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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SUMTER COUNTY
COURT OF COMMON PLEAS

KRISTI F. CURTIS, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2019-000502

Jamaine Holmes, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gostonia Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated,

Petitioners,

v.

South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery, and INTRALOT, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 22, 2023.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding Petitioners' argument was unpreserved?

2. Did the Court of Appeals err in affirming the trial court's judgment?

STATEMENT OF THE CASE

This is a purported class action case. Petitioners are citizens and residents of various counties in South Carolina who purchased lottery tickets in several different counties on Christmas Day of 2017. (R. pp. 043-053). On December 25, 2017, Petitioners, and all other members of the purported class they seek to represent, purchased a $1.00 terminal-generated instant game, Holiday Cash Add-A-Play, which was designed, created, tested, administered, managed, supervised and advertised by Respondents South Carolina Lottery Commission d/b/a South Carolina Education Lottery ("SCEL") and INTRALOT, Inc. ("Intralot"). (R. pp. 043-053).

After reports of many winners, Respondent SCEL suspended the game due to what it alleged was an "error" which permitted all tickets issued to win. (R. p. 035, ¶20). This assertion is and was patently false, however, because many lottery players, including several Petitioners, purchased losing tickets at the same time they purchased winning tickets. (R. p. 046, ¶22). Thereafter, lottery players in South Carolina who tried to cash in their winnings after the game was shut down were denied compensation by Respondents for their winning tickets. SCEL suspended all

validations and all winning ticket holders were instructed to have "patience" until it concluded whether to cash the winning tickets or not. (R. p. 046, ¶24).

On February 1, 2018, Petitioners filed their Class Action Complaint against Respondent SCEL seeking validation and payment for their legally purchased winning lottery tickets. Petitioners asserted claims for unjust enrichment, breach of contract and/or breach of implied contract, promissory estoppel, and violation of the South Carolina Unfair Trade Practices Act.

In response, Respondent SCEL filed a motion to dismiss. Thereafter, on May 29, 2018, Petitioners filed an Amended Complaint adding Respondent Intralot as a party-defendant for its role in devising, designing, testing, administering, training, implementation, execution, and development of the game. (R. pp. 043-053). Petitioners asserted the same four (4) claims against Respondent Intralot which they had leveled against Respondent SCEL and added a claim of negligence/gross negligence. Respondent SCEL renewed its motion to dismiss and Respondent Intralot filed its motion to dismiss.

The case came before the Honorable Kristi F. Curtis on July 30, 2018, on Respondents' respective, but substantively similar, motions to dismiss. The trial court denied Respondents' motions in separate Orders filed on January 4, 2019.[1] Respondents thereafter filed separate motions to alter or amend on January 14, 2019. On February 25, 2019, Judge Curtis issued an Order granting separate Respondents'

[1] Petitioners conceded the claim for violation of the South Carolina Unfair Trade Practices Act against both Respondents failed and consented to dismiss those at the hearing.

motions without a hearing. Petitioners served their Notice of Appeal on March 25, 2019.

Following oral argument, the Court of Appeals filed its opinion on August 9, 2023, affirming the judgment. On August 24, 2023, Petitioners filed a Petition for Rehearing with the Court of Appeals and Respondents subsequently filed Returns. On September 22, 2023, the Court of Appeals issued an order denying the Petition for Rehearing. The Center thereafter filed this Petition for Writ of Certiorari with this Court on July 28, 2008.

ARGUMENT

I. PETITIONERS' ARGUMENT WAS PRESERVED.

In its Order, the Court of Appeals ruled Petitioners' arguments were unpreserved, specifically, regarding: (1) Petitioners' argument that the trial court's improperly considered of facts not contained in the pleadings, *Holman v. Berry*, Op. No. 6013, at 8 (S.C. Ct. App. filed August 9, 2023) ("[Petitioners] never raised this argument to the circuit court in a response to Respondents' motions to reconsider, alter, or amend and they failed to file a Rule 59(e) motion in response to the circuit court's orders granting Respondents' motions[.]"); and (2) Petitioners' exhaustion arguments; (*Id.*) ("We find these exhaustion arguments are not preserved for appellate review.").

In doing so, the Court largely relied on South Carolina's precedent surrounding Rule 59(e), SCRCP. *See id.* However, as the Court overlooked, or misunderstood, the Supreme Court has identified two (2) situations where a party should "consider"

pursuing a Rule 59(e) motion: (1) party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it; and (2) a party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. *Elam v. S.C. Dep't of Transp.*., 361 S.C. 9, 602 S.E.2d 772 (2004).

