THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Circuit Court Judge

Appellate Case No.: 2017-001996

Consolidated Case Nos.: 2010-CP-10-5520; 2010-CP-10-7233; 2012-CP-10-5559; 2013-CP-10-3733; 2013-CP-10-4175; 2013-CP-10-4176; 2015-CP-10-5486; 2016-CP-10-1632

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 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,

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FINAL BRIEF OF DIOCESE RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. **Whether a defendant in settling a class action can be liable to absent class members on a claim styled as aiding and abetting breach of fiduciary duty by class counsel when the settling parties followed the Order Approving Settlement in every regard?**

2. **Whether Appellants' veiled general collateral attack on the Class Action Settlement and Order Approving Settlement, though couched as a claim for aiding and abetting, is contrary to Rule 23 and class action practice generally?**

STATEMENT OF THE CASE

A. Procedural History

On July 9, 2010, John Doe 2 and Jane Doe 4 filed suit against the Bishop of Charleston, a Corporation Sole[1]; Robert Guglielmone, the Bishop of Charleston in his official capacity; Rev. Monsignor Martin Laughlin, former Administrator of the Diocese of Charleston; and, Robert Baker, former Bishop of Charleston, in his official capacity (the Diocese Respondents) asserting claims of negligence and gross negligence; fraudulent concealment; civil conspiracy; judicial estoppel and unfair and deceptive trade practices. All of those claims arose from 2 events – the alleged sexual abuse of Does as minors in the mid-1960s and the manner and methods by which the Diocese settled a class action suit brought on behalf of victims of sexual abuse in 2007. On June 27, 2011, Judge Roger Young conducted a limited collateral review to determine the preclusive effect of the class action settlement and determined that the class settlement did not bar the Does' claims, but the statute of limitations barred all claims except for civil conspiracy. (Order, R. 0109, 0119). Judge Young's Order is not the subject of this appeal and Does withdrew their claim for civil conspiracy before Judge Nicholson. (Transcript R. 2735, ln. 12-23). Thus, nothing on appeal impacts the Diocese Respondents from 10-CP-10-5520.[2] The only remaining claims by John Doe 2 and Jane Doe 4 are directed to Class Counsel, the Attorney Respondents.

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[1] The Corporation Sole was created by Act of the General Assembly on December 13, 1880 (17 Stat. 321).

[2] The Attorney Respondents argued before the Trial Court that Jane Doe 4 was barred from asserting her claims generally because the class notice afforded her due process and, therefore, *res judicata* would bar her claims. Doe 4 resided in the Augusta, Georgia area

Jane Doe 11 is the spouse of John Doe 2. She filed suit against the Diocese Respondents and the Attorney Respondents on August 13, 2012. Doe 11 asserted claims for civil conspiracy; aiding and abetting breach of fiduciary duty; and for injunctive relief against the Diocese Appellees, also arising from the alleged sexual abuse of John Doe 2 in the mid-1960s, some 30 years before the couple married, as well as the manner by which the class action settlement was concluded and administered. (See, Complaint, R. 0667 – 0741). On May 3, 2017, Judge Nicholson, after conducting a second limited collateral review, determined that the class action settlement did not bar Doe's claims over the alleged sexual abuse of her husband. (Amended Order on Limited Collateral Review, R. 0174). However, Doe conceded the common law doctrine of charitable immunity barred her claims.[3] (Transcript, R. 2703, line 18 – 2704, ln. 24). Judge Nicholson then granted the Diocese's motion for summary judgment and dismissed all claims stemming from the alleged sexual abuse of John Doe 2. (Order granting summary judgment, July 7, 2017). The dismissal of Doe 11's claims arising from her husband's long past alleged sexual abuse is not on appeal.

Thus, the only claims remaining against the Diocese Respondents were conspiracy and aiding and abetting breach of fiduciary duty by Class Counsel. Doe withdrew her conspiracy claim at the hearing before Judge Nicholson on July 20, 2017.

