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SC Court of Appeals

The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. J.C. Nicholson, 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.

Motion to Recall Remittitur

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Motion to Recall Remittitur

The fee for this motion will be sent by mail. A Proof of Service accompanies this motion.

On June 24 the Court of Appeals issued the remittitur in this appeal. The same day counsel filed a motion in the Supreme Court to recall the remittitur in light of a June 14 Petition for *Ceriorari*. Counsel has received today the Supreme Court's order of August 6 denying Petition to Recall the Remittitur.[1]

On June 14, counsel had served, and thought the Supreme Court had accepted, a Petition for *Certiorari* to the Court of Appeals in this matter. Upon investigation after the remittitur issued, counsel discovered that the Supreme Court had received but not accepted that filing due to the electronic file transfer *method* by which counsel had sent the voluminous record on appeal and other documents associated with the Petition.

The Supreme Court's order denying the Motion to recall the remittitur was without prejudice, permitting a similar motion to the Court of Appeals. This is that motion, and it rests on the disruption caused by counsel's mother's death.

The June 14 Petition for Certiorari was sent to the SC Supreme Court June 24 by email to supctfilings@sccourts.org. That Petition is also attached to this motion, in the same form and with the same typographical errors as submitted June 14 and again on June 24. On August 25 the S.C. Supreme Court modified the appellate rules so as to eliminate the requirement for the record on appeal to accompany the Petition for Certiorari, the requirement that prevented the June 14 Petition from simply being emailed to the Supreme Court.

None of this confusion would have occurred but for the disruption to counsel from his mother's death.

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[1] That order was not emailed, only sent via US Mail by the Supreme Court. Counsel's mother passed away June 12 in Minnesota, and since June 12 counsel has been out of South Carolina dealing with family matters associated with her death. Counsel expects to be able to return to his office in South Carolina on September 20.

Conclusion

With apologies to the Court and counsel, we ask that the Court recall the remittitur, so the Supreme Court can act on the Petition first sent to the Court on June 14.

Respectfully submitted,

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Respondents.

Petition for A Writ of *Certiorari* To the Court of Appeals

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Table of Cases

Certificate of Counsel

Petitioner's counsel certifies that on May 13, 2021, the Petition for Rehearing was denied by the Court of Appeals. R. App. 3061.

Questions Presented

1. Have the lower courts erred in determining that because *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984), predated SCRCP 23 that class counsel owed no fiduciary duty to absent class members in pleading a class action, or settling a class action, instead finding class counsel owed no duty to the class until an attorney-client relationship was formed at class certification?

2. Have the lower courts erred in concluding appellants were not damaged when the collusive change to the notice program deprived appellants of the benefit of the defenses waived for class members?

3. Has the Court of Appeals erred in determining that there had been "adequate time for discovery" as to damages, when even the trial court recognized that full discovery has not been permitted in any case and in two cases no discovery at all has yet been permitted and a separate discovery schedule was needed for those cases?

Statement of the Case

This appeal turns on the first question presented: whether SCRCP 23 eliminated the fiduciary obligations that (until the trial court's ruling in this action) imposed as a matter of law on counsel who allege a class action; or who reach a class settlement; or who move to certify a class. Other issues are subsidiary to that novel question and are properly remanded for reconsideration if in considering the first question presented the court overturns the lower courts.[1] E.g., *Doe v. Howe*, 367 S.C. 432, ___, 626 S.E.2d 25, 27-28 (2005) (vacating and remanding decision on breach of fiduciary duty for ambiguity in the trial court's rationale).

[1] Subsidiary questions that will be briefed if the Petition is granted will include the lower

The record below is full of irregularities from the 2006 class settlement at issue in this appeal. On this record, it must be presumed that the class action was collusive. A class settlement was reached seven months after the class case was filed, without a single motion having been argued or decided, or a single deposition taken. (Compare, R. App. 256, the Charleston class complaint filed December 2, 2005, with R. App. 592 – 595, the June 14, 2006, handwritten class settlement agreement reached in mediation).

After the settlement, the parties did not submit the class settlement for approval as required by SCRCP 23. Instead, through less-than-candid procedures outside of SCRCP 23 the parties moved the class settlement to a preferred judge in another circuit. E.g., R. App. 315 (first motion to approve class settlement, made in Dorchester County). Pertinent to this appeal, after filing a motion to certify the class, but before class certification, the parties agreed to change the notice program for the class from the nationwide notice originally proposed (R. App. 317, proposing notice in *USA Today*) to (in effect) notice in only South Carolina (R. App. 324, eliminating notice in *USA Today*), essentially eliminating any chance of notice to persons such as appellants, who resided outside of South Carolina. The motion to certify was amended for that change to the notice program. (R. App. 322).

