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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2019-000182

RECEIVED
MAR 01 2019
SC Court of Appeals

Donald Stanley and Sean Reiter,
Individually and as Class Representatives,

Respondents,

v.

Southern States Police Benevolent Association, Inc.,

Appellant.

**APPELLANT SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION,
INC.'S PETITION FOR REHEARING**

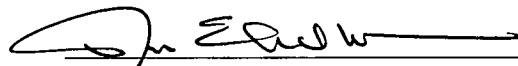
Pursuant to Rule 221, SCACR, Appellant, Southern States Police Benevolent Association ("PBA"), respectfully petitions for rehearing of the Court's decision in its Order of February 14, 2019, dismissing PBA's appeal on the basis that "class certification orders are not immediately appealable." (Order at 1.) Notwithstanding that general principle there are certain circumstances, as this Court and the South Carolina Supreme Court have held, where immediate review of a class certification order is appropriate. Accordingly, the Supreme Court has "reviewed interlocutory orders involving class certification when they contain other appealable issues." *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 449, 661 S.E.2d 81, 85 (2008). One such "other issue" exists when the practical impact of class certification is to grant injunctive relief. *See BLH v. South Carolina*

Department of Social Services, 423 S.C. 422, 229, 814 S.E.2d 638, 642 (2018) (holding that trial court's order certifying class and requiring agency to provide names and addresses of potential class members was immediately appealable); *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (order prohibiting a plaintiff from contacting potential members of class was deemed an injunction and, therefore, immediately appealable). Injunctive relief has been deemed immediately appealable in other contexts as well. *See Doe v. Howe*, 362 S.C. 212, 215, 607 S.E.2d 354, 355 (Ct. App. 2004) (denial of motion to proceed anonymously was appropriate for immediate review); *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 4-5, 630 S.E.2d 464, 466 (2006) (order permitting review of private divorce records deemed immediately appealable).

In the present case, the Circuit Court's order granting class certification resulted in the certification of an injunctive relief class and, further, impaired PBA's substantial rights by effectively striking several of its key individual defenses. Accordingly, the "other appealable issues" standard is met. PBA respectfully submits that this Court's dismissal of its appeal overlooked or misapprehended the presence of these other appealable issues and that rehearing is warranted.

Respectfully submitted,

March 1, 2019



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March 1, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

VIA HAND DELIVERY

Re: Donald Stanley and Sean Reiter, Individually and as Class Representatives
vs. Southern States Police Benevolent Association, Inc.
C/A No. 2016-CP-10-04062
Appellate Case No. 2019-000182

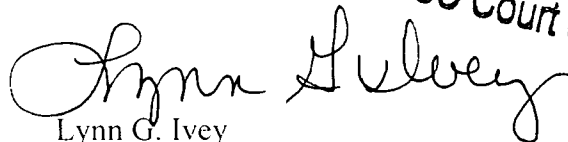
Dear Ms. Kitchings:

Enclosed for filing is Appellant's Petition for Rehearing and Memorandum in Support of
Petition for Rehearing.

Please have the extra copies clocked in and returned to our courier.

Thank you for your consideration.

Sincerely,



Lynn G. Ivey
Assistant to James Edward Bradley

Enclosures

cc: Ronald L. Richter, Jr., Esquire (via first class mail)
Scott M. Mongillo, Esquire (via first class mail)
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Appellant.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Appellant, PBA, respectfully submits this memorandum in support of its petition for rehearing of the Court's February 14, 2019, Order dismissing its appeal.

INTRODUCTION

This case, which impacts thousands of police officers, sheriff's deputies, and other law enforcement officials throughout South Carolina, warrants immediate review because of the trial court's certification of an injunctive relief class that impacts PBA's substantial right to assert individual defenses to the claims asserted. If the trial court's decision is not immediately reviewed, then the manner in which the trial will be conducted will be materially altered and the errors cannot be remedied at the end of the case. PBA respectfully submits the Court overlooked and/or misapprehended these ramifications of the trial court's certification when it summarily dismissed PBA's appeal simply because it

perceived this to be an appeal of a class action order, and not accounting for the injunctive relief and substantial rights issues presented which should be reviewed at this stage.

Plaintiffs, current (Stanley), and former (Reiter) South Carolina law enforcement officers, allege that PBA violated a number of state laws by offering “several benefits,” including a Legal Defense Benefit Plan (“Plan”), to its members, including Plaintiffs. (See Order Certifying Plaintiff Class (“Certification Order”) at 2.) They allege the Plan was actually either (1) a policy of insurance; or (2) a “prepaid legal services plan,” neither of which PBA was authorized to sell. (*Id.*) They allege that PBA did not comply with the legal services plan requirements under South Carolina law because it provided legal defense counsel to its members from a panel of defense attorneys rather than notifying its members they could choose their own attorneys. (*Id.*) They further allege PBA failed to disclose to its members that the Plan permitted PBA to withhold benefits “its members pay for if it determines that the member “has committed an intentional, deliberate, and/or illegal act.” (*Id.* at 2-3.) Plaintiffs seek “injunctive relief and damages, namely a rescission of the Plan and a refund of member dues or premiums paid, together with additional relief.” (*Id.* at 3.)

