RECEIVED
Apr 02 2021
SC Court of Appeals

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

Reply as to Petition to Rehear

Other than in the 2014 decision of the South Carolina Supreme Court in *Doe v. Bishop*, 754 S.E.2d at 501(S.C. 2014), nearly every court to consider the record of this class action has worked pointedly to avoid confronting the collusive aspects of the class action settlement that must, on this record, be presumed to be true; particularly class counsel's having elevated their own financial interests above the interests of the class they chose to represent. If it is not reconsidered, the appellate panel's decision suggests that collusion in a class action settlement, at least in some

circumstances, will be permitted despite the harm it causes for the class members affected.

In Reply the appellants make only these few points.

1. ***The panel has erred, despite the record, in finding discovery complete***. It is undisputed that discovery as to class counsel was stayed *sua sponte* by the trial court. R.g., return to Petition to Rehear by the Diocese at p. 3.

As noted in the Petition to Rehear, the trial court orders provide that more time would be provided for discovery, not that discovery was complete. Both Appellants' Opening (pages 11 and 12) and the Reply briefs (pages 1 and 2) refer to discovery being incomplete. The appellate panel's holding that summary judgment was permissible because "adequate time" has been had for discovery is in spite of the trial court's orders to the contrary. The panel has erred in that conclusion, particularly when in two cases in this combined appeal it is undisputed that no discovery whatever had yet occurred. This is an error introduced by the appellate panel.

Class counsel argues that seven years elapsed since the first victim of class counsel's professional negligence brought suit, more than ample time to depose class counsel. Joint Return at p. 4. What class counsel omits are the repeated motions they made for protective orders to block that discovery, or the time spent on the appeal, or the refusal by class counsel to agree to a deposition date once the appellants' motion to compel was resolved before, *sua sponte*, the court terminated that effort by staying discovery as to class counsel.

It is the appellate panel that erred by concluding, despite the record, that there had been "adequate time" for discovery. The trial court orders acknowledge that discovery was not complete. The appellate panel should not uphold summary judgment as to class counsel when class counsel have not been deposed as to their collusive conduct and how their own financial interests

were plainly placed before the class of persons they elected to represent.

2. ***The panel has erred by ignoring the collusion in the class action settlement, which must be presumed***. The Diocese contends, "The Record on Appeal is bereft of any evidence" to support the essential elements of aiding and abetting breach of fiduciary duty. Diocese Return at p. 3. This, of course, ignores the substantial and undisputable evidence in the record, to name only some of the lowlights, of the various ways in which the respondents colluded, as Appellants' briefs explain:

> - so that no motion was decided or deposition taken between class filing and settlement;
>
> - to judge-shopping that took place to transfer the case from Charleston County (before class settlement) to Dorchester County (after class settlement);
>
> - to modify — by consent — the nationwide class notice in the original motion for class certification to omit that nationwide notice in the amended motion, without any explanation to the trial court of how absent members of the class who lived out of state would get notice when "the best practicable" notice required by SCRCP 23 was admittedly not given;
>
> - to include in the class settlement a provision which overtly placed class counsel's financial interest ahead of the recovery to the class;
>
> - to conceal from the court that class counsel had already been paid a contingent fee for the time submitted by class counsel to support the fee award;
>
> - to conceal class counsel's charging fees to the class members which no order entitled them to charge;

- to accelerate consideration of class counsel's fee to occur before any class member could be informed about that fee or object to it, or object to class counsel's patently false billing records or to object to class counsel's numerous conflicts of interest;

- to misrepresent to the court that absent members of the class who got no notice would receive the benefits of the class action, including all waived defenses;

- to fail to secure in any written order that benefit of the waived defenses;

- to take care that no post-award fairness hearing reviewed class counsel's actual fee in light of the actual conduct of the class claims process,[1] and

- to take care that no final order would be entered at the conclusion of the claims process, so as to avoid appellate review.

The Appellants are persons who were within the class definitions but who, due to the collusive conduct, got neither notice of the class action settlement not a written order securing for them the benefits class counsel claimed to have secured in the form of waived defenses. As a result of that lack of notice, each appellant must, as to the Diocese, face defenses that would otherwise have been waived on their behalf had either (a) proper notice been given to the class or (b) had a written order secured the relief claimed by class counsel to have been obtained for absent class members.

Collusive conduct in a class action settlement places a burden on the court to examine the conduct to protect absent class members. *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1310 (4th Cir.

