The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-001996

John Doe 2 and Jane Doe 4, John Doe 10, Jane Doe 11, John Doe 193, Father Doe 194, John Doe 194, John Doe 245 and Father Doe 245, and John Doe 297,

Appellants

v.

The Bishop of Charleston, a Corporation Sole; Robert Gugliemone, The Bishop Of Charleston, in his official capacity; Rev. Monsignor Martin Laughlin, former Administrator of the Diocese of Charleston, in his official capacity; Robert J. Baker, former Bishop of Charleston, in his official capacity; Lawrence E. Richter, Jr., David K. Haller, and Richter and Haller, LLC,

Respondents

Petition to Rehear and Memorandum in Support

Appellants petition the Court of Appeals to rehear its order of March 3, 2021, affirming dismissal of the cases consolidated in this appeal. As this appeal is from orders which grant summary judgment, the record must be construed in the light most favorable to the appellants, a standard the court recites (Order at p. 1) but disregards in its analysis, as did the trial court.

The four points set forth in the memorandum below have been overlooked or misapprehended by the panel of the Court of Appeals.

1. The complaints do not allege alternative causes of action among defendants.

The panel erred in multiple ways in adopting the trial court's convenient, but incorrect, theory for interpreting the collective complaints.

First, assuming *arguendo* that the various complaints state claims in the alternative (when they do not), even if the complaints did so that is not a proper basis for dismissal. Alternative pleading is explicitly permitted by SCRCP 8(a). ("Relief in the alternative or of several different types may be demanded.") *See generally*, *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 187-88 (S.C. 2019) (discussing pleading theories of recovery based on uncertainty of whether an employee acted within the scope of employment).

Second, and more fundamentally, nowhere in any of the complaints are the causes of action alleged against class counsel as "alternative" to causes of action alleged against the Diocese.[1]

"Today we operate under the far more flexible notice pleading provisions of the Rules of Civil Procedure. " *Angela Patton, Alexia L. v. Gregory A. Miller, M.D., Rock Hill Gynecological & Obstetrical Assocs., P.A.*, 804 S.E.2d 252, 263 (S.C. 2017). We are happy to be bound by our pleadings, but not to have them inaccurately and unfairly interpreted, particularly on a grant of summary judgment, particularly on a notice pleading standard, particularly when pleading alternatives is explicitly permitted in SCRCP 8(a), particularly when the claims are not stated in

[1] When alternative claims are made by Appellants they are made explicitly. E.g., the claims for breach of fiduciary duty by class counsel are explicitly alleged as alternative to the claims for legal malpractice. E.g., R. App. p. 920 at ¶ 310, stating breach of fiduciary duty "As an alternative to the Fourth Cause of action for professional negligence …." See also, R. App. p. 1019 ¶ 308 (same); R. App. p. 1408 ¶ 296 (same). As noted, alternative claims are permissible under SCRCP 8(a) so the Court has erred in attaching disqualifying significance to that contention on summary judgment.

the alternative, and particularly when the complaints are not, as the order pretends, identical. After the South Carolina Supreme Court decided *Doe v. Bishop,* 754 S.E.2d 494 (2014), the complaints began to incorporate its holding, whereas the earliest complaints recognized as unknowns the issues as to relief that were resolved in that decision.

Each complaint does no more than recognize that until the Supreme Court decided *Doe v. Bishop* a basic issue affecting these actions was unresolved and that ambiguity gave rise to different possibilities for the potential for relief posed by the various claims.

Although the trial court and the panel each erred in construing the applicable precedents that apply to class counsel's fiduciary duties to absent members of the class, in the class action class counsel both explicitly acknowledged having assumed fiduciary duties to the absent class members and had those fiduciary duties imposed by law. The trial court and the panel have erred in failing to fully analyze the different points at which class counsel confronts those fiduciary duties, as addressed below.

Pertinent to this portion of the argument, class counsel claimed to have obtained by agreement that all absent members of the class who got no notice would get the same relief as was available to participating class members, specifically including the benefit of various defenses waived by the Diocese. R. App. 2314 (hearing transcript of July 13, 2007 at pages 16 – 17). That assurance went directly to the collusive conduct where the parties to the class settlement altered the notice plan so as to exclude any possibility that the appellants would receive notice of the class action.[2]

[2] The trial court's analysis of class counsel's fiduciary duty to absent members of the class involved some gymnastics. In the order which begins at R. App. 203, the trial court decided that class action precedents imposing fiduciary duties on class counsel as a matter of law simply did

However, that relief which class counsel claimed to have obtained for absent members of the class who got no notice was never embodied in any written order in the class action. Absent class members who never got notice argued in *Doe v. Bishop* that one written order appeared to provide that relief, but in *Doe v. Bishop* the Supreme Court held that the order did not include that relief for absent class members. 754 S.E.2d at 499 (absent class members not entitled to the "more generous terms" of the defenses waived in the class action).

