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 FINAL REPLY BRIEF OF APPELLANT

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Rules

I. THE CIRCUIT COURT ERRED IN ITS ORDER ENTERED ON JANUARY 9, 2020 IN GRANTING THE CHURCH'S SUMMARY JUDGMENT MOTION BASED ON THE DOCTRINE OF CHARITABLE IMMUNITY WHEN DOE'S COMPLAINT STATED CAUSES OF ACTION ARISING OUT OF NON NEGLIGENT INTENTIONAL ACTS BASED ON CHILD SEXUAL ABUSE FOR OUTRAGE, NEGLIGENCE/GROSS NEGLIGENCE, BREACH OF FIDUCIARY DUTY, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, FRAUDULENT CONCEALMENT, CIVIL CONSPIRACY, NEGLIGENT RETENTION OR SUPERVISION, BREACH OF CONTRACT, AND BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT.

After reviewing the pre-1971 decisions regarding the common law doctrine of Charitable Immunity, the Respondents (Church) then arrive at this obviously erroneous conclusion:

> In the present case, Appellant's own allegations and testimony establish that his alleged abuse could only have taken place sometime during the 1970-71 school year. One of the accused, Hal Brooks, testifies in his affidavit that he only taught at Sacred Heart School until December, 1970. *Therefore, the alleged abuse, which Brooks denies, would have taken place when common law charitable immunity was absolute. As a result, the Diocese is completely immune from suit, and the Circuit Court properly granted summary judgment.* (Church's Brief, p. 19)

As Doe explained in his principal brief, the fact that the then moribund doctrine of Charitable Immunity had not yet been completely extirpated from South Carolina law by 1970-1971 is hardly proof that up until that time it afforded the Church, or anybody who molests children, "absolute immunity" from any and all liability for child sexual abuse cases and others, both in tort and contract claims. No case so holds; and the unanimous South Carolina Supreme Court opinion in *Jeffcoat v. Caine*, 261 S.C. 75, 198 S.E.2d 258 (1973) laid this issue to rest definitively years ago. Of course, it is still the law.

The burden is on the Church, as the moving party, to prove that the types of claims asserted by Doe would have been barred in 1970-1971 by the doctrine of Charitable Immunity. *See, e.g., Stewart v. Richland Memorial Hospital*, 350 S.C. 589, 595, 567 S.E.2d 510, 513 (S.C. App. 2002) (a defendant has the initial burden of establishing a limitation on liability). Far from succeeding

in meeting its burden, the Church here has been unable to identify *any* reported decision from that time holding that the doctrine of Charitable Immunity, which had long been disfavored and on its way out before it was finally abolished, would have applied to *any* of the claims based on child sexual abuse which are asserted in this case. The Circuit Court erred in its ruling that the Charitable Immunity defense as it existed in 1970 provided a complete and absolute defense to every claim asserted by Doe in his Amended Complaint.

The Church then proceeds to argue that even if it did not enjoy blanket immunity for intentional torts at the time period in which Appellant Doe was molested, there is no evidence in the record that the Church committed an intentional tort:

> Yet, even if Appellant were correct, and *Jeffcoat's* exception for intentional torts applies, the Circuit Court's decision is still correct because Appellant has not presented evidence sufficient to support the one and only intentional tort he alleges, *i.e.*, outrage and intentional infliction of emotional distress. The record before the Circuit Court was bereft of any evidence that the Diocese intended harm toward Appellant or that the Diocese engaged in any egregious, extreme, or outrageous conduct whatsoever. (Church's Brief, p. 20)

The Church claims in footnote 41 that it also moved for summary judgment on Doe's claim of Outrage/Intentional Infliction of Emotional Distress, "pointing out that there was no evidence to support the essential elements of the claim. The record contains nothing in opposition to that motion." (Church's Brief, p. 20) The Church is being misleading here. The facts are that the Church chose the unorthodox procedure of filing *separate motions for summary judgment for each of its claimed grounds for summary judgment*. It then moved forward *on only three* of its separate motions: (1) the motion for summary judgment as to all claims based upon the common law doctrine of Charitable Immunity (R. pp. 789-842); (2) the motion for summary judgment as to all claims based upon the statute of limitations/lack of admissible evidence of repressed memory (R.

pp. 843-848); and (3) the motion for summary judgment based upon *res judicata* effect of 2007 Class Action Settlement. (R. pp. 849-952)

From the 12/12/19 Summary Judgment Hearing (R. pp. 594-677)

P13, L4-9 (R. p. 606, lines 4-9)

THE COURT: So, essentially, it's a lot motions for summary judgment as to certain causes of action; is that correct? Well, a bunch of causes of action, really, is what it is.