Additionally, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268 (1993)). Moreover, a party cannot use Rule 59(e) to present new evidence to the trial court. *See Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008) (holding issue is not preserved for appeal where it was never presented to the trial court prior to the filing of the motion to alter or amend); *Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (a party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial).

On reconsideration, the trial court effectively converted Respondents' Rule 12(b)(6) motions into motions for summary judgment by reviewing matters outside of the pleadings – specifically, (1) a report and findings prepared by a forensic consulting firm (which the trial court improperly accepted as fact); and (2) the offer of Respondents to Petitioners and other winning lottery ticket purchasers. A copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes

if a copy is attached to such a pleading. Rule 10(c), SCRCP. In considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. However, on a 12(b)(6) motion, if matters outside the pleading are presented to and not excluded by a court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, SCRCP, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *See* Rule 12(b), SCRCP; *Brazell v. Windsor*, 682 S.E.2d 824, 384 S.C. 512 (2009).

Although the Court determined Petitioners' argument regarding evidence presented to the trial court, in violation of Rule 12(b)(6)'s standard, was unpreserved, the trial court *did*, in fact, address that issue – in its Order Denying Respondents' Motions to Dismiss. (*See* R. p. 17, fn. 1) ("While this motion is couched as a 12(b)(6) motion to dismiss, both the [Petitioners] and [Respondents] in their respective memoranda make reference to matters outside of the pleadings on this issue. [Respondents] refer[] repeatedly to the SCEL website and [Petitioners] to a New York Times article that quotes SCEL's press release.").

Thus, while the trial court may not have directly addressed this issue in its orders dismissing Petitioners' case, the trial court's order, in essence, considered this issue and determined dismissal was appropriate. For that reason, this argument was preserved, and because the trial court improperly considered this new evidence in its order granting Respondents' Rule 59(e) motions, this Court has overlooked or misapprehended Petitioners' argument, and review is warranted.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S JUDGMENT.

A. The Trial Court Improperly Relied on Facts Not Contained in Any Pleadings Filed by Any Party, Or Its Prior Order, and Did Not Provide Petitioners Reasonable Opportunity to Rebut Those Facts.

The trial court improperly considered new evidence submitted by Respondent SCEL in its motion to alter or amend. "The purpose of Rule 59, SCRCP, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (*quoting Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)).

The Supreme Court has clarified the two (2) situations in which a Rule 59(e) motion is appropriate: (1) A party ***may*** wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it; and (2) A party ***must*** file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis added). Additionally, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268 (1993)).

Moreover, a party cannot use Rule 59(e) to present new evidence to the trial

court. *See Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008) (holding issue is not preserved for appeal where it was never presented to the trial court prior to the filing of the motion to alter or amend); *Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (a party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial).

This is precisely what occurred in this action. Respondent SCEL presented voluminous evidence and exhibits to the trial court, for the first time, in connection with their Rule 59 motion, which were never provided or presented in its motion to dismiss.

On reconsideration, the trial court effectively converted Respondents' Rule 12(b)(6) motions into motions for summary judgment by reviewing matters outside of the pleadings – specifically, (1) a report and findings prepared by a forensic consulting firm (which the trial court improperly accepted as fact); and (2) the offer of Respondents to Petitioners and other winning lottery ticket purchasers. A copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes if a copy is attached to such a pleading. Rule 10(c), SCRCP. In considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. However, on a 12(b)(6) motion, if matters outside the pleading are presented to and not excluded by a court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, SCRCP, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *See* Rule 12(b), SCRCP; *Brazell v. Windsor*, 682 S.E.2d

824, 384 S.C. 512 (2009).

Specifically, Respondent SCEL submitted facts, exhibits, letters, a forensic analysis, photographs, and a copy of Respondent SCEL's Executive Director's administrative review determinations to the Court for consideration in its Rule 59 motion to alter or amend, none of which was presented to the trial court, or provided to counsel, at the time the initial motion to dismiss was heard. In fact, the trial court specifically referred to the forensic review and administrative determination in its order granting the motions to alter or amend. This action by the trial court was wholly improper and in clear contravention of well-settled and long-standing South Carolina law as stated above.

Neither the forensic review nor the Executive Director's determination were attached as exhibits to Petitioners' Complaint, Amended Complaint, or Respondents' responsive pleadings, i.e., their motions to dismiss. Therefore, Respondents' Rule 12(b)(6) motions were necessarily converted to motions for summary judgment, and because the trial court's decision was made without a hearing, and, more importantly, without **any** reasonable opportunity for Petitioners to obtain and/or present competing evidence, such as conducting their own forensic review or to challenge Respondents' determinations, the trial court improperly dismissed Petitioners' suit.

