comply with propounded discovery requests, and Respondents were, at hearing time, on their third bite at the apple of non-compliance, and the fact that counsel for Respondents was allowed to rely on, quote from, deposition testimony of Appellant and others not "filed with" simultaneously or ever handed up to the Court. But now Respondents argue that while such approach is permissible for Respondents, Appellant must be fed from a different spoon – should not be accorded equal justice under the law. Such is not the law in South Carolina or anywhere else in the United States.

In the world of summary judgment, sometimes misconceptions abound. Grants of summary judgment are, and properly should be, hard to come by. When granted and challenged, as here, the grant of summary judgment should be closely, and really scrupulously, examined. The initial burden is clearly upon the movant. That party must show that there is no genuine issue, or even inference, of material fact that could be offered or drawn from evidentiary matters thereby absolutely entitling the party resisting the summary judgment to be heard on the merits and to have

fact finders pass upon evidentiary issues and inferences that may be drawn.

The fact is that one resisting summary judgment may not have to do anything. That concept is new to many lawyers and, like the hearsay rule, sometimes litigants and lawyers, and even judges and appellate judges, lose sight of the true requirements. If a statement made in giving testimony is not offered for the truth of the matter asserted, it is not hearsay. End of inquiry; but often a concept overlooked or much struggled with.

Recently, the South Carolina Court of Appeals in *Beneficial Financial I, Inc. v. Windham, et al* 2020 WL 4495436 filed August 5, 2020, an opinion authored by Judge Konduros, made clear who must do what and who has what burden. In a well-reasoned opinion relying in part on an earlier opinion of the South Carolina Supreme Court it was stated:

> Our supreme court has addressed the initial burden the moving party carries to succeed on a summary judgment motion:
>
> > The grant of summary judgment is appropriate only if it is clear that no genuine issue of material fact exists, that inquiry into the facts is not desirable to clarify the application of the law, and that the movant is entitled to judgment as a matter of law.
> >
> > A party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials.
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> *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990) (citations omitted).

Id. at ___, ___ S.E.2d at ___.

This is not the only time the South Carolina Supreme Court or the South Carolina Court of Appeals have addressed fine summary judgment issues. Never have our courts varied from their

consideration of such relief as being a "drastic remedy." In the case of *Baughman v. American Tel. Co.*, 306 S.C. 101, at 112, 410 S.E.2d 537, at 543-544 (1991) our Supreme Court spoke definitively saying:

> Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C.1975); *see also Holloman v. McAllister,* 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, *Federal Practice and Procedure* § 2741, p. 543 (1983); 6 *Moore's Federal Practice* ¶ 56.02[6], p. 56-39 (2d ed. 1990); *see e.g., First Chicago Int'l v. United Exchange Co.,* 836 F.2d 1375 (D.C.Cir.1988); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 756 F.2d 230 (2d Cir.1985); *Tyler v. City of Enterprise,* 521 So.2d 951 (Ala.1988); *Gangadean v. Leumi Fin. Corp.,* 13 Ariz.App. 534, 478 P.2d 532 (1970); *Commercial bank of Kendall v. Heiman,* 322 So.2d 564 (Fla.Dist.Ct.App.1975); *Board of Education v. Van Buren & Firestone, Architects, Inc.,* 165 W.Va. 140, 267 S.E.2d 440 (1980); *cf.* Rule 56(f), S.C.R.C.P.[4] [5]

The kind of behavior engaged in by Respondents, through counsel, as described herein and in the Appellant's Initial Brief and his Reply Brief in this matter heretofore filed, should be given no latitude and should be recognized for what it is. Imagine, the lawyer who actually represented that same individual, by that same name, in multiple other pieces of litigation telling a court that a named party defendant has "no presence at the law." This writer finds such conduct reprehensible

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[5] Quoting Footnote 4 of *Baughman v. American Tel. Co.*
"Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Although Plaintiffs did not file an affidavit invoking this provision, other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the trial court. *First Chicago Int'l, supra; Snook v. Trust Co. of Ga. Bank of Savannah,* 859 F.2d 865 (11th Cir.1988)"

and revealing. As has been argued and shown by specific preceding references and quotes herein, such lack of candor and misleading statements continues to date by Respondents.

Overriding all of the foregoing is the unavoidable circumstance of Appellant specifically advising the summary judgment hearing court that it was not possible for the Appellant to defend summary judgment motions appropriately because of so many pending matters, including certain of Respondents' appellate matter, and Respondents saying to the court that it lacked jurisdiction because of appeals and that it further intended to seek a writ of *certiorari* which was going to delay the matter even more. Fundamental fairness could never require that a party defending against a motion for summary judgment would have to go forward based on a not yet fully made evidentiary record.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Respondents' motion be denied.