MR. DUKES: Well, actually, the charitable immunity attacks the entire complaint.

THE COURT: Okay.

See also P13, L10-P15, L11. (R. p. 606 , line 10-p. 608, line 11)

P15, L12-14 (R. p. 608, lines 12-14)

MR. DUKES: Let's start, Your Honor, with the motion for summary judgment on charitable immunity.

THE COURT: All right. let's start there.

See also P26, L6-10 and P44, L1-5. (R. p. 619, lines 6-10 and R. p. 637, lines 1-5)

Further, the Respondents engaged in the unfair and scurrilous tactic of filing affidavits at 4:51pm on Tuesday, December 10, 2019 to be utilized at 9:30am on December 12, 2019. (R. pp. 1038-1157) Even more revealing of the Respondents' unfair tactics is the fact that at least some of said affidavits were executed long before filing but were not filed or even made available to Doe or his counsel in the pre filing interim. One affidavit was executed and held 41 days before it was filed. Another affidavit was executed and held 34 days before it was filed. These holy men of the Diocese, either of their own volition or through counsel, don't only cover up the rape of children, they also keep secret the affidavit testimony of their hired witnesses, and file at the latest possible

time for unfair tactical advantage. Of course, this was argued to the hearing judge, to no avail.

Appellant believes the trial judge has been misled and that there is an effort afoot for this Court to be similarly misdirected. One area of such effort is seen in Respondents, by counsel, representing to the court below that South Carolina law in the 1970 timeframe permitted a charity to actually sexually abuse children and enjoy immunity for doing so. Also, the orders of Judge Nicholson and Judge Jefferson were misstated when relied upon by Respondents. Consider:

From the 12/12/19 hearing (R. pp. 594-677)

P16, L15-24 (R. p. 609, lines 15-24)

MR. DUKES: And I'll point, Your Honor, to a number of decisions by other Judges in this Circuit. Granted, they're not binding on you, but I think they are persuasive.

In 2017 Judge Nicholson granted summary judgment on charitable immunity in 11 cases pending against the Diocese, in which Mr. Richter was a defendant. He held that there was no genuine issue of material fact that the Diocese and its entities were charities, and that charitable immunity insulated them from liability, because the events alleged occurred prior to 1981.

Respondents' counsel's statements above are inaccurate. Judge Nicholson's Order Granting Diocese Defendants' Motion for Summary Judgment in *John Doe 193 v. The Bishop of Charleston, a Corporation Sole, et al 2013-CP-10-3733* (R. pp. 36-37) actually states:

> Having considered the Diocese Defendants' Motion and Memorandum of Law and having heard oral arguments from all counsel on June 28, 2017, the Court finds that no genuine issues of material fact exist and that Defendants are entitled to judgment as a matter of law.

That is the extent of what Judge Nicholson said. He certainly did not say "charitable immunity insulated them from liability, because the events alleged occurred prior to 1981" as Respondents' counsel has represented to the Court in this case. Also consider:

From the 12/12/19 hearing (R. pp. 594-677)

P16, L25-P17, L3 (R. p. 609, line 25 – p. 610, line 3)

MR. DUKES: Judge Jefferson's order in 2003, which was attached as an exhibit, goes through a very detailed analysis of the law of charitable – charitable immunity in this State as it's evolved.

P17, L11-19 (R. p. 610, lines 11-19)

MR. DUKES: This lawsuit that was filed in 2002, Judge Jefferson granted summery (sic) judgment in 2003, based upon charitable immunity, that the Diocese and its entities, including Sacred Heart School, were charities. That charitable immunity was effect (sic) at the time of the alleged tort. And that – and that the Diocese was entitled to judgment as a matter of law. That case was not appealed. But I assert that Judge Jefferson was exactly correct in her ruling on that.

P18, L13-P19, L8 (R. p. 611, line 13-p. 612, line 8)

MR. DUKES: Judge, in the Doe case that Judge Jefferson ruled on in her order, they had other causes of action. I think they had a breach of fiduciary duty claim and a breach of contract claim. And she said, you know, "At its heart, this is a negligence claim. There's no evidence that the Diocese intended for Eddie Fisher to harm this particular Plaintiff."