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and Class Counsel published notice of the class settlement in the Augusta *Chronicle*. See (Transcript, R. 1475, 1481); *see also* Diocese Defendants' Omnibus Motion for Summary Judgment as to *Res Judicata*, (R. 1475 – 1566). *Res judicata* is an independent sustaining grounds for affirming the Trial Court's judgment.

[3] The Diocese filed an additional Omnibus Motion for Summary Judgment regarding Loss of Consortium Claims (R. 1440) based upon the fact that, the alleged sexual abuse took place decades before the couple married, and, thus, was not legally cognizable. The Trial Court did not reach the issue.

(Transcript, R. 2735, ln. 12-23). By Order dated August 12, 2017, Judge Nicholson granted summary judgment to the Diocese Respondents on Doe's claim that they aided and abetted Class Counsel's breach of fiduciary duty in how counsel concluded and managed the class action settlement in 2007. (Order R. 0189).

John Doe 193 filed suit, again against both the Diocese and Class Counsel, in Greenville County on June 24, 2013. Ultimately the court transferred venue to Charleston County. (Order, R. 132). Doe 193, a South Carolina resident who allegedly suffered from repressed memory syndrome,[4] brought claims of negligence and gross negligence; fraudulent concealment; civil conspiracy; and aiding and abetting Class Counsel's breach of fiduciary duty. (Complaint, R. 0742 - 0835).[5] As before, these claims were two-fold, arising from alleged sexual abuse in the 1960s on the one hand,

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[4] The evidence in the record is far from clear that John Doe 193 suffered from repressed memory or that he could satisfy the strict requirements set forth in *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000). Additionally, the Diocese did not concede that the Trial Court's limited collateral review was correct in its conclusion that Class Counsel's publication notice did not comport with constitutional due process with respect to persons who could prove repressed memory syndrome. *See, Omnibus Motion for Summary Judgment as to Res Judicata* (R. 1475 - 1566). In fact the Trial Court erred in its conduct of the limited collateral review required under *Hospitality Management* by focusing entirely on whether Doe 193 was capable of receiving notice of the class settlement. (*See Transcript*, R. 2573 – 2583).

[5] On March 17, 2017, the Diocese filed a motion to reconsider Judge Nicholson's original limited collateral review and, pointing out that the Court misapplied *Hospitality Mgmt. Associates, Inc. v. Shell Oil Co.*, 356 S.C. 644, 663 (2004), the Diocese specifically argued that the class action bar should apply to John Doe 193 – who was a South Carolina resident at the time of publication notice of the class action settlement – because the limited collateral review should *only* look to whether the Class Action Court determined that the notice program complied with due process, and whether class counsel actually followed the notice program established by the Court. It is undisputed that both were in fact the case. (Motion for Reconsideration, R. 1408 – 1417). The Diocese disagreed with the Trial Court's looking at whether any individual class member did actually receive the notice by publication. The Trial Court's order is not subject to this appeal because the Trial Court later granted summary judgment in favor of the Diocese.

and from the manner and method by which Class Counsel concluded the class action settlement on the other.[6] As with Doe 11, Doe 193 conceded in open court that common law charitable immunity barred all claims related to his alleged abuse. (Transcript, R. 2703, ln. 18 – 2704, ln. 24). As before, the dismissal of the abuse-related claims are not on appeal. Doe 193 also stipulated that his conspiracy claim should be dismissed. (Hearing Transcript, R. 2735, ln. 12 - 23). Judge Nicholson granted the Diocese's motion for partial summary judgment on the aiding and abetting claim. (Order, R. 0189). No other matters remain for this appeal.