The lack of nationwide notice was one of the objections made by other abuse victims who objected to aspects of the proposed class settlement. (R. App. 369, 383). While no explanation about the change to the notice program was given to the trial court reviewing the class settlement, and neither inquiry nor order was made by that court even after the objections to

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court's conclusion that, as out-of-state residents, appellants were not within the class definition; that John Doe 193 could make no claim for breach of fiduciary duty; that the lower court's "alternative pleading" theory barred appellants who resolved their claims against the Diocese from making a claim against class counsel.

the change to the notice program brought it to her attention, class counsel later represented in these proceedings (in a 2014 hearing) that the change was made by class counsel to accommodate a request by the Bishop of Charleston, his supposed adversary. R. App. 2435.[2]

Despite a 2009 order from the Supreme Court, R. App. 85, no final order has ever been entered in the class action case, so no appellate review has ever occurred of the conduct of the class action.[3] (E.g., R. App. 474 – 481: a final accounting was proposed to the trial court by class counsel in March 2008 but never acted upon).

A series of cases are consolidated in this appeal. The earliest were filed in 2010,[4] the most recent cases were filed in 2015 and 2016,[5] after remand of *Doe v. Bishop*, 407 S.C. 128, 754 S.E.2d 494 (S.C. 2014), the first appeal related to how the absent class members' interests were not protected. Despite the holding of *Doe v. Bishop*, 407 S.C. 128, 754 S.E.2d 494 (S.C. 2014),[6] full discovery as to class counsel's conduct has not been permitted in any case. Judge Nicholson

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[2] Counsel for class counsel: "Our testimony will be that we proposed that [nationwide notice] to the Bishop and that the Bishop said, no, that's too expensive."

[3] Implicit in this appeal is whether the collusive strategy of ignoring S.C. Supreme Court orders, such as the 2009 order to conclude the class action, or the holding of *Doe v. Bishop*, discussed below, is as acceptable to the Supreme Court as it has been to the lower courts.

[4] E.g., R. App. 532, 2010 complaint for John Doe 2 and Jane Doe 4.

[5] E.g., R. App. 1208 (Complaint for Jane Doe 240); R. App. 1230 (Complaint for John Doe 240); R. App. 1253 (Complaint for John Doe 245 and Father Doe 245); R. App. 1346 (Complaint for John Doe 297).

[6] *Doe v. Bishop*, 754 S.E.2d at 501 (S.C. 2014): "Should appellants establish on remand that they were denied due process owing to lack of notice or because of inadequate representation in the class action proceedings, and that the statute of limitations was tolled, they may proceed to further prosecution of their claims." While that opinion presumes that class counsel owed a duty to absent class members, the lower courts disagree.

acknowledged that the 2015 and 2016 cases, in which no discovery had been done, would require a further order of the court to permit discovery. R. App. 188. Nevertheless, in its brief decision, the substance of which is on two pages, the Court of Appeals determined there had been "adequate time for discovery." R. App. 3030, making no distinction among cases with different complaints.

Summary judgment was granted in 2017 as to the claimed breaches of fiduciary duty by class counsel. R. App. 203. The trial court found class counsel owed no fiduciary duty to absent class members until a court certified a class, R. App. 217, discounting the obligations imposed at pleading by *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984). The rationale to discount those cases was because those cases were decided before the 1985 implementation of the Rules of Civil Procedure[7] and because no class had been certified in the class case giving rise to those decisions. R. App. 217. The order contains no analysis about how SCRCP 23 changed those case holdings, and none is apparent.

Without a fiduciary duty owed by class counsel at any time before formal class certification, the trial court found that the pre-certification collaboration among the parties to change the notice program for the effective purpose of excluding class members who resided outside of South Carolina could not constitute aiding and abetting breach of fiduciary duty by the Diocese defendants. R. App. 193. For its part, the Court of Appeals refused to rule on the alleged breach of fiduciary duty claims made against the Diocese.

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[7] The order contains no analysis about how SCRCP 23 changed those case holdings, and none is apparent.

