THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2016-CP-10-04062

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

v.

Southern States Police Benevolent Association, Inc., ... Appellant.

Appellant.

INITIAL BRIEF OF APPELLANT SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION, INC.

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STATEMENT OF THE ISSUES ON APPEAL

(1) Whether the trial court erred in granting certification to an injunctive relief class where, among other things, there is no threat of imminent harm, one Plaintiff lacks standing to pursue the requested injunctive relief, and where Plaintiffs cannot satisfy any of the requirements for injunctive relief;

(2) Whether the trial court erred in granting certification of a damages class where neither named Plaintiff is a member of the proposed class, neither Plaintiff has sustained any recoverable damages, and Plaintiffs' claims are riddled with individual issues that cannot be adjudicated on a classwide basis.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. The Parties

1. PBA

PBA, which has been in existence since 1987, is a 501(c)(5) non-profit, tax-exempt corporation organized under Georgia law and is headquartered in McDonough, Georgia. (PBA Resp. to Pls.' Mtn. for Class Cert. p.2) PBA 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 provided as part of the PBA Membership Plan (the "Plan"), provides, subject to terms and conditions, payment for an attorney to represent the member (at no cost to the member with no caps or limits) should a member ever be involved in a critical incident such as a shooting 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 or civil litigation. (*Id.* p.3; *see generally*, Membership Plan documents). At the time of class certification, the PBA was providing counsel to seventy PBA members that reside in South Carolina. (7-10-18 Aff. of Charles Cordell).

2. Plaintiffs

Plaintiff Donald Stanley is a patrol lieutenant in the Charleston County Sheriff's Office. (Stanley Dep., 12:6-10). He joined PBA in October 1994. (*Id.*, 22:13-16.) His wife, also in law enforcement, is a lieutenant in the North Charleston Police Department. (*Id.*, 9:12-17). She has been a member of PBA for over 20 years. (*Id.*, 9:20-23). At some point during his PBA membership – he believes it was 1997 or "in that range" when he worked with the North Charleston Police Department – Mr. Stanley served as a board member for his local PBA chapter. (*Id.*, 25:16-25). He has not attended local meetings, however, in 15 to 20 years. (*Id.*, 56:1-7; *see also id.*, 59:25-60:2 (agreeing that "[o]ther than [being] a member," he has not "been active in the PBA, in the last 15 or 20 years")).

In March 2005, Mr. Stanley was accused of striking a child with his departmental vehicle. (*Id.*, 130:1-6). While not recalling the circumstances in which the PBA assigned him an attorney, he acknowledged PBA paid attorney Andy Savage to represent him.[1]

[1] Mr. Savage is counsel of record for Plaintiffs in this matter.

(*Id.*, 132:10-17). He further acknowledged that he had no complaints with Mr. Savage's representation. (*Id.*, 132:18-20). In March 2016, Mr. Stanley was named as a co-defendant in a lawsuit brought by Akilou Smith. *See Smith v. Charleston County,* Case No. 2:16-cv-00655-BHH, D.E. 1 (D.S.C.) Complaint). Upon learning he was named in the suit, Mr. Stanley called PBA, which supplied him with counsel to defend him in the Smith lawsuit. (Stanley Dep., 125:6-8, 126:9-13.) As Mr. Stanley testified, he had no concerns with PBA's obtaining legal counsel for him, nor did he believe PBA did anything wrong in hiring his counsel. (*Id.*, 128:11-19.) In fact, Mr. Stanley was dismissed as a defendant from that case in March 2019. *See Smith v. Charleston County*, Case No. 2:16-cv-00655-BHH, D.E. 78 (Order Ruling on Report and Recommendation).

Plaintiff Reiter worked for the Charleston County Sheriff's Office from 2002 to 2007 and for the North Charleston Police Department from 2009 to 2016. (Reiter Dep., 6:3-14.) In June 2016, he obtained a job in New Jersey with CSX Transportation as a "railroad police officer." (*Id.*, 8:22-9:3, 14:19-20.) At that point, he left PBA. (*Id.*, 19:8-9 ("When I left the state [of South Carolina], I was no longer a member of PBA.").) While he was with PBA, he was elected a leader for his local chapter for nearly a year. (*Id.*, 17:23-24.) In June 2004, Mr. Reiter had an automobile accident in which he struck and killed a pedestrian, and he contacted PBA after the accident. (Reiter Dep., 22:3-5.) PBA assigned him a lawyer – one of Plaintiffs' counsel of record, Mr. Savage, who are now *suing* PBA in this case – and Mr. Reiter agreed he was pleased with his lawyer's work on the case. (*Id.*, 22:22-25.) Other than a slight delay in having that lawyer assigned, Mr. Reiter did not find any fault with how PBA reacted in that situation. (*Id.*, 23:1-3.) Of course, Mr. Reiter did not have to pay for that representation. (*Id.*, 44:19-20.)

B. The Slager Events and Case

It is undisputed this case springs from the highly publicized arrest and conviction of Michael Slager, an officer in the North Charleston Police Department who, in 2015, shot and killed an unarmed African American man, Walter Scott. *See generally United States v. Slager*, 912 F.3d 224, 227-32 (4th Cir. 2019) (describing the facts of the *Slager* case). Earlier this year, the Fourth Circuit Court of Appeals affirmed Mr. Slager's 240-month sentence for depriving Mr. Scott of his civil rights under color of law. *See id.* at 232-38.[2]

Mr. Slager was a member of PBA at the time of his arrest. *See Slager v. Southern States Police Benevolent Ass'n*, Case No. 2:15-cv-4536 DCN, D.E. 1 (D.S.C.) (Complaint), ¶ 31. As such, he requested that PBA defend him in the criminal proceedings. *Id.*, ¶ 36. PBA agreed to that request and assigned him counsel. *Id.*, ¶ 37. Subsequently, after investigating further, PBA concluded it would not provide coverage under the Plan's intentional acts exclusion as it had determined Mr. Slager had "committed an intentional, deliberate and/or illegal act, either civilly or criminally." *Id.*, ¶ 41. That decision prompted Mr. Slager to sue PBA in federal court in South Carolina; the parties settled that lawsuit out of court in May 2017. *See Slager v. Southern States Police Benevolent Ass'n*, Case No. 2:15-cv-4536-DCN, D.E. 41 (D.S.C. May 2, 2017) (order of dismissal). In the civil case against PBA, Mr. Slager was represented by the

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[2] The Fourth Circuit's opinion detailed what it termed "four different accounts as to what happened" in the Scott shooting that Mr. Slager put forth over the course of his criminal case. *See Slager*, 912 F.3d at 229-30. As the Fourth Circuit observed, "the district court discredited Defendant's testimony, characterizing it as 'contradictory,' 'self-serving, evolving, and internally inconsistent.'" *Id.* at 231 (quoting *United States v. Slager*, 2018 WL 445497, *4, *6 (D.S.C. Jan. 16, 2018)).

Bland Richter firm, which also is counsel of record for Plaintiffs in this case. *Slager*, D.E. 1 at 14.

