RECEIVED
Jul 29 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Civil Action No. 2016-CP-14-198
Appellate Case No. 2019-001970

Rebecca J. Robbins and Marie Babayan, individually
and on behalf of all those similarly situated, ... Appellants,

v.

Town of Turbeville and the Town of Turbeville Police Department, ... Respondents,

v.

The State of South Carolina, ... Third Party Defendants.

INITIAL BRIEF OF APPELLANTS

John S. Simmons (SC Bar No. 10260)
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201
jsimmons@simmonslawfirm.com
(803) 779-4600

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. In a case presenting questions of urgency requiring the establishment of a rule for future guidance in matters of significant public interest, did the circuit court err in denying Plaintiffs' motion for partial summary judgment and granting Defendants' cross-motion for summary judgment on mootness grounds where the conduct at issue remains capable of repetition and evading review and judicial resolution of questions of law would provide essential guidance on matters of substantial public concern?

II. In denying Plaintiffs' motion for summary judgment, did the circuit court err in failing to declare the Town's Traffic Ordinances unconstitutional and unenforceable as a matter of law?

III. Did the circuit court err in finding Plaintiffs' claims preempted and barred by the Uniform Post-Conviction Relief Act where Plaintiffs never sought to void their convictions and solely seek the equitable remedy of disgorgement of any illegal benefit obtained from the Town's enforcement of admittedly invalid ordinances?

IV. Did the circuit court err in holding Plaintiffs cannot establish the Rule 23 requirements for class certification?

STATEMENT OF THE CASE

A. Overview of the Claims and Disposition.

This is an appeal from an order granting summary judgment in favor of the Town of Turbeville and the Turbeville Police Department (collectively "Defendants" or "the Town"), denying Plaintiffs' motion for partial summary judgment and denying class certification under Rule 23, SCRCP. Finding that the Town had repealed certain local traffic ordinances following the filing of this lawsuit, the lower court held that Plaintiffs' claims for injunctive and declaratory relief were rendered moot and judgment in favor of the Town was therefore appropriate. (Order at 1.) Plaintiffs filed this class action lawsuit on May 9, 2016, against Defendants Town of Turbeville and Turbeville Police Department, contending the Town enacted and enforced local traffic ordinances which were in contravention of state law governing traffic enforcement. Plaintiffs asserted the Town ticketed allegedly speeding motorists for violations of the Town's traffic ordinances instead of ticketing the motorists for violating state law. Plaintiffs alleged that fines for these tickets vastly exceeded the fines set by applicable state statutes and that officers who issued the tickets often informed motorists that unlike a ticket written under state law, no points would be assessed for the violation. (Compl.)

In addition to claims in their individual capacity, Plaintiffs sought certification of a class consisting of persons ticketed under the illegal ordinances as well as certification of a subclass of anyone fined pursuant to the illegal ordinances. Plaintiffs sought declaratory relief, injunctive relief, and a refund of any illegal benefit the Town retained. (Compl. p. 18.) Defendants responded by way of a motion to dismiss filed July 8, 2016. The motion to dismiss was granted by order of the Honorable W. Jeffrey Young dated November 10, 2016 as to the claims asserted against the Town's Chief of Police, David Jones, but denied as to

the other defendants. The case was designated as complex by Order of the Honorable R. Ferrell Cothran, Jr. dated June 1, 2017, noting the parties' joint request for such designation due to complex procedural and substantive issues in the case. On July 27, 2017, the Plaintiffs filed an amended complaint with the consent of the Defendants. On November 1, 2017, Plaintiffs filed a motion for class certification and for partial summary judgment, seeking a declaration that the ordinances were invalid as a matter of law. (Pl. Mot. for Summ. J. pp. 1-2.) Plaintiffs further sought the trial court's permission to defer class notice. *Id*. Defendants filed a cross-motion for summary judgment on February 14, 2018, asserting that Turbeville's repeal of the relevant ordinances on October 10, 2017, after the commencement of this action, rendered the claims for injunctive and declaratory relief moot. (Def. Mot. for Summ. J pp. 1-2, 5.) Tellingly, the motion for summary judgment did not include a defense of the constitutionality of the ordinances. *See Id*. The Town further contended all claims were barred by the Uniform Post-Conviction Relief Act. S.C. Code Ann. § 17-27-20(B). *Id*.