Respectfully submitted,

THE RICHTER FIRM, LLC

s/ Lawrence E. Richter, Jr.
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ATTORNEYS FOR APPELLANT

Mt. Pleasant, South Carolina
October 9, 2020

90748

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2018-CP-10-03929

John Doe,.....Respondent,

v.

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

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

NOTICE OF APPEAL

The Appellant Bishop of Charleston in his individual capacity hereby appeals the Orders of the Honorable Bentley D. Price, which have the effect of striking a defense asserted in the Appellant's Answer and which directly affect the Appellant's substantial constitutional rights and the substantial constitutional rights of Bishop of Charleston, a Corporation Sole. Counsel for the Appellant received written notice of the entry of the original Order on July 24, 2019, and filed a timely motion pursuant to Rule 59(e), SCRCP. Counsel for the Appellant received written notice of the entry of the Order denying that motion on August 5, 2019. Copies of the two Orders are attached.

(Signature on next page)

R. Hawthorne Barnett

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Attorneys for the Appellant

September 3, 2019

Other Counsel of Record:

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2018-CP-10-03929

John Doe,

Plaintiff,

v.

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

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION TO COMPEL DISCOVERY

DATE OF HEARING:	July 17, 2019
PRESIDING JUDGE:	Bentley D. Price
PLAINTIFF'S ATTORNEY:	Lawrence E. Richter, Jr. and Jennifer S. Ivey
DEFENDANTS' ATTORNEY:	Richard E. Dukes
COURT REPORTER:	Patricia Szoke

THIS MATTER came before the Court for a hearing on July 17, 2019 on Defendant, the Bishop of Charleston, a Corporation Sole's (hereinafter the "Corporation Sole")[1] Motion for Partial Summary Judgment as to the Bishop of the Diocese of Charleston, in his official capacity (hereinafter "the Bishop" and collectively "the Diocese") and Plaintiff's Motion to Compel Discovery.

Present at the hearing were Lawrence E. Richter, Jr. and Jennifer S. Ivey, Counsel for the Plaintiff, and Richard E. Dukes, Counsel for the Defendants. Also present in the courtroom were non-lawyer staff for both Plaintiff and Defendants' Counsel and Dr. Gregory B. Adams.

[1] In its pleadings, including the Motion for Partial Summary Judgment, the Corporation Sole claims that it is incorrectly identified by the Plaintiff as the "Diocese of Charleston, a Corporation Sole." Accordingly, from this point forward, the caption in this case is to be restyled as John Doe v. The Bishop of Charleston, a Corporation Sole, and the Bishop of the Diocese of Charleston, in his official capacity.

After a full review of the pleadings, the legal memoranda filed by the parties, arguments of counsel, and considering the controlling legal authorities, this Court makes the following findings of fact and conclusions of law:

THE BISHOP, IN HIS OFFICIAL CAPACITY AS A PARTY-DEFENDANT

1. The first matter heard by the Court was the Corporation Sole's Motion for Partial Summary Judgment. The Motion for Partial Summary Judgment sought dismissal of the Bishop as a defendant in this case on the basis that: (i) the Bishop is not a real party in interest, and is not a proper defendant; (ii) the Bishop does not have the capacity to sue; and (iii) the Corporation Sole is the only proper party and the only party with the capacity to be sued.

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.

3. The Plaintiff further argued that not only is the Bishop a proper defendant, but that it is necessary for the Bishop to be named as a Defendant for the Plaintiff to obtain the relief he seeks. The Plaintiff presented to the Court S.C. Code § 33-56-180, which provides in pertinent part: "An action against the charitable organization pursuant to this section constitutes a complete bar to any recovery by the claimant, by reason of the same subject matter, against the employee of the charitable organization whose act or omission gave rise to the claim unless it is alleged and proved in the action that the employee acted in a reckless, willful, or grossly negligent manner, and the employee must be joined properly as a party defendant."

4. Based upon the long precedent of the Bishop using South Carolina courts to sue in the name of the Bishop, the Bishop's history of being sued in South Carolina, and other legal acts taken by the Bishop under this South Carolina's laws, I find that the Bishop has the capacity to be sued and is a proper party-defendant to this suit.

5. I further find that the Bishop is a necessary party for relief. Based upon the existence of statutory rules like S.C. Code § 33-56-180(A) and the facts of this case; the inclusion of the Bishop as a party-defendant may be critical to the viability of the Plaintiff's claims.