C. Plaintiffs' Claims

Plaintiffs assert claims against PBA 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. (*See* Order Certifying Plaintiff Class ("Certification Order") at p.2.) The Class Certification Order states Plaintiffs 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 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.[3] (*Id.*) They further allege PBA failed to disclose to its members 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.)[4]

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[3] Notwithstanding the Class Certification Order's recital of those allegations, the operative Complaint – the Amended Complaint – does not, in fact, make such allegations, therefore, inclusion of that allegation in the Order was in error and should be corrected by this Court.

[4] Even though he purports to seek a return of dues he paid to the PBA, Mr. Stanley was unwilling to repay to PBA the legal fees for the lawsuit in which PBA-funded counsel defended him (Stanley Dep., 91:16-22), even though he was dismissed from that lawsuit in 2019.

In reality, though, Plaintiffs and their lawyers simply do not like the fact PBA withdrew its defense of Michael Slager; both Plaintiffs made that clear in their depositions. (*See* Stanley Dep., 37:18-24 (with regard to "what happened with Mr. Slager and the PBA, testifying that "I was disgusted by it. . . . I felt it was completely inappropriate."); Reiter Dep., 13:22-24 (Q. "Were you upset that the PBA did not assume the defense of Michael Slager?" A. "Yes, sir.").) Beyond the Slager events, however, neither Plaintiff can identify a single instance in which PBA has failed to provide them with the benefits of their membership or that PBA has committed any wrongful acts. As Plaintiff Reiter testified, other than the Slager events, (1) he knows of no other harm the PBA is causing (Reiter Dep., 33:19-21); (2) the PBA never refused anything he asked it to do (*id.*, 27:16-18); (3) he is unaware of an untruthful representation made by the PBA (*id.*, 36:10-15); (4) he knows of no acts PBA has committed in bad faith or that he believes constitute a breach of contract (*id.*, 42:8-10, 16-19); and (5) he knows of no one, including himself, whose rights have been damaged or who have in fact been damaged by any actions of the PBA do (*id.*, 43:15-22). Indeed, when asked what he expected to receive for being a member of PBA, Mr. Reiter responded, "That as long as I was acting in the line of duty, I would be provided an attorney," and when asked "[d]id you receive what you expected," he replied, simply and succinctly, "I did, yes." (*Id.*, 53:2-5, 8-10.)

Plaintiff Stanley testified similarly. Excluding the Slager events, Mr. Stanley testified that (1) PBA has never misrepresented anything to him or anyone else (Stanley Dep., 61:21-62:4, 63:16-18, 87:25-88:2); (2) PBA has not committed an act that he would consider fraudulent (*id.*, 62:22-63:6); (3) PBA has never misled anyone (*id.*, 63:10-12); and (4) other than the possibility of his encountering a "similar situation" to that which

Mr. Slager encountered (notwithstanding the undisputed fact that Mr. Stanley received full, effective, and cost-free representation from the PBA in his own lawsuit), he has not been damaged, nor does he know of anyone else who has been damaged (*id.*, 76:11-16, 82:17-25). He agreed, other than the Slager events, the PBA has done nothing that he would consider "unfair," in bad faith, or in breach of contract. (*Id.*, 81:16-82:10.)

II. PROCEEDINGS IN THE CASE

A. Proceedings in the Trial Court

Plaintiff Stanley filed his original complaint on August 4, 2016, in the Court of Common Pleas for the Ninth Judicial Circuit, Charleston County. (*See* Compl.). On November 22, 2016, Plaintiffs filed an amended complaint, which added Mr. Reiter as a named Plaintiff. (*See* Am. Compl.). PBA filed a motion to dismiss and Plaintiffs filed a motion to strike PBA's answer; the trial court denied both motions on July 31, 2017. (*See generally*, PBA Mtn. to Dismiss; Plt. Mtn to Strike, and Orders Denying Mtns.). PBA filed a motion for summary judgment, which the trial court denied on November 15, 2017. (*See generally* PBA Mtn. for Summ. Judg. and 11-13-17 Order).

Plaintiffs filed their motion for class certification on November 13, 2017. PBA filed its opposition to the motion on July 11, 2018. (*See* generally Plt. Mtn. to Certify and PBA Memo in Opp. to Class Cert.). The trial court held argument on the motion on October 22, 2018. On December 31, 2018, the trial court entered the Class Certification Order, which 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" while excluding from the class "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." (Class Cert. Order p.1.) The trial court further ordered that "no party shall communicate with the class members regarding this class action and the allegations contained therein." (*Id.* at 12.)

The PBA moved for reconsideration of the Class Certification Order on January 14, 2019, which the trial court denied. The parties agreed to stay further proceedings in trial court during the pendency of this appeal.

B. Proceedings in This Court

On February 6, 2019, PBA filed its notice of appeal of the Class Certification Order with this Court. On February 14, 2019, this Court dismissed PBA's appeal. On April 8, 2019, PBA moved for rehearing of that order. On May 22, 2019, this Court granted PBA's petition for rehearing and ordered the parties to brief PBA's appeal.[5]

STANDARD OF REVIEW

The trial court's decision whether to certify a class is reviewed under an abuse of discretion standard. *See Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 266-67, 569 S.E.2d 349, 361 (2002), *vacated on other grounds*, 539 U.S. 444 (2003); *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). The Court, however, does not accord deference to errors of law. *See Gardner v. South Carolina Dept. of Revenue*, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003) ("We

[5] Despite the pendency of this appeal, Plaintiff Stanley has petitioned the Supreme Court for a writ of mandamus that would direct the South Carolina Department of Consumer Affairs Administrator and Consumer Advocate to enforce S.C. Code Ann. § 37-16-50 against the PBA. *See Stanley v. S.C. Dept. of Consumer Affairs Admin. and Consumer Advocate Grube Lybarker*, Case No. 2019-000866 (S.C. S. Ct.). The Administrator has filed a response opposing the petition, and as of this date, the Supreme Court has not yet issued a ruling on Plaintiff Stanley's petition.

generally defer to the trial court's discretion in granting class certification *absent an error of law*.") (emphasis added); *see generally Citizens for Quality Rural Living, Inc. v. Greenville Co. Planning Comm'n*, 426 S.C. 97, 103, 825 S.E.2d 721, 724 (Ct. App. 2019) ("An abuse of discretion occurs [when] the trial court is controlled by an error of law or [when] the [c]ourt's order is based on factual conclusions without evidentiary support.") (brackets original) (citing *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000)).

ARGUMENT

"Proponents of the class certification bear the burden of proving [that the] prerequisites of class certification have been met." *Waller*, 300 S.C. at 467, 388 S.E.2d 799 at 801 (citing *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977)). Rule 23(a), SCRCP, sets forth the five prerequisites: (1) the class must be "so numerous that joinder of all members is impracticable"; (2) there must be "questions of law or fact common to the class"; (3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class"; (4) the representative parties [must] fairly and adequately protect the interests of the class"; and (5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class." *Gardner*, 353 S.C. at 20-21, 577 S.E.2d at 200. Failure to establish even one of the five elements "is fatal to the certification of a class." *Waller*, 300 S.C. at 469, 388 S.E.2d at 802. Furthermore, it is "imperative" that "the court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied." *Id.* at 467, 388 S.E.2d at 801 (citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982)); *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 ("In deciding whether class certification is proper. the court must apply a rigorous

analysis to determine each prerequisite is satisfied.").[6] The trial court failed to apply the required "rigorous analysis" here.