And the same is true here. 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". But he said – he doesn't have any evidence that anybody intended for him to be harmed. So at its heart, this case is a negligence supervision case and charitable immunity bars that claim.

I urge, Your Honor, to follow Judge Jefferson's lead, as well as Judge Nicholson and Judge Young, all of whom have – who have ruled in favor of the Diocese on charitable immunity, and to follow that.

P25, L16-23 (R. p. 618, lines 16-23)

MR. DUKES: As Judge Jefferson and Judge Nicholson and Judge Young and Judge Harrington have all recognized, at one time or another, the Catholic Church is a charity. They're entitled to the law of charitable immunity as it stood at the time of the sexual – alleged sexual abuse in 1970. At that time charitable – charities enjoyed immunity from tort. For that reason this case – summary judgment is due to be granted.

Again, Respondents' counsel's statements to the Court are inaccurate. First, there aren't any such orders from Judge Young or Judge Harrington. Second, Appellant does not dispute that the Diocese is a charity.

From the 12/12/19 hearing (R. pp. 594-677)

P16, L7-9 (R. p. 609, lines 7-9)

MR. RICHTER: Well, we stipulate that the Diocese is a charity. All of these entities enjoy a charitable status pursuant to 501(c)(3), is what they are.

Third, Judge Jefferson's Order dated January 21, 2003 in *John Doe v. The Diocese of Charleston, et al Case No. 2002-CP-10-0770* (R. pp. 4-28) actually states:

> 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)

Of course, "the parties" included Respondents herein. It suited them in 2003 to "concede that the Doctrine of Charitable Immunity would not apply to an intentional tort..." That is a position of convenience; not one that squares in any way with the position Respondents now take in this case.

There exist certain precepts which express, define, and ensure the viability of our system of justice. These precepts are precious, and without question form the bedrock of our system of

law and its function. Among these precepts are the following: All men are created equal; all are entitled to equal justice; as the law is applied to one, it is applied to all. We all drink from the same cup of justice.

These concepts, and others, have been preserved, strengthened, refined, and enforced scrupulously over time, and must be so in this case and hereafter. The refinements referenced stretch down even to control the activities of those who declare the law, those who adjudicate the law, and those who help shape, and sometimes twist and seek to have courts misapply the law. An example of this last is seen in the requirements of Rule 3.3 of the Rules of Professional Conduct, Rule 407 SCACR, that lawyers be forthcoming with the tribunals before which they appear and to which they make representations.

Although the Church had filed a number of other motions for summary judgment on other grounds, and even though Appellant had not received critical discovery response materials the Church was ordered to produce, still yet the hearing judge went forward with the December 12, 2019 motion hearing.[1] Nothing else was heard, and accordingly this Court should decline to address the Church's belated effort at submitting any arguments beyond the grounds raised in the three aforesaid motions as additional sustaining grounds. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000):

> The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the

1 The trial judge granted Appellant's motion to compel the Respondents to comply with the discovery requests propounded to them. (R. pp. 40-45) In an effort to avoid compliance Respondents appealed that pre trial order and this Court dismissed that appeal. Respondents then moved this Court for reconsideration, which this Court also denied. Then Respondents petitioned the S.C. Supreme Court for a writ of certiorari, which is briefed but has not yet been acted upon. But delay and avoidance of an appearance before a jury in a public trial have been accomplished by the Diocese; their purpose to begin with.

> record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds.

Endnote 9 of *I'on* further reiterates that it is in the Appellate Court's discretion whether to rely on additional sustaining grounds in the Record of Appeal "[t]he appellate court may or may not wish to address such grounds when it reverses the lower court's decision. *E.g., Smith v. Haynsworth, Marion, McKay & Geurard,* 322 S.C. 433, 438, 472 S.E.2d 612, 615 (1996)(reversing lower court and declining to discuss additional sustaining grounds)."

II. THE CHURCH IS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON THE ADDITIONAL SUSTAINING GROUND OF THE STATUTE OF LIMITATIONS/LACK OF ADMISSIBLE EVIDENCE REGARDING REPRESSED MEMORY SYNDROME.