Finally, John Doe 297 filed his complaint on March 31, 2016. As with the other Does, Doe 297 asserted claims against the Diocese for negligence and gross negligence; fraudulent concealment; civil conspiracy; and aiding and abetting Class Counsel's breach of fiduciary duty. As with the other Appellants, Judge Nicholson concluded that the class action settlement did not bar Doe 297, but Doe 297 conceded charitable immunity barred all claims arising from any alleged sexual abuse in the early 1970s. (Transcript, R. 2703, ln. 18 – 2704, ln. 24). As did the others, Doe 297 withdrew his claim for civil conspiracy between the Diocese and Class Counsel. (Transcript, 2735, ln. 12-23). Thus, the only matter on appeal is Judge Nicholson's order granting summary judgment regarding Doe

[6] The Diocese also filed the following Motions, which the Court did not reach: Omnibus Motion for Summary Judgment as to Statute of Limitations (R. 1604); Omnibus Motion for Summary Judgment as to *Res Judicata* (R. 1475); Omnibus Motion for Summary Judgment as to Vicarious Liability / Lack of Notice (R. 1665); Omnibus Motion for Summary Judgment as to Civil Conspiracy (R. 1419); Omnibus Motion for Summary Judgment as to Unfair Trade Practices (R. 1567); Omnibus Motion for Summary Judgment as to Aiding and Abetting Liability (R. 1709 and R. 2896 - 2899 (John Doe 193 only)). The Diocese also submitted a supplemental memorandum in support of its Omnibus Motion for Summary Judgment on Civil Conspiracy (R. 1713). Each of these constitutes independent grounds for sustaining the Court's dismissal.

297's claim that the Diocese aided and abetted Class Counsel's alleged breach of fiduciary duty (Order, R. 0189).

The appeals brought by John Doe 10 (10-2733); Father Doe 194 (13-4175); John Doe 194 (13-4176); John Doe 245 and Father Doe 245 (15-5486) do not involve the Diocese Respondents, and only involve claims against Class Counsel.

B. Factual Background.

1. The 2007 Class Action Settlement.

It is undisputed that Class Counsel and the Diocese carried out the class action settlement precisely according to the terms of the class action settlement agreement and Judge Goodstein's Order approving settlement. As ordered, Class Counsel published notice of the class settlement in 11 South Carolina newspapers, the Augusta *Chronicle*, and in the Diocese's publication, *The Catholic Miscellany*. Class Counsel and the Diocese also provided notice by First Class Mail to all individuals about whom the Diocese had any notice of possible abuse, but who had not previously made a claim.[7] This, too, was exactly as ordered by the Court. As part of the class action settlement, the Diocese waived all defenses, including the statute of limitations, charitable immunity, or other legal or equitable defenses, for anyone submitting a claim. Thus, any member of the class could submit a claim without regard to when and how long ago the abuse took place.

[7] Importantly, in determining the fairness and reasonableness of the class settlement, Judge Goodstein ordered 1st Circuit Solicitor David Pascoe to conduct an independent review of the Diocese's files and to determine the names of all victims who had reported any sexual abuse by an employee or agent of the Diocese. The Solicitor undertook that review and reported to the Court and to Class Counsel on his findings, confirming that every individual about whom the Diocese had actual notice of a claim would be notified of the class settlement directly. (Transcript, R. 2420 – 2452); *and* Order Approving Settlement (R. 0039 – 0078); and Order, (R. 0079 – 0084)).

Class Counsel administered the settlement and took in claim forms from class members – both victims of sexual abuse and loss of consortium claimants. Again, the claim forms were handled exactly as ordered. The claimants each participated in arbitration proceedings as the settling parties agreed. The arbitrator then made awards to each claimant, with payments coming from an escrow account administered by a third party. All valid claims were paid in full. All claimants received offers psychological treatment and pastoral care as well. The claims period concluded as approved by the Court.

Appellants' Counsel represented several objectors and opt-outs to the class action settlement. The objections raised almost every point asserted in Appellants' Complaints regarding the process of the class action settlement.[8] Yet, no objector took an appeal from an adverse ruling on any objection. Appellants' Counsel ultimately withdrew all objections to the class action settlement. Their claims were resolved and likewise paid in full and the Diocese obtained releases from those claims.

Appellants did not file claims in the class action. Failing to do so, they now simply rehash tired and decade-old challenges to the process Judge Goodstein approved and the procedures the Class Action Court ordered for the protection of the interests of the class as mandated under Rule 23, SCRCP.[9] Appellants failed to take advantage of the

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[8] *See Objections to Class Settlement* (R. 0355; 0365) and *Motion to Alter or Amend* (R. 0373).