I. THE TRIAL COURT REVERSIBLY ERRED IN CERTIFYING AN INJUNCTIVE RELIEF CLASS.

First, the trial court erred in certifying Plaintiffs' proposed injunctive relief class. 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.) For multiple reasons, there is no basis to certify an injunctive relief class, and the trial court erred in doing so.

A. The Trial Court Gave No Basis for Enjoining PBA from Communicating with Its Members.

The trial court not only certified a class without the requisite rigorous analysis, it also, seemingly *sua sponte*, entered an injunction ordering that "no party shall communicate with the class members regarding this class action and the allegations

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[6] As the *Gardner* court's frequent citations to federal case law indicate, South Carolina courts look to interpretations of Federal Rule of Civil Procedure 23 where there is no South Carolina decision on point, as the Supreme Court held in a prior class action opinion: "Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure. *See* H. Lightsey & J. Flanagan, *South Carolina Civil Procedure,* (2d ed. 1985)." *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991); *see also Middleton v. SunStar Acceptance Corp.*, 2000 WL 33385388, n.3 (S.C. C.P. Jan. 13, 2000) ("As the South Carolina Reporter's Notes indicate, South Carolina's Rule 23 is 'drawn principally from Federal Rule 23.' *See also*, *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (SC App 1986) (Court of Appeals cites federal cases and commentary in construing new Rule 23, SCRCP). Citations to federal case law and the federal rules are based on the principal [sic] that interpretations of the federal rule provide guidance in interpreting the South Carolina rule absent material differences in their wording.").

contained therein." (Class Certification Order p.12.) The court cited no authority to support the injunction, and it effectively strips PBA of the right to communicate with its own members should they inquire about this lawsuit.

It is well settled an injunction "is a drastic remedy issued by a court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). To obtain an injunction, the movant "must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Id.*, 603 S.E.2d at 908. The trial court made no effort to analyze any, let alone all, of those elements, nor did it make any findings that they were present in this case. The trial court reversibly erred in entering the injunction.

B. The Trial Court Reversibly Erred by Certifying an Injunctive Relief Class.

Related to its erroneous entry of an injunction, the trial court committed reversible error by certifying a class for injunctive relief. Plaintiffs have not come close to satisfying the elements of injunctive relief.

1. The Basis for Plaintiffs' Requested Injunction Requiring "Oversight" or Licensure of PBA Has Been Mooted and, Therefore, Does Not Provide a Basis for Class Certification.

Here, Plaintiffs have not – and cannot – put forth any legal authority entitling them to injunctive relief. In their Amended Complaint, Plaintiffs assert 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.) PBA has sought 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. Thus, Plaintiffs' request for an injunction based on an alleged "lack of oversight" (Stanley Dep., 84:24-25) is entirely moot.

"An appellate court 'will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.' . . . 'A case becomes moot when judgment, if rendered, will have no practical legal effect upon [an] existing controversy. This is true when some event occurs making it impossible for [a] reviewing [c]ourt to grant effectual relief.'" *Shah v. Richland Memorial Hosp.*, 350 S.C. 139, 151, 564 S.E.2d 681, 687 (Ct. App. 2002) (quoting *Mathis v. South Carolina State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 714-15 (1973)). Thus, the appellate courts in this State have rejected injunction requests where, as here, the basis for the proposed injunction has been mooted. *See, e.g., United Student Aid Funds, Inc. v. S.C. Dept. of Health and Env. Control*, 356 S.C. 266, 275, 588 S.E.2d 599, 603 (2003) (reciting that "the Court of Appeals did not address the issue of injunctive relief" against defendant agency because employee "is no longer employed by the State"); *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006) ("Generally, this Court only considers cases presenting a justiciable controversy."); *McMillan v. BCG Properties, LLC*, 2007 WL 8326632, *3 (S.C. Ct. App. Nov. 3, 2003) (plaintiff sought injunction to prevent building from being demolished, but parties stated in briefs that the building "ha[s] been demolished": "[b]ecause a decision on this issue would not grant [plaintiff] any effectual relief, we hold this issue moot"); *Shah*, 350 S.C. at 152, 564 S.E.2d at 688 (request for injunction over breach of contract "is no longer viable as the disputed

contract has now expired, and thus there is nothing for the court to enjoin"). The injunctive relief claim, therefore, was erroneously certified on this basis.

2. The Alleged Concern of "Future" Harm Is Not Sufficient to Certify an Injunctive Relief Class, and Plaintiff Reiter Has No Standing to Request an Injunction In Any Event.

Even if the primary basis for the purported injunctive relief class had not been mooted, the record testimony does not remotely rise to the level of injunctive relief sufficient to permit an injunctive relief class. There is no threat of immediate harm, which is required for an injunction.

a. Plaintiff Reiter Has No Basis to Pursue Injunctive Relief Because He Is No Longer a Member of the PBA.

First, Plaintiff Reiter has no basis to pursue an injunction because he is no longer a member of the PBA. It is undisputed he moved to New Jersey over three years ago, in June 2016; at that point, as he testified, "I was no longer a member of PBA." (Reiter Dep., 19:8-9.) Thus, he is no longer paying dues to PBA or realizing the benefits of dues-paying membership – he now lives in New Jersey and works for CSX. (*Id.*, 8:22-9:3, 14:19-20.) Accordingly, there is simply no legal basis for Plaintiff Reiter to obtain injunctive relief pertaining to the structure, management, and operations of an organization, PBA, of which he is no longer a part. *See, e.g.*, *Meehan v. Meehan*, 2006 WL 7285712, *2 (S.C. Ct. App. Feb. 10, 2006) (in action by plaintiff challenging conveyance of deeds, Court upheld trial court's dismissal of case for lack of standing where plaintiff "did not own the . . . properties at the time [his] Mother transferred them to [his siblings]").

Stated differently, Plaintiff Reiter's injunctive relief claim against the PBA is moot. Because Plaintiff Reiter, a non-member of PBA, has no standing to enjoin PBA, the certification of an injunctive relief class in his name should be reversed.

b. Plaintiff Stanley Has Not Established a Threat of Imminent or Immediate Harm Sufficient to Justify Certification of an Injunctive Relief Class.

Second, Plaintiff Stanley has not come close to establishing the type of imminent harm that would warrant an injunctive relief class. Indeed, an injunction "is a drastic remedy issued by a court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 907. To obtain an injunction, Plaintiffs "must establish (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Id.*, 603 S.E.2d at 908. As detailed below, Plaintiffs have, and are pursuing, an adequate remedy at law and they are unlikely to succeed on the merits of their claims. Regardless, they do not come close to meeting the "irreparable harm" component for an injunction.

Plaintiff Stanley's testimony makes clear he will not suffer irreparable harm if an injunction is not issued; indeed, he will not suffer *any* harm absent an injunction other than purely speculative and conjectural "harm." As he testified, "I'm concerned that there *could be* a similar situation [to Slager] and the PBA decides they're not covering." (Stanley Dep., 76:8-10 (emphasis added).) Purported "concerns" that a "similar" situation "could" happen at some unidentified time in the future are a wholly insufficient basis for an injunctive relief class: "Irreparable injury must be both imminent and likely; *speculation about potential future injuries is insufficient.*" *Williams v. Stirling*, 2018 WL

7824521, *2 (D.S.C. Dec. 13, 2018) (emphasis added) (citing *Winter v. Nat'l Resource Defense Council, Inc.*, 555 U.S. 7, 22 (2008)); *see also Genesis Health Care, Inc. v. Azar*, 2019 WL 2612737, *2 (D.S.C. June 26, 2019) ("[T]he Court cannot issue a preliminary injunction 'simply to prevent the possibility of some remote future injury.'") (quoting *Winter*, 555 U.S. at 22).