In a brief opinion, the Court of Appeals affirmed. R. App. 3029. The Court made no distinction among the complaints, which have evolved over time and more explicitly addressed the "alternative pleading" argument accepted by the Court of Appeals. Class counsel had first begun making that "alternative pleading argument" in 2014, R. App. 2407, so successive complaints in 2015 and 2016 grew more explicit about the request for only one recovery, as opposed to alternative claims for liability. In other words, not all complaints are identical.

A petition for rehearing was denied by the Court of Appeals. R. App. 3061 .

Argument

1. SCRCP 23 makes no change to the holdings of *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984). A fiduciary duty to absent members of a class begins at pleading a class action.

For the core question in this petition — the duty owed by class counsel upon pleading a class action, and the subsidiary issues that derive from the core issue — even though it might be helpful to bench and bar for the Court to do so, the Court need not wade into the extensive evidence of collusion or the judge-shopping that occurred in this record. Every court other than this Court (in 2014) has studiously avoided addressing how class counsel placed their own financial interests ahead of the class and deliberately compromised the interest of the absent class members they undertook to represent so as to accommodate a request of their "adversary." Full discovery has not been permitted into class counsel's class representation.

But if there is no duty to absent class members until certification, then class counsel can presumably manipulate the class action as exemplified not only in this record but also as exemplified in *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984).

As the case stands at present, it is apparently accepted that such manipulative conduct by class counsel is permitted, since class counsel has been construed to have no duty to the class prior to formal class certification.

Nothing about SCRCP 23 changes the rationale of *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) or *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984). SCRCP 23(d) requires a motion to certify a class be made "as soon as practicable" after the class action is filed. SCRCP 23(c) provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

SCRCP 23 embodies the Due Process obligations that protect absent class members. *Premium Investment Corp. v. Green*, 283 S.C. 484, ___, 324 S.E.2d 72, 76 (Ct. App. 1984): (internal citations omitted, emphases added) held:

> a plaintiff who sues on behalf of a class ***and the attorney representing the class assume a fiduciary obligation to absent members of the class, including the obligation to inform them of proposed compromises of the group action***. The class representative also surrenders the right to settle the action in return for individual gain, alone.
>
> If the class representative ***or class counsel*** breaches the fiduciary duties he assumes and receives and retains benefits flowing from the breach, he holds what he receives upon a constructive trust for the class. This is true although the benefit received by the class representative is not at the expense of the class. Under no circumstances will the fiduciary be permitted to profit from a breach of his duty as fiduciary.

See also, *Tilley v. Pacesetter Corporation*, 355 S.C. 381, ___, 585 S.E.2d 292, 302 (2003) (class definition "a strategy choice" that the parties and class counsel "have to live with.")

These holdings are consistent with Fed. R. Civ. P. 23, on which the South Carolina Rules are modeled. The Notes to SCRCP refer specifically to the federal rules of civil procedure, which have long held that counsel undertakes a fiduciary duty upon pleading a class action. E.g., *Cohen*

v Beneficial Indus. Loan Corp., 337 U.S. 541, 549, 69 S.Ct. 1221, 1227 (1949)

> a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated.

Until the trial court in this case concluded that it no longer had effect, *Premium Investment* held that upon *pleading* a class action class counsel assumes fiduciary duties to absent members of the class. Upon class *certification*, class counsel assumes an attorney-client relationship with class members, present and absent.

The commentary to SCRCP 23(d) reinforces the identical point:

> This Rule requires those seeking to maintain an action on behalf of a class to notify members of the class of the pendency of the action.

That obligation is on "those seeking to maintain," not just on "certified" class actions. As reflected in the Ethics Watch article by Professor Freeman from September 2007, R. App. 2092 – 2093, discussing both *Premium Investment* and *Green*:

> In essence, the Supreme Court in *Green* held that a fiduciary obligation is owed by class counsel to putative class members so long as the case is postured as a class action regardless of whether a formal certification order has been issued.

Professor Freeman advised "so long as the caption claims the case is a class action, unless and until the class certification motion is denied or the class is decertified, class counsel must assume that a duty of loyalty and fair dealing is owed to absent class members." *Id*. Yet the trial court and Court of Appeals disagreed.

Given the divergence between Professor Freeman's academic commentary, Professor Virzi's affidavits attached to the various complaints (E.g., R. App. 1045 – 1046), and the orders of the trial court and Court of Appeals, it obviously needs clarified by the Supreme Court if class counsel does or does not assume a fiduciary obligation upon alleging a class. Or moving to

certify a class. Or reaching a class settlement. The Petition should be granted to provide that clarity.