In *Doe v. Bishop* the Supreme Court authorized the claims against class counsel to proceed, 754 S.E.2d at 501, specifically including among those claims the "inadequate representation" claim. *Id*. Failing to secure the relief claimed to have been secured is one aspect of that inadequate representation claim, yet Appellants have not been permitted to pursue the claim as the South Carolina Supreme Court ruled could be done.

A party always has a duty to mitigate damages. E.g., *McClary v. Massey Ferguson, Inc.*, 354 S.E.2d 405, 407-408 (S.C. App. 1987). Until the Supreme Court decided *Doe v. Bishop,* one possibility was that class counsel's damage to absent class members might have been entirely

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not apply, as noted below. The court ignored (instead of interpreting favorably to Appellants) the record of class counsel's overt statements which acknowledged they had assumed a fiduciary duty to absent class members. The trial court (at R. App. 220) focused on one ambiguous paragraph from a class complaint (¶ 41, which is in the record at R. App. 307 – 308) filed October 6, 2006 in case 06-CP-18-1636 (R. App. 220). The trial court interpreted that ambiguous paragraph favorably to class counsel rather than favorably to the appellants as summary judgment required. But in doing so, the trial court also entirely ignored the class definitions pleaded in two other, earlier class complaints: those filed August 15, 2006 (as part of the judge-shopping process) in 06-CP-18-1310 and 06-CP-18-1311. Those earlier class complaints begin at R. App. 271 and 279, respectively. Those class complaints, and the motions to certify the classes (in the record at R. App. 315 and 322), defined the classes differently than did the October 2006 complaint the trial court relied on. Compare those August 15, 2006 complaints and the first motion to certify the classes, R. App. 315 - 317 (expanded class definitions and original notice program proposal) with R. App. 322 – 324 (reiterated expanded class definitions but altered the notice program to exclude Appellants).

mitigated by a claim against the Diocese, if despite the collusive conduct class counsel had actually obtained for absent class members the waived defenses they claimed to have obtained. That mitigation possibility does not mean, and never meant, there was no claim against class counsel for breach of fiduciary or other duty, only that the collusive conduct might have damaged Appellants in a way that could be mitigated.

After the Supreme Court in *Doe v. Bishop* clarified that in fact no written order secured for Appellants the relief that class counsel claimed, 754 S.E.2d at 499, and after the Supreme Court authorized the claims against class counsel to proceed, 754 S.E.2d at 501, it was then known that, as to the Diocese, Appellants must each confront defenses that but for class counsel's failure would have been waived by the Diocese.

On this landscape, which is both factually and legally complex, the complaints do no more than recognize and propose a sequence for addressing the different harms done by the different defendants, specifics to help the parties and the court organize the claims. The panel has erred in construing the complaints as claims in the alternative as to liability. Before the Supreme Court decided *Doe v. Bishop*, when it was not known if class counsel had actually obtained the relief they claimed to have obtained for absent class members who got no notice, the complaints generally state this damage mitigation sequence. After the Supreme Court decided *Doe v. Bishop*, the complaints identify the mitigation issue with more specificity, incorporating the Supreme Court's holding of *Doe v. Bishop* that class counsel had not obtained the relief they had claimed to have obtained.

For example, at R. App. 1269 - 1270, in the complaint for John Doe 245 and Father Doe 245, the mitigation sequence is stated more precisely, reflecting Supreme Court's the holding in *Doe v. Bishop*:

> 94. If the Diocese agrees, or the court finds, that the Plaintiffs are not precluded by the class action from bringing claims against the Diocese defendants, then the damage caused by the admitted inadequacies of [class counsel] who, for a fee, abandoned their clients, and conspired against the Plaintiffs through the class action, ***may be mitigated*** through their claims against the Diocese defendants. However, if the court finds that the Plaintiffs are precluded for any reason from pursuing claims against the Diocese defendants, including the *res judicata* effect of the class action, charitable immunity (which the Diocese defendants waived for those within the class definition), ***or because an insufficient recovery fails to fully mitigate*** the admitted misconduct by [class counsel], then the claims against [class counsel] should be liquidated, and claims for punitive damages are properly made against those who conspired against the Plaintiffs, as well as against [class counsel] who failed to properly represent the Plaintiffs in the representation of the Plaintiffs that [class counsel] undertook.