[1] "In conducting the fairness hearing, the court considers both fairness and adequacy. The fairness inquiry seeks to determine 'whether the settlement was reached as a result of good-faith bargaining at arm's length, without collusion." *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 159 (4th Cir. 1991). On this record collusion must be presumed.

1978) (court should review for "evidence of collusive agreement is present" before dismissal).

> The district court, in failing to engage sufficiently with the merits of the state court's findings [that parties had engaged in collusive conduct to the detriment of class members], did not act as a fiduciary of the class and thus abused its discretion….

Sharp Farms v. Speaks, 917 F.3d 276, 293 (4th Cir. 2019). The merits of the collusive conduct must be examined. Like the trial court, the appellate panel has chosen instead to look the other way. The courts have, and but for the SC Supreme Court in *Doe v. Bishop* the courts have failed to discharge, an affirmative fiduciary duty to review the collusion in the class settlement proceedings for how it disadvantaged absent members of the defined classes.[2]

3. ***Class members were damaged by losing the benefit of defenses that would have been waived***. As noted above, every appellant whose claims could not survive a defense that would have been waived in the class action, or whose claim was compromised in part because he or she had to confront the defense, has an injury caused by class counsel having failed to perform adequately in providing notice or in securing by written order the benefits claimed to have been obtained as reflected in the transcripts of the class action proceedings. The trial court erred in not recognizing the injuries caused by each of the respondents, and permitting claims to go forward against class counsel for breach of fiduciary duty and against the Diocese for aiding and abetting that breach of duty.

4. ***Alternative liabilities does not end at pleading***. "Where a plaintiff presents two causes of action because he is uncertain of which he will be able to prove, but seeks a single recovery,

---

[2] The Return by the Diocese proposes a never-ending review of class actions. But, of course, this appeal concerns a ***collusive*** class action, not an ordinary class action conducted legitimately, where review would be conducted according to *Hospitality Management v. Shell Oil Co.*, 356 S.E.2d 644 (S.C. 2004). And even *Hospitality Management*, at 356 S.E.2d 666, recognized the importance of "non-collusive negotiations" in any class action.

he will not be required to elect." *Adams v. Grant*, 358 S.E.2d 142, 144 (S.C. App. 1986). Appellants were each sexually abused as children, a tort committed by agents of the Diocese but against which powerful defenses now exist. When respondents agreed to a vehicle for compensating for those injuries, they then colluded so as to exclude Appellants from any chance of recovery for those injuries. Class counsel assumed that duty towards Appellants when the Appellants were each included in their chosen definition of the class they undertook to represent. The professional, fiduciary duty assumed by class counsel to gain compensation for the initial personal injury tort by the agents of the Diocese was breached when the respondents all cooperated and agreed (a) to elevate class counsel's financial interest above that of the recovery for all class members, (b) to modify the originally proposed notice so as to exclude all appellants from the class action (class counsel now says intentionally) and (c) to fail to procure a written order so as to cause the Appellants would had no chance of getting notice of the class action to have to pursue their claims in the face of defenses that would otherwise have been waived for them.

The trial court erred in dismissing the claims against class counsel after their claims against the Diocese had to be confronted in light of the defenses that should have been waived. The panel has erred in upholding dismissal of claims for breach of fiduciary duty against class counsel and aiding and abetting that breach against the Diocese.

Conclusion

The panel has erred and the decision should be reconsidered and the issues remanded for further proceedings.

Respectfully submitted,

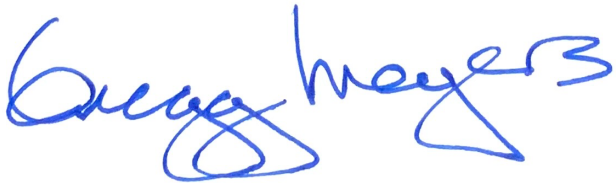
Gregg Meyers, S.C. Bar No. 9908
217 Lucas Street F-1
Mt. Pleasant SC 29464
843-324-1589
attygm@gmail.com

Attorney for Appellants

Certificate of Service

Pursuant to SCACR 240(c)(1), counsel certifies that a copy of this Reply as to the Petition to Rehear 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.

Respectfully submitted,



Gregg Meyers, S.C. Bar No. 9908
217 Lucas Street F-1
Mt. Pleasant SC 29464
843-324-1589
attygm@gmail.com

Attorney for Appellants