The trial court's ultimate factual determination that the winning lottery tickets were issued in "error," at this stage of the litigation, with no discovery whatsoever and with evidence submitted from only one party, is a gross miscarriage of justice, improper, unwarranted and both legally and factually unsupported. This

clear error, standing alone and without addressing the substance or merits of the trial court's ruling, is sufficient for this Court to reverse the trial court's order.

B. The Administrative Procedures Do Not Apply to Petitioners' Equitable and Tort Claims.

The trial court erred in dismissing Petitioners' Amended Complaint pursuant to Rule 12(b)(6), SCRCP, based upon exhaustion principles because the Amended Complaint sets forth sufficient facts to support claims for breach of contract, unjust enrichment, promissory estoppel and negligence – claims not subject to the administrative exhaustion requirements. "A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) (citing *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000)). For example, in *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002), the respondent argued that the appellant's failure to exhaust administrative remedies precluded a tort action against third parties. *Id.* at 412, 563 S.E.2d at 114-15. The South Carolina Supreme Court disagreed and held the following:

> If this were an appeal from the denial of the permit through the administrative process in which [the agency] was the appropriate fact finder, Thomas Sand would clearly be required to exhaust its administrative remedies prior to bringing suit. . . . However, in a tort action against a third party, no such exhaustion requirement exists. The question is not whether the permit would have been granted but whether Thomas Sand was damaged. . . . [The agency] is not the appropriate fact finder to answer this question. The jury is.
>
> The basic purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reasons for the permit denial, would not assist the court in this instance. The alleged wrong is not one

> which the administrative process was designed to redress. "The doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered."

Thomas Sand, 349 S.C. at 413, 563 S.E.2d at 115 (quoting *Med. Mut. Liab. Ins. Soc. of Md. v. B. Dixon Evander & Assocs.*, 92 Md. App. 551, 609 A.2d 353 (Md. App. 1992)).

Here, like the *Thomas Sand* case, Petitioners' claims against Respondent Intralot are clearly against a third-party, for which there is no administrative exhaustion requirement. Furthermore, like this Court's decision in *Capital City Ins. Co. v. Bp Staff, Inc.*, Petitioners' claims are not based on a statutory violation for which the legislature mandates the pursuit of an administrative remedy. 674 S.E.2d 524, 382 S.C. 92 (Ct. App. 2009).

In short, the Lottery Act, S.C. Code Ann. § 59-150-300, sets forth a statutory scheme for grieving a board decision. Here, there is no indication that Petitioners were given any Board decision.[2] They were simply not paid winnings by retailers from whom they purchased winning lottery tickets. There was no "Board" – as defined by statute – decision prior to the filing of Petitioners' Complaint and/or Amended Complaint. Accordingly, as in *Thomas Sand* and *Capital City*, Petitioners were not required, as a matter of law, to exhaust the administrative process regarding their equitable and tort claims before filing the current action in circuit court.

[2] "Board" means the Board of Commissioners of the South Carolina Lottery Commission. S.C. Code Ann. §59-150-20(2).

C. Even If Required, The Trial Court Erred in Reversing Its Conclusion That Petitioners Did Not Fail to Exhaust Their Administrative Remedies or Excused Their Failure to Do So.

Initially, the trial court correctly ruled that Respondents' argument that Petitioners failed to exhaust their administrative remedies failed on several grounds. The trial court determined such argument was moot because Respondent SCEL had, at the time of the hearing, publicly announced it would not pay any winning tickets. Furthermore, the trial court determined that even if Petitioners were required to exhaust their administrative remedies, Petitioners' failure to exhaust was excused because it would be futile for the same reason. (R. pp. 018, 025).

While the trial court rejected Petitioners' argument that the statutory language in the Lottery Act concerning administrative remedies is permissive ("may") rather than mandatory, it also found that, since this was a class action, it would be "futile to require thousands of ticketholders to individually exhaust their administrative remedies." (R. pp. 018, 025). The trial court also correctly noted that "plaintiffs in a class action suit need not exhaust administrative remedies prior to instituting judicial proceedings where the administrative remedies available to the plaintiffs do not provide for class relief." *Rose v. City of Hayward*, 126 Cal. App. 3d 926 (Cal. App. 1981).

Based upon the wholly improper "new" evidence submitted with Respondents Rule 59(e) motions, however, and the trial court's favorable consideration thereof, the trial court completely reversed itself in connection to these findings and conclusions regarding the exhaustion of administrative remedies. As set forth below, however,

the trial court's reversal reasoning was erroneous, even void of the improper new evidence.