Under *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000), a plaintiff must present at the summary judgment stage and at trial independently verifiable, objective evidence that corroborates a repressed memory claim in order to assert the discovery rule. A non-exclusive list of examples of corroborating evidence that may satisfy the objective verifiability requirement includes "(1) an admission by the abuser; (2) a criminal conviction; (3) documented medical history of childhood sexual abuse; (4) contemporaneous records or written statements of the abuser, such as diaries or letters; (5) photographs or recordings of the abuse; (6) an objective eyewitness's account; (7) evidence the abuser had sexually abused others; or (8) proof of a chain of facts and circumstances having sufficient probative force to produce a reasonable and probable conclusion that sexual abuse occurred"). *Id*. at 335, 534 S.E.2d at 680.

Part of the matter Appellant sought to rely on, and which, without objection, the Court allowed, was the deposition testimony of a psychologist expert witness, Dr. Duffy, of 40 years experience, who directly diagnosed Appellant as a repressed memory victim. Dr. Duffy not only

testified in her deposition accordingly, she also wrote a supporting report which had previously been given to Respondents' counsel, as well as all depositions and documents making up the case materials for the instant action and two related cases brought by child sex abuse victims of priests of the Diocese of Charleston.

Also, relied upon was the testimony of therapist Dorothy Whalen, to whom the Respondents sent Appellant for diagnosis and treatment, which has been paid for by them, when he reported to them through their Victim Assistance Coordinator that he had been sexually molested by agents of Respondents. This witness testified, as did Dr. Duffy, being deposed by counsel for Respondents. The depositions of these witnesses, as well as their records were all relied upon by Appellant, just as Respondents' counsel had been allowed to do earlier in the hearing itself and the 59(e) hearing. See Appellant's Initial Brief pp 5-8. This was in addition to deposition testimony of the Appellant, which was bone chilling and powerfully compelling, and relied upon by Respondents as well. All of which created a lengthy recitation containing multiple sickening issues of fact, as well as support for the expert opinions Appellant relies on.

Also relied upon were the deposition testimony and documents of Louisa Storen, Victim Assistance Coordinator of the Diocese of Charleston, and the damning writing from her which the Respondents hid and never produced. (R. pp. 344-593) That writing contained the names, which had been redacted, of two other young victims of Doe's perpetrators; horrible, sanctionable activity by Respondents and their counsel if he knew. Also, Ms. Storen's writing pointed out that Hartnett, the perpetrator-agent of Respondents, died of AIDS; she obviously thought that to be a fact relevant to Doe's claim. (R. pp. 471-472)

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 the above mentioned 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. (R. p. 471-472)

These good faith Respondents, these holy men, and their counsel if he has taken part, continue today to hide these victim-witnesses and their whereabouts and contact information. For this activity alone the Respondents should be sanctioned and not afforded any relief by the trial court nor this court. The Respondents have had this information about this criminal conduct for at least more than four years and still have not notified this writer nor the police.

Also, the perpetrator Hartnett's sister was found but would not come to her deposition scheduled for November 18, 2019. A motion concerning her being compelled to appear, or be protected from testifying, has been pending since November 15, 2019 and is still unheard, just as it was at the time of the summary judgment motion hearing. (R. pp. 1027-1037) At the hearing on

December 12, 2019 this was urged by Appellant as yet another example of reasons the hearing should not proceed until this and other discovery related matters were resolved so that Appellant Doe could fully and properly defend against the summary judgment motion here at issue. All to no avail.

All of this in the face of the fact that the trial court's discovery order requiring Respondents to make certain production was never complied with and as mentioned at page 7 was appealed to this Court which turned down Respondents' efforts on two occasions, and the Respondents' petition for writ of certiorari is now still pending before the South Carolina Supreme Court. The gravamen of the harm is that Appellant was made to defend against a motion for summary judgment in a grossly incomplete record and without the benefit of a full and fair opportunity to conduct discovery. See Appellant's Initial Brief pp 9-11 quoting the April 6, 2020 59(e) hearing transcript of record.

In *Baughman v. American Tel. Co.*, the Court held that summary judgment was premature and that:

> [s]ince 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.

Baughman v. American Tel. Co., 306 S.C. 101, at 112, 410 S.E.2d 537, at 543 (1991).

III. THE CHURCH IS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON THE ADDITIONAL SUSTAINING GROUND OF THE *RES JUDICATA* EFFECT OF A 2007 CLASS ACTION SETTLEMENT.