Not only are Plaintiff Stanley's "concerns" insufficient to warrant injunctive relief, those "concerns" ultimately proved completely unfounded because the PBA provided him with a lawyer at no cost to him and, in 2019, obtained dismissal for Mr. Stanley. In other words, Mr. Stanley wasn't harmed at all, let alone "irreparably" harmed. Therefore, Plaintiff Stanley's own facts provide a textbook example as to why injunctions, and thus injunctive relief classes, should only be reserved for those occasions where truly imminent and irreparable harm is present, not speculative concerns about what might happen in the future. The trial court erred in certifying an injunctive relief class for this alternative reason.

3. There Is No Basis for a Mandatory Injunction.

Furthermore, as noted above, Plaintiffs went further in their depositions and demanded that 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.[7]

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 the trial court erred in not so ruling 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 recessionary remedy is sought.") (citing several cases). The fact Plaintiffs and their lawyers seek a complete dismantling of PBA notwithstanding their own admitted lack of damages is further reason to reverse the certification of an injunctive relief class.

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[7] Shutting down the PBA is, not surprisingly, strictly a lawyer driven request made without regard to the thousands of law enforcement members who rely on the organization for the wide array of benefits it provides. Indeed, Plaintiffs could not name a single PBA member, other than themselves, that wanted to shutter the PBA. (Reiter Dep., 45:16-19.) Predictably, Plaintiffs had no idea how such a dismantling would work if it were actually to be ordered; such practicalities as whether, if their dues are refunded, Plaintiffs should likewise repay to PBA all legal fees the organization spent defending its members (Stanley Dep., 91:21-22 ("I'm not prepared to answer that. I really don't know.")), or whether PBA must simply cease defending those members it currently is defending (*id.*, 92:23-25 ("I don't have an opinion on that. I really don't know. I don't know where they need to go with that.")), or how PBA could fund the defense of any member's case without dues (*id.*, 93:3-4 ("That's something that'll have to be figured out. I – I don't know.")) were essentially unanswered at deposition.

II. THE TRIAL COURT REVERSIBLY ERRED IN CERTIFYING A CLASS FOR MONETARY RELIEF.

Likewise, the trial court reversibly erred in certifying a class for monetary relief. Plaintiffs' claims are permeated with individualized issues and they do not meet hardly any of the required elements for class certification.

A. The Trial Court Reversibly Erred in Ruling That Plaintiffs Satisfied the Commonality Standard.

As the leading scholar of South Carolina civil procedure has observed:

> The commonality requirement is a condition of class action status, but common questions alone are not sufficient. The class action must be a better procedural mechanism for resolving the litigation than the joinder of named parties or individual cases. The court should first determine the existence of common questions, and then whether they are sufficiently central to justify the class action.

James F. Flanagan, *South Carolina Civil Procedure* § 23.B.3 (2010). Under South Carolina law, a court "determines the existence of commonality" by "examining the plaintiffs' claims and the defendants' anticipated defenses." *Gardner*, 353 S.C. at 22, 577 S.E.2d at 201. Here, the trial court examined neither the specific claims Plaintiff assert nor PBA's defenses to those claims. Accordingly, the court erred in holding that Plaintiffs satisfied the commonality requirement.

1. The Trial Court Did Not Rigorously Analyze Plaintiffs' Claims Or PBA's Defenses To The Claims.

The Supreme Court has held that "[c]ommonality is met only where the class shares a determinative issue." *Gardner*, 353 S.C. at 21-22, 577 S.E.2d at 201 (citing *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990)). Quoting another case, the Supreme Court in *Gardner* observed "a representative plaintiff cannot establish commonality ... if the court must investigate each plaintiff's individual claim." *Id.* at 22, 577 S.E.2d at 201

(quoting *Peoples v. Wendover Funding Inc.*, 179 F.R.D. 492, 498 (D. Md. 1998)). Because "[a] court determines the existence of commonality among defendants by examining the plaintiffs' claims and the defendants' anticipated defenses," the court must consider the elements of Plaintiffs' claims and PBA's defenses within the context of the facts of the case." *Id.* at 22, 577 S.E.2d at 201. "In practical terms this means the party must articulate the existence of significant common, legal, or factual issues which bind the proposed class together." *Id.* (quotations omitted). In cases where the "factual differences" between class members' claims "are the crux of a predominant legal issue," commonality does not exist. *Id.*

In the Class Certification Order, the trial court held Plaintiffs demonstrated commonality because Plaintiffs and other class members paid dues, were purportedly subject to the same limitations in the Plan, and were "all presented with the same marketing pitch and the same documents and forms." (Class Certification Order at 7.) First, there is no evidence in the record that over 2,000 people were presented with "the same marketing pitch and the same documents and forms," and the trial court cited no such evidence to support its finding. Second, and in any event, the court listed eight "issues of law that are common to the entire class and can be decided on a class-wide basis." (*Id.*) None of these purported common issues, however, accounted for the individual elements of the causes of action upon which Plaintiffs' Amended Complaint is based. They are focused on the "'insurance policy" and "legal defense plan" theories of liability, but the actual elements of the causes of action in the Amended Complaint are completely ignored. As discussed below, the trial court erred in failing to rigorously

analyze each cause of action as it related to certification, particularly the commonality requirement.

2. Plaintiffs' Tort Claims Are Inappropriate for Class Certification.

Plaintiffs assert four claims sounding in tort: breach of fiduciary duty, fraudulent inducement, negligence, and negligent misrepresentation. None is certifiable, and the trial court erred in ruling otherwise.

a. The Breach of Fiduciary Duty Claim Is Not Certifiable.

Plaintiffs' breach of fiduciary duty claim is not certifiable. To prevail on a claim for breach of fiduciary duty, Plaintiffs "must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff[s] by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012). Plaintiffs offer no authority for the proposition that a fiduciary duty between PBA and Plaintiffs exists in the first place. The Amended Complaint simply states, in a conclusory manner, that PBA owed a fiduciary duty to the class, and that PBA breached the fiduciary duty of good faith and fair dealing by issuing insurance policies without a license. (Am. Compl., ¶¶ 98-99.) Mere conclusory statements do not prove commonality.

Plaintiffs erroneously assume the existence of a fiduciary duty based on their allegation that PBA acted as an unlicensed insurer.[8] While the question whether PBA

[8] The "unlicensed insurer" issue is, if anything, a red herring because it does not supply Plaintiffs with a basis to recover damages simply because PBA allegedly was not licensed as an insurer at relevant points in time. This Court's opinion in *Lenz v. Walsh*, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005), is instructive, as the Court there addressed, in a matter of first impression, "whether a homeowner may recover payments made to an unlicensed builder under a residential construction contract." This Court held that "generally, a homeowner may not recover payments already made to an unlicensed

acted as an insurer may be for a court to determine, South Carolina does *not* automatically recognize a fiduciary duty between insurers and the insured. To the contrary, an insurance relationship does not ordinarily give rise to a fiduciary duty. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 331, 574 S.E.2d 502, 508 (Ct. App. 2002). There is nothing in the record that would warrant any court departing from the general rule that the relationship here – whether characterized as insurer-insured, organization-member, or any other status – is one of a fiduciary nature.