[9] Appellants' counsel has raised these challenges numerous times, including *Ex Parte Doe*, 393 S.C. 147, 711 S.E.2d 892 (2011); *Doe v. Richter, et al.*2010 WL 8741102 (S.C. Com. PL) (Trial Order, Nicholson, J.) A complaint also was filed in the original jurisdiction of the Supreme Court, which was summarily dismissed. Appellants' counsel filed a number of ancillary actions challenging the legitimacy of the 2007 class action settlement.

benefits of the class action settlement, including the Diocese's waiver of defenses for claims made in the class action, and now seek to recover from Class Counsel and the Diocese on wholly novel theories.

ARGUMENT

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard as the Trial Court.[10]

> Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.[11]

The Court cannot simply ignore facts that are unfavorable to the non-moving party, and must determine whether a verdict in favor of the party opposing summary judgment would be reasonably possible.[12] It is not sufficient that one create an inference that is not

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[10] *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

[11] *NationsBank v. Scott Farm*, 320 S.C. 299, 302–03, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted).

[12] *Stewart v. State Farm Mut. Auto Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597, 600 (Ct. App. 2000).

reasonable or an issue of fact that is not genuine.[13] The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine.[14] Rather, summary judgment should be granted when "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ."[15] The fact that a case might present a novel issue does not render summary judgment inappropriate.[16] On appeal, the Court may affirm the grant of summary judgment on any ground found in the record.[17]

I. The Trial Court Properly Granted Summary Judgment Because the Diocese Complied with the Class Action Settlement Agreement and Order Approving Settlement in Every Respect and, thus Cannot be Liable for Aiding and Abetting any Breach of Fiduciary Duty by Class Counsel.

It is well-settled in this State that a cause of action for aiding and abetting breach of fiduciary duty requires that plaintiff *prove* (1) a breach of fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. "The gravamen of the claim is the defendant's knowing participation in the fiduciary's

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[13] *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984).

[14] *Priest v. Brown*, 302 S.C. 405, 408–09, 396 S.E.2d 638, 639–40 (Ct. App. 1990).

[15] *See Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617, 673 S.E. 2d 801, 803 (Ct. App. 2010).

[16] *See, Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); *Medical University of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004).

[17] *See Moore v. Weinberg*, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007) and Rule 220(e), SCACR.

breach."[18] Obviously, were Class Counsel to owe no fiduciary duty to the plaintiffs as a matter of law, then the Diocese Respondents cannot knowingly participate in a breach of that duty.[19] Appellants failed to adduce any evidence to support the essential elements of their claims, and the Trial Court determined that Class Counsel owed no duty to the members of the settlement class who were not afforded due process under the notice plan. Therefore, the Trial Court properly granted summary judgment to the Diocese.

Following the Trial Court's Amended Order on Limited Collateral Review, the Appellants were in precisely the same position as they were in 2007 – no better and no worse. Their claims of sexual abuse and damages from the Diocese's alleged negligent supervision faced the same affirmative defenses then as now. Their claims remained subject to charitable immunity, the statute of limitations, and the legal and equitable defenses raised by the Diocese before the Trial Court.[20] The result would have been no different prior to the class action settlement in 2007 as it was before the Trial Court in 2017.

More importantly, nothing Appellants alleged in their complaints constitutes aiding and abetting breach of fiduciary duty. Rather, every action by the Diocese was done to effect settlement of a class action suit. Each and every action (or inaction) alleged as a basis for the aiding and abetting claim against the Diocese was, in fact,

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[18] *Future Group II v. Nationsbank*, 478 S.E.2d 45, 50 (S.C. 1996) (internal citations omitted).

[19] *Mason v. Mason*, 770 S.E.2d 405, 422 (S.C. 2015); *see also Zimmer Paper Products, Inc. v. Berger & Montague*, 758 F.2d 86 (3d Cir. 1985) (class counsel not required to do more than what is required by due process and ordered by the court providing notice to the class).