The Respondents also seek to escape accountability based on an argument concerning the *res judicata* effect of the 2007 class action settlement. This is the Respondents' second attempt to secure judgment in this case and avoid accountability based upon the class action settlement, as they have already tried and failed to have this case dismissed on that issue. Further, the issue of who is barred by the class action settlement has already been considered and determined, albeit by a trial judge. Hon. J.C. Nicholson, Jr., on May 3, 2017 entered an Amended Order on Limited Collateral Review in *John Doe 2, et al. v. Bishop of Charleston, et al.*, 2010-CP-10-5520). (R. pp. 29-35) The Amended Order on Limited Collateral Review required a review of the record in the underlying class action and concluded "it would be inconsistent with due process to bind him to the class action settlement if he had a repressed memory of sexual abuse at the time the notice was published." Well and sensibly said by the presiding trial judge therein (though not mandatorily binding here).

It is beyond dispute that Appellant made no claim seeking compensation during the pendency of the class action, nor until August 8, 2018. It is manifestly clear that one who did not know he was a tort victim cannot possibly be held to a burden of participating in a class in which he could not know he had a right to claim. It defies reason.

IV. THE CHURCH IS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON THE ADDITIONAL SUSTAINING GROUND THAT ALL OF DOE'S SEPARATE CAUSES OF ACTION FAIL DUE TO LACK OF ANY EVIDENCE SUPPORTING THE ESSENTIAL ELEMENTS OF EACH CLAIM.

The Church contends that it:

> also filed separate summary judgment motions highlighting the lack

> of any genuine issue of material fact regarding the required elements of each claim and asserting that they were entitled to judgment as a matter of law. Appellant did not submit anything in response to the Circuit Court prior to the hearing on all pending motions on December 12, 2019. As such, summary judgment was proper as to each claim and these unopposed motions stand as independent sustaining grounds. *See I'On v. Town of Mt. Pleasant, supra*. (Respondents' Brief, p. 30)

Contrary to the Church's assumption, summary judgment is not awarded by default simply because nothing is filed in response to a motion for summary judgment. As this Court recently reasserted in *Beneficial Financial I, Inc. v. Windham*, Op. No. 5753 (S.C. Ct. App. Filed August 5, 2020), where the moving party fails to carry its initial burden, it is not necessary for the non-moving party to submit anything in order to defeat a summary judgment motion:

> 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.
>
> *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 ___.

Opposing counsel specifically told the hearing judge, and has even told this Court, that there was no evidence of other instances of claimed sexual abuse of children by Appellant's perpetrators; saying so in the face of a letter to Vicar General Harris from the Diocese's Victim Assistance Coordinator, Ms. Storen, identifying two other child victims of at least Hartnett. The Church still refuses to reveal the identities of these two, or any, child sex abuse victims.

As previously explained in Argument I, although the Church filed separate motions for summary judgment for each of its grounds for summary judgment, it and the trial judge chose to move forward on only three of them: (1) the motion for summary judgment as to all claims based upon the common law doctrine of Charitable Immunity (R. pp. 789-842); (2) the motion for summary judgment as to all claims based upon the statute of limitations/lack of admissible evidence of repressed memory (R. pp. 843-848); and (3) the motion for summary judgment based upon *res judicata* effect of a 2007 Class Action Settlement. (R. pp. 849-952) The same material relied on by Appellant was applicable to all motions the trial court may have considered that day, and accordingly this Court should decline to address the Church's belated effort at submitting any arguments beyond the grounds raised in the three aforesaid motions as additional sustaining grounds. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000):

> The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds.

Also, Appellant fully and repeatedly incorporated extensive materials into the hearing record and relied on same in resisting summary judgment, just as Respondents' counsel did in quoting

Appellant's deposition testimony and that of other of Appellant's experts in support. (R. pp. 594-677 and R. pp. 691-741)

a. Summary judgment was not warranted as to Doe's fraud and fraud-based claims and contract claims.

First, the Church contends that Doe:

> came forward with no admissible evidence regarding the essential elements of his claims for Breach of Contract, Breach of Contact Accompanied by a Fraudulent Act, or Fraudulent Concealment. Without any evidence to support the elements of these claims, Appellant's Fourth, Seventh, and Eighth causes of action failed as a matter of law. (Respondents' Brief, p. 31)

i. Fraudulent Concealment

As this Court explained in *Ardis v. Cox*, 314 S.C. 512, 431 S.E.2d 267 (S.C. App. 1993):

> Nondisclosure is fraudulent when there is a duty to speak. *Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978). *See also Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601 (1967) (non-disclosure becomes fraudulent when it is the duty of the party having knowledge of the facts to uncover them to the other). In *Jacobson*, the Court stated:
>
> > The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Id. at 517, 431 S.E.2d at 270.