PLAINTIFF'S MOTION TO COMPEL DISCOVERY

6. The Court also considered the Plaintiff's Motion to Compel Discovery. The Plaintiff seeks to compel responses to: (1) its first set of written discovery, issued to the Bishop on September 5, 2018; and (2) its second set of written discovery, issued to both Diocese Defendants on May 13, 2019.

7. The First Set of Written Discovery: Plaintiff seeks to compel the Bishop's responses to the Plaintiff's First Set of Interrogatories, First Requests for Production, served upon the Bishop on September 5, 2018. Plaintiff also seeks to compel the Bishop's responses to Plaintiff's First Requests for Admission, served to the Bishop on December 4, 2018. The Bishop has objected to all these discovery requests upon him based upon the Corporation Sole's Motion for Partial Summary Judgment. The Diocese has further sought an order of protection as to the Bishop based upon the pendency of the Motion for Partial Summary Judgment.

8. The Second Set of Written Discovery: The Plaintiff also seeks to compel full and complete responses to the Plaintiff's Second Set of Interrogatories and Requests for Production that were issued to the Corporation Sole and the Bishop on May 13, 2019. The Bishop did not respond to this discovery, based upon the pendency of its Motion for a Protective Order, but the Corporation Sole did. However, the Plaintiff argues that the responses made by the Corporation Sole were packed full of dilatory and delay-intentioned objections, and were not valid or sufficient responses. The Diocese maintained its objections and represented to the Court that it is going to be necessary to go line-by-line through every discovery request and have this Court rule on each.

9. The Diocese represented that it cannot produce responses, including responses to the September 5, 2018 discovery issued to the Bishop, the May 13, 2019 discovery issued to both Defendants, and the June 6, 2019 document requests by subpoena *duces tecum* to the Chief Financial Officer of the Diocese, John Barker, and its Vicar General Rev. Msgr. Anthony Droze VG, in the Roe case, until a confidentiality order is entered by the Court. The Diocese has filed a Motion for Entry of a Confidentiality Order. Plaintiff's Counsel has expressed a need for the information the Diocese seeks to shield, and as such, I find it necessary to consider the parties'

positions attendant to a line-by-line review of the Plaintiff's discovery requests and the Diocese's objections. Given the Scheduling Order in this case, I will consider both of these matters on August 19, 2019.

10. The Plaintiff's Motion to Compel is hereby granted. Based upon my foregoing conclusions with respect to the status of the Bishop as a party-defendant, the Bishop is ordered to produce responses to the Plaintiff's September 5, 2018 and December 4, 2018 first set of written discovery as soon as possible, but in any event no later than thirty (30) days from the date of the motions hearing or August 16, 2019. The Diocese is ordered to review and supplement its responses to the May 13, 2019 second set of written discovery as soon as possible, but in any event no later than thirty (30) days from the date of the motions hearing or August 16, 2019. To the extent the Diocese claims privilege or confidentiality to certain documents or information, the Diocese is ordered to have such documents ready and available in advance of the August 19, 2019 hearing. If the Court finds the documents or information are in fact not privileged, the documents and information are to be produced at the August 19, 2019 hearing or within 24 hours. As required by the SCRCP, the Defendants are to compile and send Plaintiff's Counsel a proper privilege log. Additionally, upon entry into a confidentiality order or if the Court declines to enter a confidentiality order, the documents and information are to be turned over to the Plaintiff at the conclusion or the August 19, 2019 hearing, or within 24 hours thereafter.

11. This Court will consider the Plaintiff's request to impose costs, fees, and sanctions on the Diocese under Rule 37, SCRCP at the time of the August 19, 2019 hearing.

NOW, THEREFORE, IT IS HEREBY

ORDERED AND ADJUDGED that Defendants' for Partial Summary Judgment is **DENIED**. Plaintiff's Motion to Compel is **GRANTED** and Defendants' discovery-related motions are rendered moot.

Hon. Bentley D. Price
Circuit Court Judge

24 day of July, 2019
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON John Doe, Plaintiff v. The Diocese of Charleston, a Corporation Sole, and the Bishop of the Diocese of Charleston, in his official capacity Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT 2018-CP-10-3929 **ORDER DENYING DEFENDANTS' MOTION TO RECONSIDER**

This matter initially came before the Court on July 17, 2019 on Defendant's Motion for Partial Summary Judgment and Plaintiff's Motion to Compel. At the conclusion of oral arguments, the Court granted the Plaintiff's Motion to Compel and denied the Defendants' Motion for Partial Summary Judgment. Defendant thereby timely filed a Motion to Reconsider. After thoroughly reviewing the Motion, Defendants' Motion to Reconsider is **DENIED**.