On December 31, 2018, the trial court certified a class of [a]ll residents of South Carolina who participated in the Defendant’s Legal Defense Benefit Plan by paying ‘member dues’ to the Defendant in exchange for benefits of said Plan from August 4, 2013 to August 4, 2016.” (*Id.* at 12.) On February 6, 2019, PBA filed its notice of appeal with this Court. On February 14, 2019, this Court dismissed PBA’s appeal. For the reasons discussed below, PBA respectfully submits it should be granted rehearing.

RELEVANT FACTUAL BACKGROUND

PBA is a 501(c)(5) non-profit, tax-exempt organization that has been in existence since 1987. (PBA's Memorandum in Opposition to Plaintiff's Motion For Class Certification at 2.) It operates as a labor organization for the welfare of its police officer members to improve working conditions, reduce the hazards of law enforcement, and enhance the professionalism of law enforcement. (*Id.*) PBA is funded by membership dues, and its benefits from those dues include lobbying efforts, endorsement of candidates for office, accidental death benefits, publication of a police magazine, a legal defense benefit, and representation in grievance and disciplinary matters in the administrative context. (*Id.*) The legal defense benefit provides, subject to the Plan's terms and conditions, payment for an attorney (at no cost to the member with no caps or limits) should a member ever be involved in a critical incident or sued as a result of actions taken as a result of his or her employment as a law enforcement officer, including any criminal investigation of a PBA member. (*Id.* at 3.)

Plaintiff Stanley is a current PBA member and Plaintiff Reiter is a former PBA member. (Certification Order at 1.) They have sued PBA in this proposed class action, asserting claims for (1) breach of contract; (2) negligence; (3) breach of fiduciary duty; (4) unjust enrichment; (5) fraud in the inducement; (6) negligent misrepresentation; and (7) injunctive relief. (*Id.* at 2.) Plaintiffs do not claim they or anyone in the class has been denied a benefit under the Plan or has been damaged by PBA in any way whatsoever other than the voluntary payment of membership dues (Plaintiffs' Memorandum In Opposition To Defendants' Motion For Summary Judgment at 15).

ARGUMENT

I. THE COURT’S ORDER OVERLOOKED OR MISAPPREHENDED THAT CLASS CERTIFICATION ORDERS ARE IMMEDIATELY APPEALABLE WHEN THEY CONTAIN “OTHER APPEALABLE ISSUES.”

In its Order dismissing the appeal, the Court observed that “[t]he general rule established by this Court is that class certification orders are not immediately appealable.” (Order Dismissing Appeal at 1.) The Court acknowledged, however, that there are some circumstances where a class certification order may be immediately appealable when it held that “[u]sually, an order denying class certification is interlocutory and not immediately appealable.” (*Id.*) (emphasis added). In the *Salmonsens* case the Court cited, the South Carolina Supreme Court held that class certification orders can be reviewed when they contain “other appealable issues.” *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008); *see also Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004) (“Certain interlocutory orders are, however, immediately appealable. An interlocutory order is appealable if it falls into one of a few, limited categories of appealable judgments or orders.”); *see also BLH v. South Carolina Department of Social Services*, 423 S.C. 422, 229, 814 S.E.2d 638, 642 (2018) (trial court’s order certifying class and requiring agency to provide names and addresses of potential class members was immediately appealable); *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (order prohibiting a plaintiff from contacting potential members of class was deemed an injunction and, therefore, immediately appealable).

Trial court orders that award injunctive relief have been deemed immediately appealable in other contexts as well. *See Doe*, 362 S.C. at 215, 607 S.E.2d at 355 (denial of motion to proceed anonymously was appropriate for immediate review); *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 4-5, 630 S.E.2d 464, 466 (2006) (order permitting

review of private divorce records deemed immediately appealable). In its Order dismissing the appeal, the Court did not cite the above authorities, which recognize that there are circumstances where class certification orders are immediately appealable and, in so doing, did not analyze whether this case includes such “other issues” sufficient to warrant immediate review. Accordingly, rehearing is required to address this threshold, yet essential, issue.

II. THE COURT OVERLOOKED OR MISAPPREHENDED THAT INJUNCTIVE RELIEF IS AN “OTHER ISSUE” SUFFICIENT TO WARRANT IMMEDIATE REVIEW.

