

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

RECEIVED
MAR 27 2019
SC Court of Appeals

Circuit Court Case No. 2016-CP-10-04062

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

v.

Southern States Police Benevolent Association, Appellant.
Inc.

**RESPONDENTS' MEMORANDUM IN OPPOSITION TO APPELLANT'S
PEITION FOR REHEARING**

This matter is before the Court on the request of Appellant Southern States Police Benevolent Association ("PBA") for a rehearing of this Court's dismissal of Appellant PBA's appeal. The trial court in this matter granted Plaintiffs-Respondents Donald Stanley and Sean Reiter ("Plaintiffs") motion for class certification and also denied PBA's motion to reconsider that order.

The trial court's orders did nothing more than certify a class, appoint class counsel, and bar communications with class members regarding the litigation:

IT IS THEREFORE ORDERED THAT:

a. the Court certifies this matter as a class action and certifies the following class of plaintiffs:

All 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.

Excluded from the class are Defendant's current and former executive and local board members or executive level officers, employees, and persons that timely and properly exclude themselves from the class. Based on the foregoing, the Court certifies the class.

b. Counsel for the Plaintiffs are appointed as class counsel for the Plaintiff class.

c. Any 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.

IT IS SO ORDERED.

Trial Court Order Certifying Plaintiff Class ("Certification Order"), Page 12.

The trial court made no legal or factual findings other than those required to determine whether a class should be certified. The trial court did not explicitly or impliedly rule on any substantive issues in the case, did not strike any pleadings, did not grant any injunctions, and did not foreclose any substantive arguments that could be made by PBA. Under the South Carolina Rules of Procedure, PBA is free to move to decertify the class.

As acknowledged by PBA, “[t]he general rule is established by this Court is that class certification orders are not immediately appealable.” *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81, 85 (2008). As noted by the Court in *Salmonsens*, the South Carolina legislature has determined that class certification orders are not appealable. *Id.* at 85-87. Although the Court in *Salmonsens* ultimately accepted the appeal in that case, it repeatedly noted that it was to consider the trial court decision to create an “opt-in” notification procedure, which presented an unusual and special situation that affected a mode of trial and “created a class action anomaly,” which a class certification order, standing alone, does not do. *Id.* at 87. Needless to say, no such situation exists in this matter.

PBA suggests that a class certification order becomes appealable when the underlying complaint includes a request for injunctive relief. There is no legal or logical support for this position. Plaintiffs have indeed requested injunctive relief. Amended Complaint, Page 20, Exhibit C to PBA’s Amended Memorandum in Support of Petition for Rehearing. Nothing in the class certification implicitly or explicitly granted the injunctive relief sought by Plaintiffs. Just like every other cause of action in the Amended Complaint, Plaintiffs’ requested injunctive relief remains a matter to be determined by the trial judge or jury.

The cases cited by PBA each involve class certification orders that created additional conditions or requirements that would not generally be reviewable at a

later date. As noted before, the certification order reviewed in *Salmsonsen* created an illegal opt-in class. The certification order reviewed in *BLH v. South Carolina Department of Social Services*, 423 S.C. 422, 814 S.E.2d 638, 642 (2018), *cert. granted* (Nov. 9, 2018),¹ required the South Carolina Department of Social Services to reveal the names and addresses of its clients, a situation where “the resulting harm cannot be corrected” because it involved “the disclosure of personal and potentially sensitive information for which there would be ‘no appellate remedy . . . likely to repair any damage done by an improper disclosure.’” *Id.* at 428-29.

Finally, the order reviewed in *Eldridge v. City of Greenwood*, 308 S.C. 125, 417 S.E.2d 532, 534 (1992), was not even a class certification order. Rather, the trial court in *Eldridge* had barred the plaintiff from contacting *potential* class members, while allowing the defendant to contact *potential* class members. The order was not part of a class certification, but rather an order that preceded class certification and undoubtedly presented an uneven playing field for the plaintiff seeking certification. The Supreme Court deemed this unilateral ban on communications to be in the nature of an injunction.

The real relevance of *Eldridge* is the holding that “[o]rders that severely limit plaintiff/appellant’s contact with potential members of the class are authorized only

¹ PBA inexplicably failed to note that the Supreme Court granted certiorari to review the Court of Appeals’ opinion in November of 2018, calling into question the reliability of this opinion entirely.

under the general grant of power in Rule 23(d)(2).” *Id.* at 127. In compliance with this mandate, the Certification Order in this matter included a blanket ban on communications with class members of an already certified class. Just as *Eldridge* noted, once a class is certified, communications with the class must be authorized by the court under the powers granted by Rule 23(d), SCRCP, which vests the trial court with the right and duty to oversee all notices given to the class. Without the ban included in the Certification Order, PBA would be free to provide notices to the class without court supervision and without notice to the Plaintiffs, who are now class representatives. This is an entirely different situation from the pre-certification issues raised in *Eldridge*.