[20] *Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494, 499 (2014).

disclosed to the Class Action Court; scrutinized by the Class Action Court; and disclosed in the Court-approved notice to the class. Further, many of the items Appellants now complain about were the subject of objections to the class settlement filed by clients of Mr. Meyers – which the Class Action Court considered and overruled.[21] The class settlement went forward pursuant to the deal struck by the representative plaintiffs, class counsel, and the Diocese. The Diocese's *only* task in settling the class action was to fulfill its obligations under the settlement agreement and the Class Action Court's Order Approving Settlement. There is no question the Diocese did that. The Diocese had no duty to object, oppose, or otherwise upset the settlement agreement. In complying with the precise terms of the settlement agreement, the Diocese cannot also be held liable for aiding and abetting any alleged breach of fiduciary duty.

II. Appellants' Veiled Collateral Attack on the Class Action Settlement and Order Approving Settlement, Though Couched as a Claim for Aiding and Abetting, is Contrary to Rule 23 and Class Action Practice Generally, and the Dismissal Should be Affirmed.

Put simply, permitting absent class members who fail to submit a timely claim in a class action to upend the class action settlement by suing one or all of the settling parties for conspiracy, aiding and abetting fiduciary duty, or any other novel claim, would turn class action practice on its head. One of the purposes the class action device is to promote finality and certainty for both defendants and the plaintiff class. That finality – and the *res judicata* and collateral estoppel afforded to class action judgments – is the reason courts are careful to analyze the settlement terms and conditions and to issue a judgment that the proposed settlement is fair, reasonable, and adequate, not just to the

[21] Objections to Proposed Order (R. 0365); Memorandum in Support of Motion to Alter or Amend (R. 0373).

representative parties, but to the class as a whole.[22] Finality is also one reason that class members are entitled to notice of the settlement and the opportunity to opt out.[23]

Accepting Appellants' argument would render moot the careful and considered analysis that Rule 23 requires. Rule 23 commands a well-ordered procedure for settling class actions, with multiple levels of protection for absent class members' interests. The protections afforded to absent class members by the court's Rule 23(c) approval of the settlement and determination that settlements are fair to the absent class members, would always be open to question and challenge by frustrated class members who fail, for whatever reason, to make a claim in the class action. Likewise, fee awards to class counsel, though vetted and approved by the court, would always be open to challenge.

If Appellants' position is to be accepted, the specter of unending challenges to any settlement would wreak havoc on any class action practice. Allowing post judgment collateral attacks on class settlements would more likely than not result in:

- Settling defendants never being able to close the door on the claims they settle;
- Class counsel never being certain that cases could be closed and that their former clients (the absent class members) would not be able to sue them;
- Settling defendants facing the prospect of near unlimited future potential liability and legal costs even after the class settlement has been approved and fully paid;
- Class counsel forever facing the prospect that settling defendants will seek indemnification from them for fees, expenses, and damages recovered by members of some long ago class action;
- Parties to a class action settlement and their lawyers having to procure evergreen insurance policies to guard against claims arising from a long-concluded settlement;

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[22] Rule 23(d)(2, SCRCP; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.62 AT 315-16 (2014.

[23] Rule 23(b), SCRCP; *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

- Class claimants facing the perpetual prospect of being called on to refund some or all of their recovery;

- The effectiveness and conclusiveness of class-wide releases coming under question; and

- The Trial Courts' role under Rule 23(c) and Rule 23(d)(2) likely being undermined through subsequent collateral challenges to class proceedings.

This parade of horribles would undermine every class action settlement and would negate the very utility of the class action device. Parties simply could not settle any matter on a class-wide basis for fear of never-ending challenges to court-approved and court-ordered processes and virtually unlimited future exposure. Without any guarantee of finality and a bar on future suits, no reasonable party would agree to settle a class action. Allowing full-on collateral attacks on class action judgments would impose profound challenges to the courts and to any party faced with class claims.

CONCLUSION

For the reasons set forth above, the Trial Court's judgment should be affirmed.

Respectfully submitted,

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RULE 211(b) CERTIFICATION

The undersigned, an attorney for the Respondent, certifies that this Final Respondent's Brief complies with the requirements of Rule 211(b), SCACR.

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