D. The Lottery Act Provision Grievance Procedure Is Inapplicable.

Contrary to its initial findings and ruling, in the order granting the motions to alter or amend, the trial court determined that Petitioners failed to exhaust their administrative remedies and did not present evidence that this failure was excused. In their respective motions, Respondents argued that an "error" in their system resulted in nearly every player "winning" during a two-hour period. In fact, the trial court improperly relied solely on Respondents' hired experts in concluding the winning tickets were printed in "error." There exists strong evidence that every, or "nearly every" player did not win during the relevant time-period.

Petitioners did not allege there was any "error" in their Complaint, Amended Complaint, or memoranda filed with the trial court. Since Petitioners did not allege and, in fact, vehemently denied there was an "error" in the system, the Lottery Act's limitation on Respondent SCEL's prize-paying discretion, by forbidding Respondent SCEL from paying unissued tickets or erroneously issued tickets, was inapplicable because the tickets in contention were not erroneously issued. *See* S.C. Code Ann. § 59-150-230(C)(3)(a) (stating a prize must not be paid if it is issued in error). At the very least, there is a serious factual dispute warranting reversal of the trial court's decision.

For those reasons, there was no purpose for an aggrieved ticket holder to file a complaint with Respondent SCEL's Executive Director, schedule the appropriate

hearing with the director after review, appeal the respective decision to the Board, or to ultimately appeal to the Administrative Law Court because Petitioners never alleged their tickets were issued erroneously. Furthermore, the trial court's conclusion afforded Petitioners no opportunity to rebut Respondents' forensic firm, nor to put forth their own forensic review to determine the issue of "error." This was a question of fact to be determined during discovery. Quite simply, it was improper for the trial court to dismiss Petitioners' Complaint based solely on its unbridled acceptance of Respondents' factual assertions first presented in a Rule 59 motion.

The question of whether the Lottery Act, and its corresponding administrative remedies provisions, applies in this case has been improperly determined by the trial court, which made its own factual findings. These findings were erroneous, both procedurally and substantively. Petitioners should be given the opportunity to conduct discovery to determine the issue of whether the allegations in their pleadings – that no error occurred in printing the winning tickets – are true; thus, eliminating the statutory administrative (permissive) requirements, and allowing Petitioners to proceed on their claims.

E. There Was No Board "Decision" Until, at the Earliest, May 30, 2018.

In its Memorandum in Support of its Motion to Alter or Amend, Respondent SCEL noted that its board "adopted a report and findings prepared by Gaming Laboratories International" on May 30, 2018, after Petitioners filed their Complaint and Amended Complaint. The Lottery Act states that an individual may grieve the board's "decision" within ten days from receipt of official notice from the board of the

action of which review is sought. S.C. Code Ann. §59-150-300(A). For that reason, Petitioners could not grieve any decision until that date, and there was no "decision" to grieve when Petitioners' Complaint and Amended Complaint were filed. Therefore, because there was no board "decision" existing at any time prior to the filing of Petitioners' claims, they were not required to exhaust their administrative remedies under a plain reading of the Lottery Act.

F. Any Administrative Review Would be Futile Given the Board's "Decision."

"The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Hyde v. S.C. Dep't of Mental* Health, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). "A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act." *Moore v. Sumter County Council*, 300 S.C. 270, 273-74, 387 S.E.2d 455, 458 (1990) (citing 82 Am. Jur. 2d *Zoning and Planning* § 332 at 903 (1976)). Futility is an exception when the administrative body cannot provide the relief requested or when circumstances guarantee a negative result of appeal. *See Ward*, 343 S.C. at 18–19 ("Allowing ALJs to rule on the constitutionality of the statute would violate the separation of powers doctrine.... Requiring a party to go before an agency or ALJ who cannot rule on the constitutionality of a statute would be a futile act."); *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) ("Futility, however, must be demonstrated by a showing comparable to

the administrative agency taking a hard and fast position that makes an adverse ruling a certainty.") (internal quotation marks and citation omitted).

Here, after Respondents' May 30, 2018 decision, it would have been futile for Petitioners to exhaust their administrative remedies as the Board's decision was certain to be unfavorable. *Storm M.H. v. Charleston Cnty. Bd. of Trs.*, 400 S.C. 478, 735 S.E.2d 492 (2012). Further, the administrative remedies would have been inadequate given the pendency of Petitioners' action and the potential delay of an administrative appeal. *Id.*

G. Even if the Act Applies, Respondents' Administrative Remedy Argument is Still Moot, As It Was When the Trial Court Issued Its Initial Order, Because SCEL Has Denied Class Members' Claims for Payment.