Comparable language was alleged in the complaint for John Doe 297, also filed after *Doe v. Bishop* was decided. E.g., R. App. 1364 – 1365, ¶ 96.

The panel has erred in confusing as alternative liability claims Appellants' recognition of how the different injuries caused by the Diocese and class counsel interact and should be sequenced for mitigation. The panel has apparently viewed the complaints not through a lens of notice pleading but through some unstated version of Code pleading to declare that the various complaints state alternative claims, when in fact (a) none of the claims are alleged as alternative liability claims and (b) the complaints do no more than recognize how the injuries caused by class counsel should be sequenced in potential mitigation as compared to the injuries caused by the Diocese, (c) in language that was stated more precisely as the South Carolina Supreme Court clarified issues which in the first pleadings were unknowns. The claims stated against class

counsel are different claims than those stated against the Diocese, because the injuries are different. They are not stated as alternative claims.

The "series of alternative claims" pleading theory was urged by class counsel (e.g., R. App. 1059), so far successfully, to offer a way for first the trial court and now for the panel to avoid confronting both (A) the different points (class pleading, class settlement, class definition, and class approval) at which class counsel's fiduciary obligation to absent class members should properly be assessed under *In re Green*, 354 S.E.2d 557 (S.C. 1987); *Premium Investment Corp. v. Green*, 324 S.E.2d 72 (S.C. App. 1984); and *Tilley v. Pacesetter Corporation*, 585 S.E.2d 292, 302 (S.C. 2003); and (B) the extensive evidence (which must on this record be accepted as true) of collusion in the class settlement, judge-shopping, actions contrary to SCRCP 23, providing false information to the court, withholding information from the court and grotesque self-dealing by class counsel at the expense of the absent class members they purported to represent; as well as the disturbing record of a shopped-for judge prepared both to be shopped-for and to give no scrutiny to that extensive evidence of harm to absent class members despite the court's independent obligation under SCRCP 23 to protect the interests of absent members of the class. The Diocese joined the "alternative claims" theory as to seeking judgment on the allegations of aiding and abetting the breach of fiduciary duty claims. R. App. 1764.

That the parties to the class action colluded on this and many other points in handling the class action settlement so as to harm absent class members is not a proper basis for affirming the trial court.

2. Damages, part 1. The panel erred in determining that there had been "adequate time for discovery" as to damages, when in fact full discovery has not been permitted in any case and in two cases no discovery at all has yet been permitted.

As reflected at R. App. 188, in the two most recently filed cases that were dismissed (2015-CP-10-5486, for John Doe 245 and Father Doe 245; and 2016-CP-10-1632, for John Doe 297), literally no discovery had been permitted before summary judgment was granted. The scheduling order entered shortly after those cases were filed states that a "further Order of the Court" was "to allow for a discovery extension" for each of those cases. That order never came. No discovery whatever has been permitted in those cases before dismissal.

In the limited discovery that has been allowed in other cases to date, at no point has class counsel submitted to deposition to respond to, among other things, the extensive evidence of collusive conduct, self-dealing, misrepresentations to and concealments from the shopped-for judge, the fiduciary duties class counsel acknowledged having assumed towards absent members of the classes, and the damage to Appellants and other class members from class counsel having failed to secure the relief for absent class members class counsel claimed to have achieved. Summary judgment in all of Appellants' cases was entered two months after that *sua sponte* scheduling order acknowledged that recently filed cases would receive a separate discovery schedule. R. App. 189, 191, 195, 199, and 203.

Despite the Supreme Court in *Doe v. Bishop* having authorized the claims against class counsel to proceed, 754 S.E. 2d 494, 501 (S.C. 2014), and despite ample evidence in the record of collusive conduct as set out in Appellants' briefs and the record of the class action, the lower courts have protected class counsel from being deposed. In 2016, after "various status conferences," R. App. 157, the trial court ordered bifurcated trials for the defendants, to try first

the claims against the Diocese, deferring trial of the claims against class counsel. R. App. 158, 160. Further discovery as to class counsel was stayed by direction of Judge Nicholson because of the bifurcation order. An amended bifurcation order was entered in 2017, R. App. 166 – 173, and a "*sua sponte* scheduling order" was entered after a case set for trial against the Diocese settled as to claims against the Diocese. R. App. 181, 186.