Because the Court, in issuing its Order, apparently did not consider that there can be “other issues” warranting immediate review, it also did not consider whether the grant of an injunctive relief class, as occurred here, was such an “other issue.” Immediately reviewable “other” issues have been held to exist when the practical impact of class certification is to grant injunctive relief. *See BLH*, 423 S.C. at 229, 814 S.E.2d at 642 (trial court’s order certifying class and requiring agency to provide names and addresses of potential class members was immediately appealable); *Eldridge*, 308 S.C. at 127, 417 S.E.2d at 534 (order prohibiting plaintiff from contacting potential members of class was deemed an injunction and, therefore, immediately appealable). Injunctive relief has been deemed immediately appealable in other contexts as well. *See Doe*, 362 S.C. at 215, 607 S.E.2d at 355 (denial of motion to proceed anonymously was appropriate for immediate review); *Capital U-Drive-It*, 369 S.C. at 4-5, 630 S.E.2d at 466 (order permitting review of private divorce records deemed immediately appealable).

In the present case, the Court should grant rehearing so it may determine whether the injunctive relief class certified here warrants immediate review. In its Certification Order, the trial court found “Plaintiffs seek injunctive relief and damages, namely a

rescission of the Plan and a refund of member dues or premiums paid, together with additional relief.” (Certification Order at 3.) The court then certified the injunctive relief class of “[a]ll residents of South Carolina who participated in the Defendant’s Legal Defense Benefit Plan by paying “member dues” to the Defendant in exchange for benefits of said Plan from August 4, 2013 to August 4, 2016.” (*Id.* at 12.) The court further acknowledged that PBA has now become licensed as a prepaid legal benefits plan through the Department of Consumer Affairs and “Plaintiffs’ claims are primarily focused on the actions of Defendant PBA in the years leading up to the filing of the Complaint and prior to PBA seeking licensure.” (*Id.* at 2.) The court’s finding was directly in conflict with the fact that Plaintiffs seek injunctive relief “to bar Defendant PBA from operating as an insurer without proper authority and license, including barring Defendant PBA from soliciting, marketing, selling and issuing insurance contracts and adjusting claims unless Defendant obtains proper authority and licensing from the states in which it is operating.” (Am. Compl., ¶ 127.) The Circuit Court’s certification of an injunctive relief class was error that should be corrected at this stage.

Indeed, Plaintiffs have not – and cannot – put forth any legal authority entitling them injunctive relief. In their Memorandum Opposing Summary Judgment (the only document in which Plaintiffs offered any caselaw pertaining to this claim), Plaintiffs merely cited South Carolina cases explaining that injunctive relief aims to prevent potential future irreparable injury. (Pls.’ Opp. To MSJ at 17.) In their Amended Complaint, Plaintiffs assert that the future irreparable injury to the class would be PBA’s “acting without any regulatory oversight whatsoever,” and they seek injunctive relief to “bar [PBA] from operating” and issuing the Plan “unless Defendant obtains proper authority and

licensing.” (Am. Compl. ¶¶ 125, 127.) Because, as the trial court acknowledged, PBA has sought, and now obtained, proper authority for providing the Plan under South Carolina law, and is currently regulated by the state through the South Carolina Department of Consumer Affairs, the speculative, hypothetical potential future irreparable injury Plaintiffs predict is factually impossible. *See Gardner v. South Carolina Dept. of Revenue*, 353 S.C. 1, 24 n.14, 577 S.E.2d 190, 202 n.14 (2003) (citing *Edisto Fleets, Inc. v. S.C. Tax Com’n*, 256 S.C. 350, 182 S.E.2d 713 (1971), for the proposition that a “plaintiff cannot maintain a class action where [the] record indicates he was not directly harmed by defendant[s’] actions”). The certification of the injunctive relief class was, therefore, error and rehearing is warranted to cure it.

Furthermore, Plaintiffs went even further in their depositions and demanded PBA be dismantled, with all membership agreements rescinded and all membership dues refunded. In other words, Plaintiffs seek a mandatory injunction against PBA. There is absolutely no basis for one. “A mandatory injunction is an especially drastic remedy and is rarely granted.” *Johnson v. Phillips*, 315 S.C. 407, 417, 433 S.E.2d 895, 901 (1993), *aff’d in part, rev’d in part on other grounds by Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995). Furthermore, “if the damage suffered by the party seeking a mandatory injunction is very small, a mandatory injunction is unduly oppressive and not in accordance with the principles upon which equitable relief is usually granted.” *Johnson*, 315 S.C. at 417, 433 S.E.2d at 901.