"The exhaustion doctrine acts as a prudential rule that provides the courts 'with a method to exercise comity toward administrative agencies and to promote efficient use of judicial resources while protecting the rights of parties who have come before the court seeking relief.'" *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991) (citing *Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (9th Cir. 1987)).

However, as the trial court recognized initially, there are exceptions to the requirement that parties exhaust administrative remedies before seeking judicial review. Exceptions to the doctrine exist where "(1) the dispute is a matter of statutory construction; (2) the utilization of administrative procedures would cause irreparable injury; and (3) the resort to administrative procedures would be futile." *Id.*

This argument is still moot, however, for three reasons. First, this is a matter of statutory construction, as stated *supra*, and as argued by Respondents at length in their memoranda. Because the determination of whether Petitioners are entitled to any damages depends on a determination as to whether the winning tickets were printed or issued in "error," Petitioners were not required to submit their claims to administrative review.

Second, as Respondents admitted and as found by the trial court in both orders, Petitioners did initiate administrative reviews or grievances, each of which was denied or rejected in writing by Respondent SCEL. Third, as admitted by Respondent SCEL, Respondents determined it would limit relief to the issuance of a refund for the purchase price of tickets to those who purchased tickets. Respondent SCEL has issued its final decision – a "hard and fast" position with which Petitioners disagree and are unwilling to accept. For that reason, Respondents' administrative remedy argument is now moot, and Petitioners should be allowed to proceed with their lawsuit, which they were entitled to file the same day Respondents made the above-referenced determination.

H. Class Relief and Remedies are Not Available Under the Administrative Remedies and Should Therefore Be Excused.

The report prepared by the "independent" consulting firm hired by Respondents stated that "tens of thousands" of winning tickets were issued on Christmas Day. In its original order, the trial court correctly found that "it would be futile to require thousands of ticketholders to individually exhaust their administrative remedies." This is completely accurate and logical. "Tens of

thousands" of individual appeals would also not be an efficient use of valuable Court time and resources and would we wasteful, duplicative, impractical and taxing on already thinly stretched resources. Such thousands of individual appeals would be necessary, however, as the South Carolina Supreme Court has held that class actions under SCRCP 23 are not permissible, as a matter of law, in administrative appeals in the Administrative Law Courts. *Allen v. S. C. Pub. Emp. Benefit Auth.*, 411 S.C. 61, 769 S.E.2d 666, 671-72 (2015). Thus, by law "tens of thousands" of individual appeals would necessarily have to be filed if such is required to be pursued through the ALC rather than as a more practical class action under Rule 23, SCRCP. "[T]he class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Anthony v. S.C. State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197, 204 (2011).

Furthermore, the entire thrust and intent of Rule 23 would be seriously undermined and effectively gutted because there is no class action vehicle or remedy available in the ALC. Again, the trial court initially correctly pointed out one holding from a Court that plaintiffs "in a class action need not exhaust administrative remedies prior to instituting judicial proceedings where the administrative remedies available to the plaintiffs do not provide class relief[.]" *Rose v. City of Hayward*, 126 Cal.App.3d 926 (Cal. App. 1981) (citing *Ramos v. County of Madera*, 4 Cal.3d 685, 690-91, 484 P.2d 93 (Cal. App. 1971)).

The *Rose* court was not the only court to make such a finding, however. In *Thorn v. Jefferson County*, 373 So.2d 780 (Ala. 1979), the Supreme Court of Alabama held that a class action lawsuit was a "permissible vehicle" and a "proper remedy" for taxpayers to pursue claims even though they had failed to first exhaust available statutory remedies. *Id.* at 788.

This is the quintessential class action scenario, with "tens of thousands" of potential plaintiffs, each of whom only suffered damages in the hundreds or low thousands of dollars, all under identical circumstances involving the same defendants and same conduct. Very few, if any, of the individual cases would allow for the client to retain counsel and pursue litigation on an individual basis. The individual cases are simply not economically viable. To require an exhaustion of administrative remedies on an individual basis is, in effect, barring the class action mechanism and therefore depriving the winning ticketholders any recourse or relief while giving Respondents a "get out of jail free" card. This is precisely the scenario envisioned by Rule 23 and to prevent its use here would be manifestly unjust and unfair.

Moreover, the South Carolina Supreme Court has expressed the viewpoint that class actions are favored in this State:

> Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP), intentionally omitted from our state rule the additional requirements found in Federal Rule 23(b), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

Anthony, 390 S.C. at 562 (citing *Littlefield v. South Carolina Forestry Comm'n*, 337 S.C. 348, 523 S.E.2d 781, 784 (1999)).

CONCLUSION

For the reasons stated, this Court should grant this Petition and review the Court of Appeals' decision affirming the trial court's judgment.

Respectfully submitted,

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