Following a hearing, the Honorable Clifton B. Newman, by Order dated October 30, 2019, denied Plaintiffs' motion for partial summary judgment and granted Defendants' cross-motion for summary judgment based upon a finding that Plaintiffs' claims for equitable relief were rendered moot since Turbeville had repealed the ordinances.[1] In its Order, the lower court declined to address the merits of the ordinances and further denied Plaintiffs' Motion for Class Certification, finding first Plaintiffs did not meet certain factors articulated in Rule 23 of the South Carolina Rules of Civil Procedure. The Court also held that the claims for refunds as part of Plaintiffs' putative subclass was barred by the S.C. Tort Claims Act and, further, that Plaintiffs'

[1] As reflected in this Court's correspondence dated June 29, 2021, the parties have agreed to proceed without the transcript of the hearing in this matter.

constitutional challenge to the ordinance was preempted by the Uniform Post Conviction Relief Act. On November 27, 2019, the Plaintiffs filed and served their Notice of Appeal from Judge Newman's Order.

STATEMENT OF FACTS

The History of the Ordinances and Improper Ticketing Practices

This case arises out of a small town's successful efforts to generate revenue by instituting local traffic ordinances which run afoul of State law.[2] On May 13, 2003, the Turbeville Town Council enacted the Town Traffic Ordinance. (Am. Compl. ¶ 26; Answer ¶ 26). On August 11, 2009, the Turbeville Town Council amended the Town Traffic Ordinance to provide as follows:

> It shall be unlawful for any person to operate any vehicle without care, caution, and full regard for safety of persons or property. Any person failing so to do shall be guilty of the Town Traffic Ordinance. The operation of any vehicle when the same or any of its appliances is not in proper or safe condition shall be prima facie evidence of the violation of the Town Traffic Ordinance.

(Am. Compl. ¶ 27; Answer ¶ 27). The Turbeville Town Council also adopted the Penalty Ordinance, which stated:

> It shall be unlawful for any person to fail to obey the traffic ordinances of the Town of Turbeville and the State of South Carolina while operating a motor vehicle within the town limits. Any person convicted of violating the provisions of this section, shall be fined not more than five hundred and no/100ths ($500.00) dollars plus the assessments, or imprisoned not more than thirty (30) days.

(Am. Compl. ¶ 28; Answer ¶ 28).

Defendant Turbeville Police Department aggressively enforced the Town Traffic Ordinance and the Penalty Ordinance, generating substantial revenue for the Town and resulting

[2] According to the Town's website, Turbeville's population is 720 people. https://townofturbeville.com/town-history/.

in at least 5,000 individuals having been cited under the traffic ordinances from May 9, 2013 through August 15, 2017. (*See, e.g.,* Pl. Mot. for Summ. J., Ex. A.)

The Issuance of Multiple Advisory Opinions

On November 18, 2013, the South Carolina Attorney General's Office issued two advisory opinions relevant to the Traffic Ordinances. First, the Attorney General issued an opinion requested by State Treasurer Loftis that addressed a decrease in court fines and fees remitted by municipalities in recent years. (*See* Am. Compl. at Ex. B). Treasurer Loftis inquired about the legality of local traffic ordinances, which may have a net effect of decreasing money sent to the State by municipalities. (*Id*.) In a thorough opinion, the Attorney General discussed a variety of prior Advisory Opinions and concluded that "local ordinances attempting to regulate traffic in the same manner as any provision under the [Uniform Traffic Act], unless expressly authorized, are likely invalid." (*Id.* at 5). The Attorney General also cited an earlier Advisory Opinion and noted that "[o]rdinances lowering or relaxing statutory standards relative to offenses are void as in conflict with state law and policy." *Id.* (quoting Op. S.C. Att'y Gen., 2006 WL 422574 (Feb. 1, 2006)).

The Attorney General also issued a related Advisory Opinion requested by Representative Jimmy C. Bales.[3] (*See* Am. Compl. at Ex. C). In that Advisory Opinion, the Attorney General similarly concluded that municipal ordinances setting their own penalties for speeding and other traffic violations were invalid as they conflict with State law. (*Id*. at 4–5).

Despite these clear pronouncements from the Attorney General's Office, Defendants failed to cease enforcement of their unlawful traffic ordinances or otherwise remediate their unlawful

[3] Rep. Bales undertook several efforts to put a stop to the Defendants' unlawful traffic enforcement scheme.

conduct. (*See* Pl. Mot. for Summ. J., Ex. B.) Indeed, Defendants continued to write tickets under the Traffic Ordinances, including issuing tickets to both of the named Plaintiffs in this case.

