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Dec 29 2021

S.C. SUPREME COURT

The State of South Carolina
In The Supreme Court

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.

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

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Certificate of Counsel

Petitioner's counsel certifies that on November 30, 2021, the Court of Appeals, citing SCACR 221, declined to act on the Petition for Rehearing, even though as provided by SCACR 221(c), the court's action had "the effect of dismissing or finally deciding a party's appeal." It is yet another instance in this record of Supreme Court rules or orders being simply ignored.

The $250 filing fee required by SCACR 242 for this petition will be transmitted by US Mail to the clerk of court.

Questions Presented

Has the Court of Appeals erred by:

a. refusing to recall a remittitur issued after a Petition for *Certiorari* had been served by email and sent electronically to the Supreme Court,

b. failing to consider whether the Petition for *Certiorari* was timely sent under the court rules that had been modified during the covid-19 pandemic and then changed permanently in August 2021, or

c. failing to consider whether the death of counsel's mother constituted good cause sufficient to accept the petition as timely filed.

Statement of the Case

In 2009 counsel filed the first of a series of cases arising from a collusive class action. In 2014 the Supreme Court decided *Doe v. Bishop*, 407 S.C. 128, 754 S.E.2d 494 (2014), reversing an order dismissing various actions which arose from that collusive class action. The claims associated with the collusive conduct and legal malpractice were remanded for further proceedings.[1]

[1] "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

Three years later, without full discovery having been permitted on the central issues decided in *Doe v. Bishop*, summary judgment was granted for the defendants. Another appeal was noticed. Four years after that appeal was noticed, twelve years after the first of the cases related to the collusive class action was filed, the Court of Appeals affirmed the 2017 grant of summary judgment. Order of the Court of Appeals of March 3, 2021. A petition to rehear was denied by the Court of Appeals by letter of May 13, 2021.

On June 12, 2021, counsel's mother passed away in Minnesota and counsel left South Carolina to attend to family matters associated with his mother's death. Counsel arranged for a colleague to monitor his mail while he was in Minnesota.

On June 14, 2021,[2] from Minnesota, counsel served on opposing counsel by electronic means, and submitted electronically to the Supreme Court both a Petition for *Certiorari* and the voluminous Record on Appeal required by SCACR 242(e) concerning those few merits issues which the Court of Appeals addressed from the collusive class action and the many merits issues which the Court of Appeals had chosen not to address.

The appellate rule which required the petition be accompanied by the voluminous record was changed in August 2021 to require only the Petition be submitted, not the Record. Meaning that a petition can now simply be sent via email to the court without the size of the filing exceeding email limits.

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statute of limitations was tolled, they may proceed to further prosecution of their claims." *Doe v. Bishop*, 754 S.E.2d at 501 (S.C. 2014).

[2] Pursuant to SCACR 242(c) and 263, June 14 was the due date for the petition.

Upon receiving the June 14 petition and record the Supreme Court requested, by email only (i.e., not also by U.S. Mail), that counsel submit the petition using an electronic routing method (meaning via box.com) other than the one used for the voluminous filing (via wetransfer.com). Due to his mother's death and due to the court notice being sent only by email, counsel was unaware it had been sent, and unaware of any issue about the filing the court had received.

On June 24 the Court of Appeals issued the remittitur in the underlying consolidated appeal. When counsel saw notice about the remittitur having issued, he consulted with the clerk's office of each of the Court of Appeals and the Supreme Court about the Petition for *Certiorari* that had been submitted June 14. During those consultations, counsel learned for the first time that the Supreme Court preferred to receive its voluminous electronic submissions by a particular electronic routing.

A motion to recall the remittitur was submitted on June 24. The Court of Appeals denied the motion, and refused to consider a petition to rehear, citing SCACR 221, even though the action by the Court of Appeals has the effect of ending the appeal, something SCACR 221(c) explicitly enables the Court of Appeals to address by means of a petition to rehear.

In August 2021 the Supreme Court changed the appellate court rules to eliminate the requirement for submitting the record with a petition, enabling, as noted above, a petition to be emailed directly to the court. As SCACR 242(d)(5) limits a petition to 25 pages, a petition alone would be unlikely to ever exceed email size constraints, eliminating the need for any website for transferring a large file.

None of this confusion would have occurred but for the disruption to counsel from his mother's death and the court sending its notice by only electronic means. This petition seeks to

have the court reverse the Court of Appeals, order the remittitur be recalled, reinstate the appeal so the Court can consider the merits of the petition originally submitted June 14.

Argument

The Court of Appeals has erred in:

a. refusing to recall a remittitur issued after a Petition for *Certiorari* had been served by email and sent electronically to the Supreme Court,

b. failing to consider whether the submitted Petition for *Certiorari* was timely sent under the court rules that were modified during the covid-19 pandemic and then changed permanently in August 2021, or

c. failing to consider whether the death of counsel's mother constituted good cause to accept the petition as timely filed without the electronic record.

The Supreme Court has, and occasionally exercises, the discretion to order the Court of Appeals to recall a remittitur. E.g., *James v. State*, 372 S.C. 287, 290 (2007) (the Supreme Court "ordered the court of appeals to recall the remittitur…."); *Barber v. Crawford*, 86 S.C. 51 (1910) ("this Court is satisfied that [the remittitur] should be recalled, and it is so ordered.") The Court will recall a remittitur if the record reflects "some mistake or inadvertence on the part of this court or its officer…." *State v. Keels,* 39 S.C. 553, 17 S.E. 802 (1893).

Counsel's electronic filing of June 14 was received by the Supreme Court, but apparently deemed not accepted by the Court due to the electronic means by which the voluminous filing was submitted. The Court has since altered the appellate rule that previously required that voluminous filing which traditionally accompanied a petition. Had counsel's mother not died, or had the court sent by U.S. Mail as well as email its notice about the electronic method it preferred for a voluminous record, the matter could readily have been addressed and the remittitur would not have issued.

The Court of Appeals refused to address whether these unusual circumstances constituted good cause for the June 14 petition deemed not to have "counted" so as to recall the remittitur, or whether the August change to the appellate rules reflected that the requirement for a voluminous record (which led to the June 14 confusion) supported the petition being considered on its merits.

The underlying appeal concerns significant issues arising from a collusive class action as well as both attorney and judicial misconduct.[3] Despite the clear statement of the Supreme Court in *Doe v. Bishop*, 407 S.C. 128, 754 S.E.2d 494 (S.C. 2014), noted above, remanding the first appeal, the Court of Appeals opinion chose to avoid many of the difficult questions in this record, appearing to defer (as the trial court appears to have deferred) to the lawyers or the circuit judge whose conduct is challenged, a deference that is despite the negative impact on the appellants and hundreds of other sexual abuse survivors affected by the underlying class action. Significant issues related to class action practice and professional conduct underlie the appeal on the merits, which makes no deference to individuals whose conduct is challenged. If deference is due or applicable legal principles should be overlooked based on the persons involved, then the Court should deny either this petition or the petition on the merits and assist the bench and bar by articulating the circumstances or criteria under which the Supreme Court permits its orders or rules to be ignored. Alternatively, if the Court elects to review the June 14 petition on the merits, the Supreme Court may choose to benefit bench and bar by articulating that the court's rules, orders and legal principles are to be applied without regard to personality.

[3] The June 14 petition as submitted is attached as an exhibit.

Conclusion

In light of this record we contend the court should exercise its discretion to direct the Court of Appeals to recall the remittitur, reinstate the appeal and accept the June 14 petition for purposes of considering the merits of the issues presented in the June 14 petition.

Respectfully submitted,

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