In the *Ardis* case the trial judge found there was no allegation of a fiduciary or confidential relationship between the parties, no evidence such a relationship existed, and this assertion was

not properly raised in the pleadings as required by Rule 9, SCRCP. *Id*. at 517-518, 431 S.E.2d at 270. In the present case, Doe's Amended Complaint asserts detailed allegations in paragraphs 1 through 28 which fully establish the Church's duty to disclose what it knew or should have known of Hartnett's and Brooks' sexually deviant propensities with minors, and then goes on to allege (R. pp. 58-124):

> 42. The allegations of paragraphs 1 through 28 above are incorporated into this cause of action as if fully stated herein.
>
> 43. Defendants knew or should have known of Hartnett and Brooks sexually deviant propensities with minors prior to the sexual molestation of Plaintiff. Plaintiff could not have known, nor did he reasonably have the opportunity to know, that the Defendants had such knowledge about Hartnett and Brooks deviant and sexual propensities prior to the abuse perpetrated on him. Further, Plaintiff could not have discovered the truth through reasonable inquiry or inspections. By acts and conduct described herein, Defendants concealed material facts from Plaintiff, inducing Plaintiff and his family into a false belief that children were safe being around Hartnett and Brooks, a false belief that no other children were sexually abused by Hartnett and Brooks, and a false belief that the Defendants did not possess knowledge that Hartnett and Brooks engaged in predatory sexual practices and abused other children, among other things.
>
> 44. The Defendants' failure to report, as required by law, along with their active concealment of Hartnett and Brooks' above mentioned propensities, as mandated by the INSTRUCTION attached at Exhibit A, and as required by South Carolina law, constitutes fraudulent concealment of the information about Hartnett and Brooks from their potential prey. This fraudulent concealment lasted until the present.[2]
>
> 45. As a direct and proximate result of the outrageous conduct of the Defendants, Plaintiff has been injured and suffered damages. Plaintiff is entitled to a judgment against the Defendants for actual damages to be determined by the trier of fact, and punitive damage in a sufficient amount to deter such similar conduct by these Defendants and others. Plaintiff further requests the court enjoin these Defendants from conducting, or

2 Of interest is a document entitled INSTRUCTION attached as "Exhibit A" to the Complaint/Amended Complaint when this case was initially filed. (R. pp. 58-124) It emanated from Rome, the Vatican, and it is the veritable playbook to keep the lid on cases of child molestation. It was sent to all bishops in the world with a firm dictate that it could not be altered in any way and that it must be stored in the Secret Archives of the Diocese.

having minor children participate and/or facilitate, their illegal gambling operations including bingo, raffle, drawings, door prizes, lotteries, and other games of chance, which Defendants use to fund the cover-up of child sexual abuse by its priests, employees, and agents as alleged herein, and enjoin these Defendants from failing and/or refusing to report allegations of child sexual abuse to the proper legal authorities.

ii. Breach of Contract and Breach of Contract Accompanied by a Fraudulent Act

The Church asserts that Doe:

> failed to point out any material fact to support his allegations that he entered into any contract with the Respondents; that Respondents breached that contract; or that any fraudulent act accompanied the breach. Further, Appellant failed to plead fraud with the specificity required under Rule 9, SCRCP, and he failed to submit any evidence that Respondent engaged in any fraudulent intent relating to some breach of contract. (Respondents' Brief, p. 32)

Doe's Amended Complaint asserts detailed allegations in paragraphs 1 through 28 which fully establish the Church's contractual relationship with Doe. Quite obviously, the parties were not strangers to each other. The Amended Complaint then goes on to plainly allege a breach of that contract:

57. The allegations of paragraphs 1 through 28 above are incorporated into this cause of action as if fully stated herein.

58. By and through the Plaintiff's attendance at Sacred Heart school in exchange for the payment of, among other things, tuition and fees, a legally binding contract was formed between Plaintiff and Defendants. As part of the contract Defendants agreed to keep Plaintiff in a safe environment and condition.

59. Implied in every contract is a covenant of good faith and fair dealing.

60. By and through the conduct described herein, Defendants breached the contract with the Plaintiff.

61. As a direct and proximate result of the Defendants' breach(es), Plaintiff sustained and continues to sustain injuries and damages described herein

and therefore is entitled to receive actual, compensatory damages in an amount to be determined by a jury against these Defendants.