The *sua sponte* order provided that a "further Order of the Court" would "allow for a discovery extension" in the recently filed cases for the Does 245 and John Doe 297. R. App. 188. That order never came. Instead, the cases were dismissed.

The panel has plainly erred in concluding there has been "adequate time for discovery" when there has been no discovery whatever in two cases, only limited discovery in all other cases, and no opportunity to compel class counsel to submit to deposition. *Lee v. Kelly*, 378 S.E.2d 616, 617 (S.C. App. 1989) ("Summary judgment is inappropriate where further development of the facts is desirable to clarify the application of the law.")

3. Damages, part 2. The panel erred in construing the damages issue.

R. App. 211 contains an efficient, concentrated example of the trial court's error on damages that the panel has erred by affirming. Addressing Appellants' breach of fiduciary duty claims against class counsel (and, by implication, the aiding and abetting the breach of fiduciary duty claims directed against the Diocese), the trial court concluded (emphasis added):

> Thus, the Plaintiffs have either voluntarily settled with the Diocese Defendants or voluntarily conceded ***to the defense of charitable immunity***.[3]

[3] Note that the order granting summary judgment against all Appellants contradicted the trial court's order of two months earlier, R. App. 166, bifurcating trials. The trial court bifurcated trials because the claims against the Diocese were "sufficiently distinct" from the claims against the lawyers that separate trials were appropriate. R. App. 166. Two months later the cases were dismissed because the trial court concluded that nothing the lawyers had done had caused harm

Because class counsel had failed to obtain for every absent member of the class the waiver of, for example, the charitable immunity defense, every appellant was subject to that defense. Charitable immunity would have been inapplicable to Appellants' claims had class counsel secured the relief claimed or, even simpler, had class counsel met the obligation to provide notice to the absent class members commensurate with the class they chose to define without geographic limit. Some of those defenses were fatal to Appellants' claims against the Diocese. Other Appellants were compelled to compromise their claims in light of that defense. See, R. App. 210 notes 9 and 10. That failure by class counsel has plainly damaged each appellant, and their claims against class counsel should proceed.

Nor was the trial court correct in claiming that only civil conspiracy, not any other cause of action, could feature joint and several liability among the Diocese and class counsel. R. App. 212. Joint and several liability arises

> when two or more tortfeasors are responsible for a *single* injury:
>
> > That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, even in the absence of community of design or concert of action, to a liability which is both joint and several, is a proposition recognized and approved in this state and supported by the great weight of authority elsewhere.

Collins v. Bisson Moving Storage, Inc., 332 S.C. 290, 306 (S.C. Ct. App. 1998) (internal citations omitted).

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to any appellant (despite conduct which subjecting Appellants to a powerful defense that should have been waived for them) and that there was only "one loss," R. App. 212, not "distinct" claims. R. App. 166. The breach of fiduciary duty is the duty assumed by or imposed by law on class counsel, aided and abetted by the Diocese, which is extensively laid out in the record of the class action and related in Appellants' briefs.

Class counsel both assumed and had imposed as a matter of law fiduciary duties to the appellants, as explicitly set out in the record of the class action and set forth in Appellants' briefs. Class counsel breached those duties by failing to include in any written order the defenses that should have been waived for the appellants. That breach, which was aided and abetted by the Diocese, subjected the appellants to defenses they would otherwise have avoided. Those defenses were powerful, as reflected by the trial court at R. App. 211. (*See also*, R. App. 1502, where another court referred to them as "significant legal defenses.") The record viewed favorably to Appellants is extensive that the Diocese aided and abetted that breach. Each refers to the injury from the breach of fiduciary duty, which the trial court earlier had concluded was so distinct from the sexual abuse itself that separate trials were needed.

The sexual abuse is clearly the original injury. Class counsel assumed fiduciary duties to obtain relief for that injury. But class counsel chose to place their own financial interests ahead of obtaining that relief for absent members of the class whose interests they undertook to represent, not only by making their fee the highest priority of the class action settlement but through the various collusive ways laid out in Appellants' briefs. The Diocese aided and abetted all of the collusive conduct by class counsel.

Joint and several liability would be entirely appropriate for that misconduct, which is extensively documented in the record of the class action and as noted above, includes misrepresentations to the shopped-for judge and withholding information from the shopped-for judge, particularly in service of class counsel pursuing their fee which was the highest priority of the class action settlement and was explicitly prioritized above recovery to any class member. E.g., R. App. 30 ¶ 6B.