AND IT IS SO ORDERED.

The Honorable Bentley D. Price
Circuit Court Judge
Ninth Judicial Circuit

August 4th, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2018-CP-10-03929

John Doe,.....Respondent,

v.

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

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

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this **3rd day of September, 2019**, served a copy of the **Notice of Appeal** on counsel for the Respondent by causing it to be deposited in the United States mail with sufficient postage attached, addressed to: Lawrence E. Richter, Jr., and Jennifer S. Ivey; The Richter Firm, LLC; 622 Johnnie Dodds Blvd., Mt. Pleasant, SC 29464.

for R. Hawthorne Barnett

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Attorneys for the Appellant

September 3, 2019

Turner | Padget

REPLY TO:

Richard S. Dukes, Jr.

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September 3, 2019

Via Hand Delivery

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate St.
Columbia, 29201

Re: John Doe v. The Diocese of Charleston, et al.
Case No. 2018-CP-10-03929
Our File No. 8724.252

Dear Ms. Kitchings:

Enclosed are the following materials: (1) the original and one copy of the Notice of Appeal, (2) the original and one copy of the Proof of Service, and (3) a check for the filing fee. Please file the originals and return the stamped copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.

R. Hawton Barrett

for Richard S. Dukes, Jr.

RHB
Enclosures

cc: Lawrence E. Richter, Jr.
Jennifer S. Ivey

The South Carolina 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,

and

Richard Roe, Respondent,

v.

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

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

Appellate Case No. 2019-001470

ORDER

This appeal arises out of two circuit court orders denying the appellant's motion for summary judgment and granting the respondents' motion to compel. The appeal is dismissed as interlocutory. *See Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 461, 814 S.E.2d 643, 659 (Ct. App. 2018) (holding the denial of summary judgment is not appealable); *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) ("An order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14–3–330 [(2017)]."). The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

The appellant's motion to consolidate is granted. Any future filings should feature the caption above.

H Bruce Williams, J.
FOR THE COURT

Columbia, South Carolina

cc:
Richard S. Dukes, Jr., Esquire
Lawrence E. Richter, Jr., Esquire
Jennifer Sue Ivey, Esquire
R. Hawthorne Barrett, Esquire

FILED
December 2, 2019

The South Carolina Court of Appeals

Richard Roe, 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.

AND

John Doe, Respondent,

v.

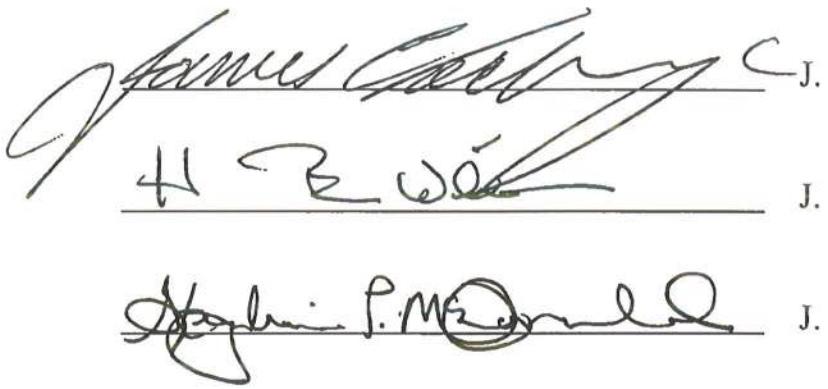
The Diocese of Charleston, a Corporation Sole, and the Bishop of the Diocese of Charleston, in his official capacity, Defendants,

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

Appellate Case No. 2019-001470

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



Columbia, South Carolina

cc:
Richard S. Dukes, Jr., Esquire
Lawrence E. Richter, Jr., Esquire
Jennifer Sue Ivey, Esquire
R. Hawthorne Barrett, Esquire
Julie J. Armstrong

FILED
February 14, 2020

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. 2020-000804

John Doe, ……Appellant,

v.

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

AMENDED PROOF OF SERVICE

The undersigned, an attorney in this matter of the Appellant, certifies that I have this 9th day of October, 2020, served copies of the Appellant's Return to Respondents' Motion to Strike Portions of Appellant's Designation of Matter to be Included in the Record on Appeal upon all counsel for the Respondents (listed below) by email and causing them to be deposited in the United States Mail with sufficient postage attached, addressed to:

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October 9, 2020