Doe's Amended Complaint also properly alleges a claim for breach of contract accompanied by a fraudulent act:

62. The allegations of paragraphs 1 through 28 above are incorporated into this cause of action as if fully stated herein.

63. By and through the Plaintiff's attendance at Sacred Heart School in exchange for the payment of, among other things, tuition and fees, a legally binding contract was formed between Plaintiff and Defendants. As part of the contract Defendants agreed to keep Plaintiff in a safe environment and condition.

64. Implied in every contract is a covenant of good faith and fair dealing.

65. By and through the conduct described herein, and further by allowing Defendants' agents/employees to take minor children under their care and supervision away, on out of town travel and otherwise, including the Defendants' concealment of information and knowledge of Defendants' agents/employees conduct from the Plaintiff and others, Defendants breached the contract with the Plaintiff with fraudulent intent relating to the breach of the contract and not merely to its making, and with fraudulent acts accompanying the breach.

66. Moreover, the Diocese acted with fraudulent intent relating to the breach of the contract and not merely to its making, and with fraudulent acts accompanying the breach by actively concealing information regarding the commercial operation of its schools, its illegal gambling activity, and its secret payments and/or reassignments of priests and/or other abusing employees or agents.

67. As a direct and proximate result of the Defendants' breach(es), Plaintiff sustained and continues to sustain injuries and damages described herein and therefore is entitled to receive actual, compensatory damages in an amount to be determined by a jury, and punitive damages in a sufficient amount to deter similar conduct by these Defendants or others. Plaintiff further requests the court enjoin these Defendants from conducting, or having minor children participate and/or facilitate, their illegal gambling operations including bingo, raffle, drawings, door prizes, lotteries, and other games of chance, which Defendants use to fund the cover-up of child sexual abuse by its priests, employees, and agents as alleged herein, and enjoin

these Defendants from failing and/or refusing to report allegations of child sexual abuse to the proper legal authorities.

b. Breach of Fiduciary Duty

Doe's Amended Complaint asserts detailed allegations in paragraphs 1 through 28 which fully establish the Church's fiduciary relationship with Doe. The Amended Complaint then goes on to plainly allege a breach of that relationship:

> 37. The allegations of paragraphs 1 through 28 above are incorporated into this cause of action as if fully stated herein.
>
> 38. By and through the relationships described herein, Defendants entered into a fiduciary relationship with the Plaintiff. Additionally, by accepting physical custody of the minor Plaintiff, as student at Sacred Heart School and a parishioner of Sacred Heart Catholic Church, Defendants assumed the duty to act in loco parentis with respect to the Plaintiff. The Defendants undertook a duty to provide a safe environment for Plaintiff, as well as for all children at the schools of the Diocese, at its churches, and at its activities and all interactions by agents and/or employees of Defendants with children. A relationship of trust and confidence, and therefore a fiduciary relationship, was formed.
>
> 39. By entering into a fiduciary relationship with Plaintiff, Defendants were obligated to act only in the best interests of Plaintiff. This duty extended to Defendants' agents and employees, Hartnett and Brooks included.
>
> 40. Plaintiff reposed trust and confidence in Hartnett and Brooks, his teachers, advisors, counselors, and role models and in the Defendants. As a result of Hartnett and Brooks predatory acts described above and the Diocese and Bishop's failure to act properly on Hartnett and Brooks' conduct, the Defendants breached the duties owed to the Plaintiff.
>
> 41. As a proximate result of the negligent actions, inactions and breaches of fiduciary duties by the Defendants and through agents, Plaintiff was harmed and is entitled to actual, compensatory damages in an amount to be determined by the jury, and punitive damages in an amount sufficient to deter similar conduct by these Defendants and others.