The collusive changes to the notice program matter. Absent class members were deliberately excluded from any chance of participation. Class counsel claimed in the record to have secured for all class members, known and unknown, the same agreement from the Diocese as was extended to class members: that the Diocese would waive its available defenses, including the statute of limitation and charitable immunity.[8] But no written order secured that relief, so any class member who files an independent action against the Diocese must confront the defenses waived for class members.[9] In many cases, that failure is fatal to an abuse victim being able to make a claim.[10]

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[8] Compare, R. App. 2312, in discussing four known abuse victims that had not been located and, as counsel for the Diocese put it, "anybody else who has kind of, lack of a better word, comes out of the woodwork," class counsel responded with the claim, R. App. 2314, that the Diocese had supposedly agreed, that "if anybody has been missed" the Diocese "waives all the same defenses.") No order secured that relief.

[9] Although class counsel was aware of such claims, e.g., R. App. 409, 482, nothing in the class settlement provided for persons such as John Doe 193, who alone among appellants (a) resides within South Carolina and (b) had no memory of his abuse until 2010 (R. App. 1708, 2454). His complaint begins at R. App. 760. Unique among appellants, Doe 193 might conceivably avoid the statute of limitations under authority of *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000). Judge Nicholson held he had not received Due Process in the class action. R. App. 179. But like every other appellant he is exposed to the other defenses the Diocese otherwise waived for the class. Had class counsel actually secured the relief he claimed for the clients he undertook to represent, none of these cases would be necessary.

[10] The trial court concluded that there was no claim against class counsel because the failure by class counsel left the appellants in the same place they would have been without any class action case having been filed, R. App. 210, a truism that if accepted would nullify any claim for legal malpractice or breach of fiduciary duty. Such cases are *always* about a duty voluntarily assumed, conduct that would not exist but for the duties assumed.

As a result, even though class counsel undertook to represent appellants, class counsel cooperated with the Diocese to deprive appellants of any chance of obtaining the benefit of the defenses waived for class members. Those defenses explicitly included charitable immunity and the statute of limitations.

Without action by this Court, class counsel was, and future class counsel will be, entirely free to replicate the conduct in this record to remove notice so as to exclude absent class members, and arrange for the fee to be the highest priority of the class action. Additionally, class counsel would be free to replicate the conduct described in *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987) and *Premium Investment Corp. v. Green*, 283 S.C. 484, 324 S.E.2d 72 (S.C. App. 1984), where a class was pleaded for effect and used to benefit counsel and the putative class representative. If the court does not accept the Petition, any class action can be manipulated however class counsel chooses, provided that manipulation is done prior to class certification.

2. The lower courts erred in concluding appellants were not damaged when the collusive change to the notice program deprived appellants of the benefit of the defenses waived for class members.

Among the subsidiary issues in this Petition are that the plaintiffs had no evidence of damage from any conduct by the lawyers. R. App. 210 (in the trial court); R. App. Court of Appeals decision at p. 3, R. App. 3030. "Damages in an action for breach of a fiduciary duty are those proximately resulting from the wrongful conduct of the defendant. " *Moore v. Moore*, 360 S.C. 241, 253 (Ct. App. 2004). Because class counsel was construed to owe no duty to absent class members until certification, the lower courts did not consider the damage from class counsel's failures in (a) altering the notice program at the Bishop's request to deliberately exclude appellants, and then (b) failing to mitigate that damage by securing in a written order the waiver of defenses they claimed to have secured for each class member. Each is a cognizable

damage, as set forth in the affidavits of Mr. Virzi. E.g., R. App. 1045 – 1046. Each absent class member is now compelled to confront the powerful defenses that the Diocese otherwise had waived.

3. The Court of Appeals erred in determining that there had been "adequate time for discovery" as to damages and class counsel's conduct

As noted above, the trial court recognized that cases filed in 2015 and 2016 required a separate discovery order, as no discovery had been done. R. App. 188. If class counsel assumes a fiduciary duty to absent class members of the class upon pleading, the Court of Appeals plainly erred in concluding there had been "adequate time for discovery," R. App. 3030, and the case should be remanded for further proceedings.

Conclusion

The petition for *certiorari* should be granted on the questions presented and the subsidiary issues that will be briefed if the Petition is granted.

Respectfully submitted,

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Respondents

Amended Proof of Service

I hereby affirm that pursuant to SCACR 226C I have served upon counsel for the defendants/respondent one copy of the Appellant's

Motion to recall remittitur, with attachment

by causing the documents and a copy of this Proof of Service to be sent via email to:

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Done September 2, 2021