Even if Plaintiffs succeeded in proving the existence of a fiduciary duty between PBA and the class, proving breach and damages would necessarily require individualized assessment by the Court. For instance, PBA's contractual responsibilities to those who availed themselves of the legal defense benefit under the Plan would be different than PBA's contractual responsibilities to members who did not utilize this benefit. Again, this is an innately fact-intensive and individualized inquiry that cannot be resolved on a classwide basis. *See Kitchens v. U.S. Shelter*, 1988 WL 108598, *3 (D.S.C. June 30, 1988) (reciting that court denied class certification to fiduciary duty claim "on the grounds that evidence of alleged ... breach of fiduciary duty [was] individual as to each class member and that each class member's claim would require separate evidence").

b. The Fraud in The Inducement Claim Is Not Certifiable.

Plaintiffs' fraud in the inducement claim is inherently uncertifiable. Indeed, to prevail on that claim, Plaintiffs must prove nine elements to establish fraud *alone*, along

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contractor merely because the contractor did not hold a license when the contract was executed." *Id.* The reasoning and holding from *Lenz* should apply here – assuming the legal defense benefit is a policy of insurance, Plaintiffs cannot recover their payments (i.e., dues) simply because the PBA was not licensed as an insurer when certain PBA members joined the Plan. The received the benefit of their bargain – cost-free and effective representation – either way.

with an additional three to establish fraud in the inducement:

> To prevail on a cause of action for fraud, a Plaintiff must prove by clear, cogent and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. ***To establish a claim or defense of fraud in the inducement, a plaintiff must prove the nine elements of fraud as well as the following three elements***: (1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him.

Moseley v. All Things Possible, Inc., 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010), *aff'd*, 395 S.C. 492, 719 S.E.2d 656 (2011) (internal quotations omitted) (emphasis added). It is inconceivable that each of those twelve elements could be resolved on a classwide basis, and the trial court made no effort to argue they can be – and neither did Plaintiffs.

The first – and dispositive – problem is that Plaintiffs admitted PBA has not defrauded them or made any misrepresentation to them. (Reiter Dep., 36:10-15 (unaware of an untruthful representation made by the PBA); Stanley Dep., 61:21-62:4, 62:22-63:6, 63:10-12, 16-18, 87:25-88:2 (PBA has never misrepresented anything to him or anyone else, has not committed an act that he would consider fraudulent, and PBA has never misled anyone).) "Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence." *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Plaintiffs' complete failure to provide any evidentiary support for a fraud claim is reason enough to reverse certification of a fraud-based class.

Regardless, the reliance element of the fraud claim precludes certification. The law is well-settled on the individualized nature of fraud-based claims, particularly as to establishing a plaintiff's reliance, the reasonableness of such reliance, and any subsequent injury and damages. In a case applying South Carolina law, the Fourth Circuit Court of Appeals rejected certification of claims of fraud and negligent misrepresentation:

> Indisputably, negligent misrepresentation and fraud require proof of reliance. *See Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 565 S.E.2d 309, 313-14 (Ct. App. 2002) (recounting elements of negligent misrepresentation and fraud claims under South Carolina law). To establish fraud, a plaintiff must prove, *inter alia*, that the hearer relied on the truth of a fraudulent statement, and had a right to rely thereon. *Id.* To establish negligent misrepresentation, a plaintiff must prove, *inter alia*, that the plaintiff "justifiably relied on [a false] representation, and ... the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *Id.* at 14. Thus, both theories of liability require that the plaintiff demonstrate (1) actual reliance ***and*** (2) that the plaintiff had a right to rely on the misstatement (in the case of fraud) or that such reliance was justifiable under the circumstance (in the case of negligent misrepresentation). Almost inevitably , establishing these elements requires an individualized inquiry.

Gunnells v. Healthplan Servs., 348 F.3d 417, 434-35 (4th Cir. 2003) (emphasis original); *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) ("because reliance must be applied with factual precision, plaintiffs' fraud and negligent misrepresentation claims no not provide a suitable basis for class-wide relief"). Given the myriad different situations in which the putative class members find themselves, the trial court could not possibly make an accurate determination as to all twelve factors of the fraudulent inducement claim for 2,300 class members in one sitting. Accordingly, the trial court reversibly erred in holding that Plaintiffs satisfied the commonality requirement with respect to their fraud claim.

c. Plaintiffs' Negligence and Negligent Misrepresentation Claims Require Individualized Assessment.

Nor are Plaintiffs' negligence and negligent misrepresentation claims certifiable. Generally, claims of negligence and negligent misrepresentation pled simultaneously are "essentially subsumed in the negligent misrepresentation cause of action." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) ("[C]laims of negligence and negligent misrepresentation should be treated as solely one for negligent misrepresentation."); *see also Spelman v. Bayer Corp.*, 2012 WL 13047524, *4 (D.S.C. Dec. 17, 2012) (where "the core of [plaintiff's] allegations is reliance by [plaintiff] on alleged misrepresentations by [defendants]," the "negligence claim is actually a negligent misrepresentation claim").

To prove their negligent misrepresentation claim, Plaintiffs must establish six factors:

> (1) [T]he defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Quail Hill, 387 S.C. at 240, 692 S.E.2d at 508 (quoting *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000)). Plaintiffs have not alleged any actionable false representation to satisfy the first element.[9] Individual issues permeate the other

[9] While Plaintiffs claim that PBA falsely represented "that it was authorized to sell the Plan" (Am. Compl. ¶ 116), the Supreme Court has observed that alleged "misrepresentations as to matters of law" do not give rise to liability for negligent misrepresentation. *Quail Hill*, 387 S.C. at 240, 692 S.E.2d at 508 (quotations omitted).

elements of this claim, particularly as to whether justifiable reliance occurred: Plaintiffs must establish each member of the class justifiably relied on a representation by PBA. "A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties." *Id.* at 241, 692 S.E.2d at 508. The position and relation of PBA to individual members necessarily differ based on the totality of the circumstances surrounding that member's involvement with PBA. These relationships and positions cannot be accurately determined on a classwide basis. For instance, some members (such as the two named Plaintiffs) received legal representation under the Plan, while some did not. Determining what constitutes justifiable reliance in these different contexts requires individualized inquiry. *See Spelman*, 2012 WL 13047524, *4 (quoting *Gunnels* and denying certification to negligent misrepresentation claim, as "each class member would be required to prove his reliance and require individualized inquiries into each class member's circumstances").[10]

In short, "[b]ecause proof of reliance is generally individualized to each plaintiff allegedly defrauded ... negligent misrepresentation claims are not readily susceptible to class action treatment, precluding certification of such actions as a class action." *Id.* (quoting *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004)). The trial court erred in certifying the negligent misrepresentation claim.

3. The Contract-Based Claims Are Not Appropriate for Certification.

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[10] To the extent Plaintiffs purport to plead a claim sounding purely in negligence, that claim is barred by the economic loss rule, which precludes damages in negligence actions "where there is neither personal injury nor property damage." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). Furthermore, a negligence claim cannot be certified because "such a claim raises questions of causation and injury which would require individual proof of causation." *Spelman*, 2012 WL 13047524, *4.

a. Plaintiffs' Breach of Contract Claim Requires Individualized Assessment.