The Church asserts that:

> South Carolina courts have routinely held that the student-school

> relationship does not give rise to a fiduciary duty under the theory of *in loco parentis* or any other theory. (Respondents' Brief, p.33)

It cites *Hendricks v. Clemson Univ*., 353 S.C. 449, 578 S.E.2d 711 (2003) (Respondents' Brief, p. 33) and *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007) (Respondents' Brief, pp. 33-34). However, neither case holds that a fiduciary relationship cannot arise between a school and pupil under the circumstances alleged by Doe. The *Hendricks* case involved mistaken advice given to a student by an athletic academic advisor, and the *Doe* case involved the claims of the parents under the Tort Claims Act: "Mr. and Mrs. Doe have not alleged any facts under which this Court could find another duty owed by the School District other than the duty of supervision as outlined by the Tort Claims Act." *Doe*, 375 S.C. 63, 72, 651 S.E.2d 305, 310.

c. Conspiracy

Doe's Amended Complaint asserts detailed allegations in paragraphs 1 through 28 which fully establish his claim for conspiracy, and then goes on to plainly allege conspiracy:

> 46. The allegations of paragraphs 1 through 28 above are incorporated into this cause of action as if fully stated herein.
>
> 47. Prior to the abuse of the Plaintiff, Plaintiff is informed and believes two or more individuals, including agents of the Defendants were aware of Hartnett and Brooks sexually deviant propensities with minors. The failure of these agents of the Defendants to report Hartnett and Brooks to the proper authorities, the active concealment of their knowledge about Hartnett's and Brooks' deviant activities, and their agreement to do nothing to stop, or at least report, the abusers' activities constitutes a conspiracy, or a conspiracy of silence. The purpose behind this conspiracy was to protect Defendants and Hartnett and Brooks and Defendants at the Plaintiff's expense, proximately resulting in injury to the Plaintiff. The conspiracy of silence constitutes a failure to protect minors who were the potential prey of Hartnett and Brooks and their sexually deviant propensities, this Plaintiff included.
>
> 48. As a direct and proximate result of the conspiratorial conduct of the Defendants, Plaintiff has been injured and suffered damages. Plaintiff is

> entitled to a judgment against the Defendants for actual damages to be determined by the trier of fact, and punitive damage in a sufficient amount to deter such similar conduct by these Defendants or others. Plaintiff further requests the court enjoin these Defendants from conducting, or having minor children participate and/or facilitate, their illegal gambling operations including bingo, raffle, drawings, door prizes, lotteries, and other games of chance, which Defendants use to fund the cover-up of child sexual abuse by its priests, employees, and agents as alleged herein, and enjoin these Defendants from failing and/or refusing to report allegations of child sexual abuse to the proper legal authorities.

Though it is typically in a SCRCP 12(b)(6) scenario that amendments to pleadings are considered, the rationale should be equally considered here. What courts seek for is full and final hearings on the merits, not summary resolutions. See *Skydive Myrtle Beach, Inc. v. Horry Cnty*., 426 S.C. 175, 179-180, 826 S.E.2d 585, 587 (S.C. 2019):

> When a trial court finds a complaint fails "to state facts sufficient to constitute a cause of action" under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal. See *Foman v. Davis*, 371 U.S. 178, 179, 182, 83 S.Ct. 227, 228, 230, 9 L.Ed.2d 222, 224, 226 (1962) (where a complaint is dismissed "for failure to state a claim upon which relief might be granted," leave to amend the complaint "should, as the rules require, be 'freely given' " (quoting Rule 15(a), Fed. R. Civ. P.)); *Dockside Ass'n, Inc. v. Detyens*, *Simmons & Carlisle* , 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988) (holding "Dockside should have been given leave to amend its complaint" before it was finally dismissed pursuant to Rule 12(b), SCRCP (citing *Foman* , 371 U.S. at 182, 83 S.Ct. at 230, 9 L.Ed.2d at 226)). Rule 15(a)"strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist*., 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005)).

CONCLUSION

Much about this case is compelling. What Respondents are requesting from this Court is confirmation that a declaration by the trial judge that the Supreme Court of South Carolina

(unanimously) got it wrong in *Jeffcoat* and that somehow it is permissible for Respondents to make manifest misstatements as referenced herein. And that at the time of Appellant's molestation Respondents were allowed to do whatever they wished, including raping children, and they were immune from accountability for such intentional acts.

Summary judgment was premature. Appellant was not afforded a full and fair opportunity to complete discovery. Respondents seek to usurp Appellant's right to trial. Respondents seek to cover up the pervasive, systemic, and intentional concealment of known child sexual abuse.

What Appellant seeks is justice; the right to a public trial before a jury of his peers, who can decide the case based on the facts shown and proven to them.

For the foregoing reasons, Doe respectfully requests that the orders of the Circuit Court be reversed.

Respectfully submitted,

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February 5, 2021
Mt. Pleasant, South Carolina

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.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Amended Final Reply Brief of the Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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