In short, the opinions cited by PBA are not applicable to this matter. The trial court did not create an illegal opt-in class. The trial court did not require PBA to produce the names and addresses of potential class members. The trial court did not bar Plaintiffs from contacting potential members of the class pre-certification. Most importantly, the trial court did not grant an injunction or provide any sort of substantive relief to any of the parties. The trial court order simply granted class certification, and, as PBA has recognized, such orders are interlocutory and not immediately appealable.

Moreover, since the trial court did not rule on any injunctive relief (or other substantive relief) there is literally nothing for this court to review other than class

certification. PBA implies that this court can review the substantive issues in this case, but there is no ruling on those substantive issues to review.

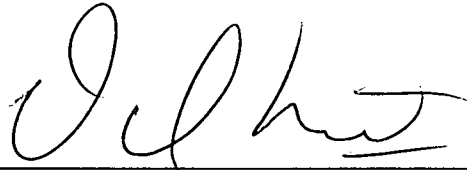
Throughout this litigation and now on this appeal, PBA has doggedly pursued two defenses that have been rejected by the trial court on at least three separate occasions. PBA has repeatedly argued that Plaintiffs have no standing to bring this case and have suffered no damages. These arguments were raised on a motion to dismiss, which was denied. These arguments were raised on a summary judgment motion, which was denied. These arguments were raised in opposition to class certification, which was granted. Indeed, PBA took the unusual step of **only** arguing these two substantive issues in opposition to class certification both in their briefs and in the lengthy hearing held before the trial court. PBA offered no arguments that addressed the factors to be considered on class certification until its motion to reconsider. So, once again, there is nothing for this Court to review because PBA failed to address or contest class certification issues at the trial court level.

In its current Petition for Rehearing, PBA has once again ignored the issues at hand (this court's lack of jurisdiction) and pivoted instead to its substantive arguments on standing and damages, which have been denied repeatedly. As has already been ruled, PBA is appealing an interlocutory order that is not subject to appeal. No substantive issues were decided, so there is nothing to be appealed or decided by this Court. Based on the foregoing, Plaintiffs would ask that this Court

deny PBA's Petition for Rehearing and immediately remand this matter to the trial court for further proceedings.

Respectfully submitted,

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Charleston, South Carolina
March 25, 2019

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REPRESENTATIVES*

I, Joseph C. Wilson, IV, of Pierce, Sloan, Wilson, Kennedy & Early, LLC, counsel for Respondents Donald Stanley and Sean Reiter, Individually and as Class Representatives, hereby certify that the foregoing **RESPONDENTS' MEMORANDUM IN OPPOSITION TO APPELLANT SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION, INC.'S PETITION FOR REHEARING** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on March 25, 2019, properly posted for delivery to the following addressees:

James Edward Bradley, Esq.
Moore Taylor Law Firm, P.A.
PO Box 5709
West Columbia, SC 29171

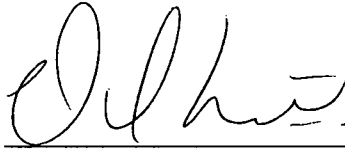
and

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Respectfully submitted,

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Charleston, South Carolina
Dated: 3/25/19

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VIA U.S. MAIL

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

Re: *Donald Stanley, Individually and as Class Representative v. Southern States
Police Benevolent Association, Inc.*
Circuit Court C/A No. 2016-CP-10-4062
PSWKE File No.: P2765.00

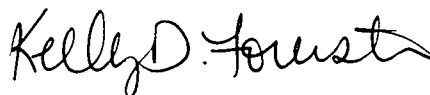
Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven (7) copies of the Respondents' Memorandum in Opposition to Appellant's Petition for Rehearing in the above referenced matter. Please file the original with the Court and return a clocked-in copy to our office via the enclosed envelope. Should you have any questions or concerns, please do not hesitate to contact our office.

Please feel free to contact me with any questions or concerns you may have.

With kind regards,

Sincerely,



Kelly D. Forrester
Paralegal to Joseph C. Wilson, IV

Enclosures

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