The panel has erred in affirming the trial court and concluding both that no damage was done to Appellants by class counsel, and that there is no evidence of damage. As the trial court itself noted, Appellants had to confront the defenses that on this record it must be assumed that class counsel claimed to have obtained would be waived for Appellants, then failed to do so.

4. **The panel erred in failing to either consider or rule on various issues from the class action record.**

There is considerable documentary evidence in the class action record that is set out in Appellants' briefs, all of which must be accepted as true, that the class action was collusive, and that class counsel neither understood his duties to absent members of the class nor fulfilled those duties. Those duties were assumed or which were imposed as a matter of law as to the absent members, which include Appellants. Class counsel put their own financial interests ahead of the classes they undertook to represent and failed to obtain the relief they claimed to have obtained for Appellants.

As has been laid out in detail in the record, before the class settlement was reached not a single motion had been decided of the few that had been filed. Not a single deposition was taken. The class settlement explicitly made class counsel's fee the highest priority of the settlement. The parties then engaged in judge-shopping. Material information was both misrepresented to and withheld from that judge. A class was proposed and approved which was defined without geographic limit and nationwide notice was proposed but the notice program was changed to be severely limited by geography. That change, which eliminated any chance of Appellants' getting notice, was (according to class counsel), a change made to accommodate his "adversary," the Bishop. The change plainly disadvantaged the interests of absent class members, including Appellants, but promoted class counsel's financial interest. Relief for absent class members,

promised on the record as having been obtained by class counsel, was not actually obtained for absent class members as claimed. And that is not an exhaustive list of what the record of the class action reflects in terms of breach of duty.

Appellants, each an absent member of one of the two settlement classes, were (according to class counsel) deliberately excluded from any chance of receiving notice.

The panel has erred by analyzing none of those issues, or the implications from those issues for the allegations of breach of fiduciary duty and that breach having been aided and abetted. Intended or not, the panel has created the impression that the various acts of alleged misconduct and breach of duty, which (we reiterate) on this record must be accepted as true, are either permissible conduct in every instance or are permissible for some if not for all.

The record, viewed in the light most favorable to Appellants, reflects that class counsel assumed and breached fiduciary duties to the appellants and that the Diocese aided and abetted those breaches. The panel has erred by making no examination of the duties that were assumed upon class counsel pleading a class action, as set forth in *Premium Investment Corp. v. Green*, 324 S.E.2d 72 (S.C. App. 1984), or of the trial court's theory that *Premium Investment* does not apply. The panel made no examination of the fiduciary duties assumed by class counsel at stages after pleading, such as when the class was defined, as held by *Tilley v. Pacesetter Corporation*, 585 S.E.2d 292 (S.C. 2003), or when the class definitions were approved, or when the classes as defined were certified. All of that has been simply avoided as if those issues do not exist. The panel has erred in not examining the fiduciary duties class counsel assumed at each such point, and recognized in the record they were assuming, as set forth in Appellants' briefs.

The panel erred by making no analysis of class counsel's failure to obtain in any written

order the relief claimed to have been obtained for absent members of the class, which subjected every appellant to defenses that were claimed to have been waived as to any absent member of the class. All of which damaged Appellants, R. App. 211, either by ending their claims against the Diocese when there was no good faith argument around charitable immunity or when the defenses that should have been waived caused them to compromise their claims.

Conclusion

An enormous number of factual issues are in dispute in this record, which is complex, and troubling, but must be viewed in the light most favorable to Appellants. Despite the Supreme Court holding in 2014 in *Doe v. Bishop*, full discovery has still not been permitted to date, and no discovery at all has occurred in two cases in this appeal that were dismissed. Full discovery should be permitted in all cases before summary judgment is considered. The panel has erred and the decision should be reconsidered and the issues remanded for further proceedings.

Respectfully submitted,

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Certificate of Service

Pursuant to SCACR 240(c)(1), counsel certifies that a copy of this Petition has been served on opposing counsel for the parties by email sent to counsel of record simultaneously with the email submission to the Court of Appeals pursuant to Administrative Order 2020-05-29-02, the order applicable to proceedings during the covid-19 pandemic.

Also pursuant to that order, the $50 filing fee for the Petition, established by SCACR 240(d) will be separately forwarded to the Court by United States mail.

Respectfully submitted,

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