Plaintiffs have made no effort to fit their case within the “rare[.]” circumstances under which the “especially drastic remedy” of a mandatory injunction could be obtained. Their lack of damages further impairs that effort. Finally, most courts reject requests for a

rescissionary remedy on a classwide basis, and this Court should grant rehearing so that it can do so here. *See, e.g., Whitmire v. Adams*, 273 S.C. 453, 456, 257 S.E.2d 160, 163 (1979) (refusing relief in class action that sought rescission of deeds); *see generally Morris v. Wachovia Securities, Inc.*, 223 F.R.D. 284, 287 (E.D. Va. 2004) (“[A] majority of courts ... have refused to certify a class action where a rescissionary remedy is sought.”) (citing several cases).

The trial court’s certification, given the injunctive relief sought, should be immediately reviewed. PBA is currently operating in a state of uncertainty given the trial court’s Certification Order. Should it continue to collect membership fees? Should it continue to offer the benefits that its members pay for each month though their membership fees? Is it at risk of having to repay its South Carolina members their membership fees from years past? How does its current licensure as a legal services plan impact its operations? Once class notice is sent to its South Carolina membership, PBA expects to receive a substantial number of questions from its members about the notice (although, under the Certification Order, it will be precluded from discussing the case with them). The practical impact of the Certification Order is to impose a *de facto* injunction upon the operations of PBA given these unresolved issues. It would be far more efficient, and reduce the risk of an unnecessary trial, to review these injunctive relief-related issues now, rather than having to review them after trial.

If immediate review is denied, then the case will proceed to trial as a class action that never should have been certified, and impacts a substantial number of law enforcement officers in South Carolina who rely upon their PBA benefits for things like accidental death insurance, legal defense, and legislative efforts. The trial court has, through its certification

of an injunctive relief class, created the potential, and indeed likelihood, that the PBA membership in South Carolina will be greatly confused concerning the status of their membership rights and benefits. In its Certification Order, the trial court ordered “[a]ny notices required by the law and the South Carolina Rules of Civil Procedure shall be given to the class in a form and manner to be determined by the Court upon application by Plaintiffs or Defendants. In the interim, no party shall communicate with the class members regarding this class action and the allegations contained herein.” (Certification Order at 12.) Once notice is sent to the class, the South Carolina PBA law enforcement members will likely be confused as to the status of their benefits and whether they should continue to pay their dues. Further, PBA will be required to turn over its South Carolina membership list to Plaintiffs’ counsel which PBA deems highly confidential. For all of these reasons, this Court should grant rehearing to address the injunctive relief-related issues presented by the trial court’s Certification Order.

III. THE TRIAL COURT’S CERTIFICATION ORDER AFFECTS A “SUBSTANTIAL RIGHT” OF PBA AND SHOULD, THEREFORE, BE IMMEDIATELY REVIEWED.

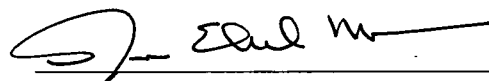
Intermediate orders that involve the merits of the case may be immediately appealed under Section 14-3-330. An order involves the merits when it “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Interlocutory orders affecting a “substantial right” may be immediately appealed pursuant to Section 14-3-330(2). In order to affect a “substantial right,” the order must discontinue an action, prevent an appeal, grant or refuse a new trial, or strike an action or defense.” *Id.* at 335 n.4, 236 S.E.2d 780 n.4.

In the present case, the Certification Order impacts PBA's substantial rights. By certifying a class of every dues paying member (during the relevant time period), the trial court stripped PBA of its ability to assert its individual defenses against each class member. In its Answer to Plaintiffs' Amended Complaint, PBA asserted the following Defenses: laches, (Eighteenth Defense), no right to reply on representations of PBA (Nineteenth Defense), waiver (Twentieth Defense), absence of clean hands (Thirty-Second Defense). Each of these defenses is highly individualized. Unless the trial court intends to have mini-trials for each and every class member, PBA cannot now assert these individualized defenses against individual class members as to whom it may have them. The practical impact of the Certification Order is to strip PBA of these defenses. Indeed, the Certification Order is silent on these defenses. This Court should grant rehearing in order to consider and reverse the Certification Order to the extent it serves as a *de facto* stripping away of PBA's individualized defenses to the claims of individual class members, thereby impacting its substantial right to assert them.

CONCLUSION

For the reasons above, PBA respectfully requests that its petition be granted and the Court grant a rehearing of its Order.

Respectfully submitted,



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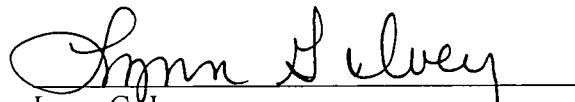
I, Lynn G. Ivey, an employee of the Moore Taylor Law Firm, P.A., certify that I have served the Appellant's Petition for Rehearing and Memorandum in Support for Petition for Rehearing on the Respondents by depositing copies of same in the United State Mail, postage prepaid, on March 1, 2019, addressed to their attorneys of record as follows:

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Lynn G. Ivey

West Columbia, South Carolina
March 1, 2019