To prove claims for breach of contract, Plaintiffs must show "the existence of a contract, its breach, and damages caused by such breach." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015). Whether PBA breached a contract with a member of the Plan must be examined on an individual level. Individual circumstances also dictate the amount of damages, if any, caused by any alleged breach.

Plaintiffs' Amended Complaint does not allege PBA breached a contract as to any putative class member through wrongful denial of any benefit under the Plan. Rather, Plaintiffs claim PBA was not authorized to enter into the contracts and, therefore, breached the implied covenants of good faith and fair dealing. (Am. Compl., ¶ 85.) "However, there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Hotel & Motel Holdings*, 414 S.C. at 653, 780 S.E.2d at 273 (quoting *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995)). Accordingly, to demonstrate a breach of the covenant, members of the class must show that PBA acted outside the provisions of their individual contracts. This necessarily requires an even more heightened level of fact-intensive, individualized inquiry, rendering a class action untenable.

To the extent PBA could be found to have breached a duty by failing to seek proper guidance on licensure, any potential breach has since been cured. PBA sought proper authority for providing the Plan under South Carolina law, and it is currently regulated by the state through the South Carolina Department of Consumer Affairs. The

element of breach is moot and, therefore, cannot be common to the class. The breach of contract claim is not certifiable.

b. Plaintiffs' Unjust Enrichment Claim Is Not Certifiable.

Nor is Plaintiffs' unjust enrichment claim certifiable. Unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched as the expense of the plaintiff(s). *See Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009); *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988). To recover for unjust enrichment, Plaintiffs must prove that (i) the class members conferred a benefit upon PBA; (ii) PBA realized that benefit; and (iii) PBA retained the benefit under circumstances that make it unjust for PBA to retain the benefit without paying the class member its value. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003); *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

Plaintiffs allege, on behalf of themselves and the putative class, that PBA was unjustly enriched by collecting dues from its members for participation in the Plan, because it acted as an unlicensed insurer. (*See* Am. Compl., ¶ 103.) By its very nature, an unjust enrichment claim is unsuitable for resolution on a classwide basis. *See Melton ex rel. Dutton v. Carolina Power & Light Co.*, 283 F.R.D. 280, 290 n.7 (D.S.C. 2012) (concluding that because an unjust enrichment claim required the factfinder to make numerous "individualized determinations" that it was unlikely any "supposed common question" would be capable of classwide resolution). Indeed, as one federal court of appeals bluntly stated: "In short, common questions will rarely, if ever, predominate an

unjust enrichment claim, the resolution of which turns on individualized facts." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009).

Adjudicating the unjust enrichment claim would require the court to investigate the individual circumstances surrounding each putative class member's claim. The court would have to determine whether, based on each class member's unique circumstances, it would be "unjust" for PBA to retain that individual's membership dues from the time period in question. Making such a determination would require the court to consider, among other things, if each class member received the bargained-for benefits in exchange for his Plan membership dues, or whether PBA unjustly retained that member's monthly dues.[11]

Put succinctly, there are many benefits funded by the membership dues collected by PBA, and if a Plan member received his benefits, PBA was not unjustly enriched by that member. Even if PBA acted in an unlicensed capacity, Plaintiffs are not presumed to have suffered injury. *Cf. Dema*, 383 S.C. at 124, 678 S.E.2d at 43 ("Whether HHRMC was authorized to perform TCCs was irrelevant to Appellants' need for the procedure, and Appellants would have received the TCCs from another provider had HHRMC not administered them. In other words, Appellants have suffered no injury even if HHRMC has been unjustly enriched. For these reasons, we must affirm the trial court's dismissal

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[11] A class member may have received the benefit of their PBA membership dues in several ways, such as: receiving the Blue Review publication; being updated on legislation concerning police officers from PBA's monitoring efforts; benefiting from the efforts of lobbyists hired by PBA; receiving accidental death benefits from PBA; receiving representation in an internal disciplinary or grievance proceeding by PBA; receiving the opportunity to join a local police officer advocacy group organized by PBA; or receiving legal representation from a lawyer whose services were paid for by PBA. (PBA Memo. in Opp. to Class Cert. pp.2-3).

of Appellants' unjust enrichment claim."). Accordingly, Plaintiffs' unjust enrichment claim is not certifiable, and the trial court erred in ruling otherwise.

4. PBA's Defenses to Plaintiffs' Claims Are Highly Individualized and Further Preclude Class Certification.

As detailed above, each of Plaintiffs' causes of action is riddled with individual issues that defy resolution on a classwide basis. But even if one or more of those claims could warrant certification, PBA's defenses to those claims constitute an independent basis to reject certification.

- ***Waiver and Estoppel***: For example, such defenses as waiver and estoppel demonstrate a lack of commonality. Waiver may occur when a party "possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992). Similarly, under South Carolina law, estoppel "applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." *State v. Hinojos*, 393 S.C. 517, 523, 713 S.E.2d 351, 354 (Ct. App. 2011). Plaintiffs' own facts and testimony demonstrate the viability of a waiver defense. Plaintiff Stanley seeks a refund of all of the dues he has paid to PBA over a 20-year period – even while he willingly accepted the benefits of cost-free, Plan-funded legal representation that, in 2019, extricated him from a legal matter in which he was a named defendant. Some PBA plan members, moreover, may have learned about the alleged "secret exclusion" in PBA insurance policy and continued to pay monthly fees, thereby waiving their claims that they were "lied to" or otherwise not receiving the benefit of

their bargain. Others may have accepted benefits with knowledge of such a provision and not paid them back, in which case they may be estopped from asserting the present claims. In *Melton*, the court cited *Janasik* and *Hinojos* in denying certification due to the presence of waiver and estoppel defenses. *See* 283 F.R.D. at 293. The same result should obtain here.

- ***Voluntary Payment Doctrine*:** It is black-letter law that "[o]rdinarily money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered back merely because the aggrieved party was ignorant of the law relating to his liability." *Moody v. Stem*, 214 S.C. 45, 60, 51 S.E.2d 163, 169 (1948); *see also Church of God v. Estes*, 2018 WL 491262, *2 (S.C. Ct. App. Jan. 17, 2018) (quoting *Moody*). Here, neither Plaintiff has alleged duress or compulsion, and both admitted that they are unaware of any fraudulent conduct committed by PBA. (Stanley Dep., 62:22-63:6; Reiter Dep., 36:10-15.) Certainly, PBA is entitled to explore the voluntary payment defense for each putative class member. *See, e.g.*, *BMG Direct Marketing, Inc. v. Peake*, 178 S.W.3d 763, 778 (Tex. 2005) (noting that "several courts have determined that application of the voluntary-payment rule causes individual issues to predominate and therefore precludes class certification") (citing cases; decertifying class).

- ***Comparative Negligence/Failure to Mitigate*:** PBA is also entitled to assert the defenses of comparative negligence (for the negligence claims) and failure to mitigate (for the contract claims). In one case, a district court in South Carolina held "the affirmative defenses of comparative negligence ... and failure to mitigate" were individualized and would require the court "to inquire into each class member's case to

determine whether these affirmative defenses are valid." *Robert Elliott Trucking, Inc. v. Caterpillar, Inc.*, 2012 WL 2918700, *8 (D.S.C. Mar. 21, 2012); *see also Spelman*, 2012 WL 13047524, *3 (agreeing that "potential defenses, such as ... estoppel, and comparative negligence" were individualized and precluded class certification).

In short, the trial court did not rigorously analyze the effect of PBA's defenses on class certification. Therefore, this Court should reverse the Class Certification Order.

B. The Trial Court Erred in Ruling That Plaintiffs Satisfied Typicality.

1. Proof of Either Plaintiff's Claim Would Not Prove the Claims of Any Other Class Member.

To establish typicality, Plaintiffs must show that they "possess the same interest" and "suffer the same injury" as the persons they propose to represent. *Burton v. Chrysler Group LLC*, 2012 WL 7153877, *3 (D.S.C. Dec. 21, 2012) (quoting *McClain v. S.C. Nat'l Bank*, 105 F.3d 898, 903 (4th Cir. 1997)). To satisfy the typicality requirement, Plaintiffs must prove that their "interest in prosecuting [their] own case . . . simultaneously tend[s] to advance the interest of the absent class members." *Dieter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006) (holding that named plaintiffs in proposed antitrust class action were not typical of other purported class members because proving absent class members' claims would require "new and different proof" than evidence required to prove named plaintiffs' claims). The "essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Dieter*, 436 F.3d at 466 (quoting *Broussard*, 155 F.3d at 340). Accordingly, the typicality analysis must "begin with a review of the elements of [the] plaintiff['s] prima facie case and the facts on which the plaintiff would necessarily rely to

prove it," whereupon the court must "then determine the extent to which those facts would also prove the claims of the absent class members." *Id.*

Here, proof of either Plaintiff's claims would not prove the other Plaintiff's claims, let alone those of over 2,000 other putative class members. For example, if Plaintiff Stanley somehow could prove PBA breached a contract with him (and he most assuredly cannot, given that he admitted under oath that PBA has never breached any contract with him, *see* Stanley Dep., 82:1-10), that would not prove PBA breached a contract with any other putative class member. Clearly, this is not a case of "as goes the claim of the named plaintiff, so go the claims of the class" as required to establish typicality.

2. Plaintiffs' Proposed Remedies Further Render Them Atypical.

Furthermore, Plaintiffs do not establish typicality because they are seeking a remedy – shutting down PBA – that, they admit, no one else has requested or desired. (Reiter Dep., 45:16-19.) There is simply no basis for such a remedy, nor is there any reasonable basis to conclude that these two Plaintiffs, who admittedly received the very benefits they bargained for under the Plan, are typical of the over 2,000 PBA members they purport to represent. The trial court failed to rigorously analyze the typicality requirement and erroneously concluded that these Plaintiffs, neither of whom have been personally damaged by any acts or omissions of PBA (beyond the speculative derivative "harm" they believe they sustained from the Slager events, which didn't involve either of them), are appropriate and typical representatives of the proposed class.

Plaintiffs must do more than simply allege typicality to justify class certification. *In re American Medical Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (stating a class is not maintainable as a class action simply by virtue of its designation as such in the

pleadings);. *Waller*, 300 S.C. at 467-68, 388 S.E.2d at 801 (stating a plaintiff bears the burden of proving she has established each of the prerequisites of a class). Plaintiffs have put forth a conclusory argument that each putative class member was injured by PBA because PBA supposedly acted as an unlicensed insurer, issuing unauthorized "policies" through the collection of the $23.50 monthly membership dues for participation in the Plan. (Am. Compl., ¶ 11.) Neither Plaintiff can offer any examples of how he personally, or any member of the class, has been similarly injured (or injured at all), whether or not caused by the alleged lack of licensure. They instead simply aver the amount paid in membership dues constitutes an injury entitling themselves and class members to refunds and rescission of their Plan membership contracts. (*Id.*, ¶ 16.) This argument borders on the absurd and presents a fundamental flaw in the trial court's order. Under Plaintiffs' theory, and particularly in light of their demand for rescission, adjudication of this claim will require the trial court to individually assess each plaintiff's damage in relation to dues paid versus the cost of benefits received. *See First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 299 S.C. 491, 496, 386 S.E.2d 245, 248 (1989) ("Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore [the party] to the position occupied prior to the making of the contract."). As stated in *Gardner*, "[r]equring such individualized examination negates the benefits of a class action suit." Moreover, typicality does not exist where "each member has unique damages which will require unique defenses." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 301, 705 S.E.2d 475, 478 (Ct. App. 2011).

Fundamentally, Plaintiffs' claims are simply a thinly veiled attempt to terminate memberships and disgorge PBA of membership fees voluntarily paid because Plaintiffs disagree with PBA's decision to not provide legal representation to Michael Slager under the provisions of the Plan, a matter that has been long been settled in other courts. These claims are not typical of the class, but rather represent the efforts of two individuals and their lawyers to obtain monetary and injunctive relief at the significant expense (and to the severe detriment) of former and current PBA members. There has been no evidence presented that any other PBA members desire rescission of their memberships and cancellation of benefits (particularly those currently being provided counsel by the PBA) or that any former PBA members desire their membership dues to be refunded – less the cost of benefits received. Accordingly, Plaintiffs failed to establish their claims as typical of the class, as required by Rule 23(a)(3), SCRCP.

C. The Trial Court Erred in Ruling Plaintiffs Satisfied the Adequacy Requirement.

Plaintiffs are inadequate class representatives because, by their own admission in deposition testimony, Mr. Stanley and Mr. Reiter are not within their own class definition and, furthermore, they possess an interest antagonistic to the class. Either reason precludes them from serving as representatives of the class under Rule 23(a)(4), SCRCP.

1. Because They Do Not Fall Within Their Own Class Definition, Plaintiffs Are Inadequate Representatives.

Quoting the United States Supreme Court, the South Carolina Supreme Court has observed that "due process' of course requires that the named plaintiff ***at all times adequately represent*** the interests of the absent class members.'" *Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 664, 591 S.E.2d 611, 621 (2004) (quoting

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)) (emphasis added by *Hospitality Mgmt.*). "Significantly, a class representative '***must be part of the class*** and possess the same interest and suffer the same injury as the class members.'" *Id.*, 591 S.E.2d at 622 (*quoting Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (emphasis added)); *see also Bailey v. Patterson*, 369 U.S. 31, 33 (1962) ("They [plaintiffs] cannot represent a class of whom they are not a part.").[12]

Here, neither Plaintiff is a "part of the class" as required by settled precedents of the South Carolina and United States Supreme Courts. The class the trial court certified is defined as: "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." (Class Certification Order at 1.) Significantly, the trial court qualified that definition with certain exclusions: "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." (*Id.* (emphasis added).)

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[12] The holding in *Hospitality Mgmt.* is consistent with the opinions from the United States Courts of Appeals. *See, e.g.*, *Camp v. Allstate Ins. Co.*, 100 F.3d 953, 953 (5th Cir. 1996) (holding that because a potential class representative was "not a member of the sub-class he purports to represent ... [his] claims [were] not typical of other sub-class claims, nor [could] he be an adequate sub-class representative"); *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 260 n.15 (3d Cir. 2012) (stating that in a class action, "the representative must be a member of the class") (quotation marks omitted); *Reid v. White Motor Corp.*, 886 F.2d 1462, 1471 (6th Cir. 1989) ("Under [Rule] 23, the class representative must be a member of the class he claims to represent."); *Foster v. Ctr. Twp. of LaPorte Cty.*, 798 F.2d 237, 244 (7th Cir. 1986) ("It is, of course, axiomatic that the named representative of a class must be a member of that class."); *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981) (describing as "fundamental" the "requirement that the representative plaintiff must be a member of the class he represents").

Plaintiffs' sworn testimony unequivocally reveals that each was, at one time, a local board member or otherwise a leader in a local PBA chapter. (Reiter Dep. 17:11-13 (Q. "And you were elected as a leader for your local chapter, right?" A. "Yes, sir."); Stanley Dep. 25:20-22 ("I served as a board member when I worked for North Charleston Police Department.").) As former "executive and local board members," Plaintiffs fall squarely within their own exclusion. Accordingly, they are "not part of the class" as required by the *Hospitality Mgmt.* and by United States Supreme Court cases. For this reason, they are inadequate representatives. *See, e.g., Weinberger v. Retain Retail Co.*, 498 F.2d 552, 556 (4th Cir. 1974) (certification properly denied where named plaintiff was "not a member of the class he seeks to represent"); *Ad Hoc Committee to Save Homer G. Phillips Hosp. v. City of St. Louis*, 143 F.R.D. 216, 221 (E.D. Mo. 1992) (denying class certification on basis of inadequate representation: "The Court concludes that plaintiffs, therefore, are not members of the class they seek to represent.") (citing *East Texas Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395 (1977)).

2. Alternatively, Plaintiffs Are Inadequate Because Their Interests Are Antagonistic to the Putative Class Members.

Additionally, to determine adequacy the Court must assess "whether the named plaintiff has interests that are antagonistic or adverse to those of the rest of the class." *Waller*, 300 S.C. at 468, 388 S.E.2d at 801 (citing *Runion v. U.S. Shelter*, 98 F.R.D. 313 (D.S.C. 1983)); *accord Middleton*, 2000 WL 33385388, *4 ("adequacy of representation requires that the proposed class representative be free from interests antagonistic to the interests of other class members"). "If so, that plaintiff will not be considered an adequate representative of the class." *Waller*, 300 S.C. at 468, 388 S.E.2d at 801. A disqualifying antagonistic interest can include "when the named representative has a

claim which conflicts with the economic interests of the class." *Id.* The importance of this factor should be considered in light of the fact that "a plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class." *Premium Inv. Corp. v. Green*, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984).

In his deposition, Mr. Reiter testified he and Mr. Stanley had "stepped up at the helm" because they wanted to see PBA "shut down," despite being unaware of any other members who shared that desire (Reiter Dep. 45:10-46:7) and notwithstanding his own testimony that "[t]he legal defense is a valuable service" (*id.*, 47:13). The stated goal of this case, then, is to judicially force the closure of PBA, the rescission of memberships, and disgorgement of membership dues voluntarily paid – a remedy that, three years into the case, they stand alone in seeking because they cannot name any other PBA members who desire such a drastic and unwarranted result. (*Id.*, 45:16-19.) Such interests are antagonistic to the proposed class.

Dismantling PBA, as Plaintiffs desire, indisputably would deprive all members of the benefit of the prepaid legal defense Plan and require them to immediately make alternative arrangements for legal representation for circumstances currently covered by the Plan.[13] As such, Plaintiffs' goal clearly is against the economic interests of the putative class members, due to the high cost of replacing the legal defense benefit and other Plan benefits (such as accidental death benefits) through individual, private resources. The other benefits provided by PBA, such as lobbying efforts and accidental death benefits, for which these class members have voluntarily paid monthly dues, would

[13] It is undisputed that PBA is currently providing legal counsel to dozens of South Carolina PBA members. (*See* 7-11-18 Aff. of Charles Cordell ¶ 2).

also cease – all without any evidence that any person other than two Plaintiffs (one of whom is not even a member of PBA and would be wholly unaffected by such a result) and their lawyers desire such a draconian result. Plaintiffs have not identified any persons whose interests they are, in fact, fairly and adequately protecting. *Cf. Robert Elliott Trucking*, 2012 WL 2918700, *7 (denying certification where "Plaintiff has not established that any other member of the putative class has experienced the same problem with Defendant's engine").

In *Waller*, the Supreme Court considered a proposed class action wherein appellants sought to represent members of Seabrook Island Property Association. 300 S.C. at 466, 388 S.E.2d at 800. The court explained that "[t]he fact that a proposed class representative is a property owner in a large or highly populated development does not, in and of itself, qualify him to bring a class action on behalf of the remaining property owners." *Id.* at 468, 388 S.E.2d at 801. The appellants, who were marsh front property owners, sought to invalidate a "special assessment to pay for beach renourishment ... [for] the primary benefit of ... beach lot owners." *Id.* The Supreme Court held the allegations revealed "interests which are adverse and antagonistic to beachfront property owners. Beachfront property owners who would directly benefit from the assessment would most certainly find this action repugnant to their interests. Consequently, appellants would be inadequate representatives of the putative class of *all* property owners." *Id.* at 469, 388 S.E.2d at 801-02 (emphasis added). Similarly, in this case, Plaintiffs seek to invalidate PBA memberships as provided by a nonprofit organization for the primary benefit of its members. PBA members who directly benefit from

memberships most certainly would find this action repugnant to their interests. Thus, *Waller* precludes certification here.

Plaintiffs' efforts are antagonistic to the interests of PBA members who wish to remain members and retain their benefits. At the very least, their claims are antagonistic to the economic interests of those members of the class who cannot afford to suddenly retain private counsel in the absence of their PBA Plan benefits. Plaintiffs' stated goals, if permitted, would significantly and unfairly harm other PBA members who receive benefits from their participation in the Plan. This Court should, therefore, reverse the trial court's class certification.

CONCLUSION

In summary, the trial court's Class Certification Order should be reversed for numerous reasons. The court erred in enjoining PBA from communicating with its own members during the pendency of the suit, and such an order is almost impossible to enforce anyway. Likewise, the court erred in certifying a class for injunctive relief because the primary basis for an injunction (licensure) has been addressed and, in any event, there is no threat of immediate harm based on the sworn testimony of the only Plaintiff that currently has standing to pursue injunctive relief. Finally, the certification of a damages class should be reversed because the trial court did not engage in the required "rigorous analysis" to determine the propriety of certification; has the trial court performed the required analysis, it would have determined that Plaintiffs' tort and contract claims are rife with individualized issues that simply cannot be resolved on a classwide basis. For these and the other reasons discussed above, PBA respectfully requests that this Court reverse the Class Certification Order.

Dated: July 22, 2019.

Respectfully submitted,

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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

Case No. 2016-CP-10-04062

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

v.

Southern States Police Benevolent Association, Inc., ... Appellant.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of the Moore Taylor Law Firm, P.A., certify that I have served the **Appellant's Initial Brief and Designation of Matter** by depositing copies of same in the United State Mail, postage prepaid, on July 22, 2019, addressed to the attorneys of record as follows:

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