The Traffic Stops of the Named Plaintiffs

On October 28, 2014, Plaintiff Robbins was stopped by Lt. Philip C. Wilkes of the Turbeville Police Department and cited with violating the Town Traffic Ordinance. (Am. Compl. ¶ 52; Answer ¶ 52). Lt. Wilkes issued Plaintiff Robbins a ticket with a recommended bond amount of $288. (Am. Compl. ¶ 53; Answer ¶ 53). Plaintiff Robbins challenged her ticked by filing a Motion to Dismiss, in which she contended that the Town Traffic Ordinance was illegal and preempted by State law. (Am. Compl. ¶ 54; Answer ¶ 54). At trial, the municipal judge *sua sponte* converted Plaintiff Robbins' charge to a violation of the State speeding statutes. (Am. Compl. ¶ 57; Answer ¶ 57). Plaintiff Robbins was convicted of violating the State speeding statutes and appealed that conviction on the ground that a judge cannot change a defendant's charge. Judge Thomas W. Cooper reversed and remanded Plaintiff Robbins' conviction.[4]

On August 16, 2015, Plaintiff Babayan was stopped by Sgt. Robert Haskell Carter of the Turbeville Police Department and cited for violating the Town Traffic Ordinance. (Am. Compl. ¶ 62; Answer ¶ 62). Sgt. Carter issued Plaintiff Babayan a ticket with a recommended bond amount of $388. (Am. Compl. ¶ 63; Answer ¶ 63). Plaintiff Babayan paid a reduced fine of $188 to resolve her ticket.

[4] When the Complaint in this case was filed, Plaintiff Robbins' appeal was still pending. On September 1, 2016, Judge Cooper entered a Form 4 Order reversing Plaintiff Robbins' conviction. A court can take judicial notice of such an order. *See* Rule 201(f) ("Judicial notice may be taken at *any stage* of the proceeding." (emphasis added)); *Doe v. Bishop of Charleston*, 407 S.C. 128, 134 N.2, 754 S.E.2d 494, 497 n.2 (2014) (holding that it is appropriate for courts to take judicial notice of prior, related court orders and filings).

The Class Action Lawsuit

Plaintiffs initiated this case seeking relief on their own behalf and on behalf of all others similarly situated related to these ordinances and ticketing practices. The Amended Complaint seeks four forms of relief: (1) a declaration that Turbeville Town Ordinances 13-22 ("the Town Traffic Ordinance") and 13-23 ("the Penalty Ordinance") are unconstitutional and in violation of State law; (2) a permanent injunction prohibiting Defendants from enforcing either ordinance; (3) restitution of the illegally collected fines and penalties; and (4) refund of the illegally collected fines and penalties. (Am. Compl.) In their prayer for relief, the Plaintiffs further sought payment of their attorney's fees, including but not limited to attorneys' fees under S.C. Code Ann. §15-77-300, on the grounds that Defendants were not substantially justified in enacting and enforcing the town ordinance. (Am. Compl. p. 17.) Plaintiffs further requested that Defendants be required to pay their costs, including but not limited to costs available under section 15-53-100 of the South Carolina Code of Laws. (*Id.*)

The first two causes of action were brought on behalf of both named Plaintiffs and a proposed Class, which is defined as follows:

> All persons who have been charged with violating, or who have paid fines for violating, the Town Traffic Ordinance and/or the Penalty Ordinance from May 9, 2013 to present ("the Injunctive Class").

(Am. Compl. ¶¶ 67, 77–84).

The latter two causes of action were brought on behalf of Plaintiff Babayan and a proposed Subclass, which is defined as follows:

> All persons who have paid fines for violating the Town Traffic Ordinance and/or the Penalty Ordinance from May 9, 2013 to present ("the Damages Subclass").

(Am. Compl. ¶¶ 67, 85–95).

Following discovery, Plaintiffs moved for partial summary judgment, seeking certification of the Injunctive Class and the Damages Subclass and a declaration that the Town Traffic Ordinance and Penalty Ordinance were unconstitutional and in violation of State law.[5] The Defendants filed a cross-motion for summary judgment.

STANDARD OF REVIEW

In reviewing appeals involving summary judgment, this Court applies the same standard of the trial court pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. *Bovain v. Canal Ins.*, 383 S.C. 100, 678 S.E.2d 422 (2009); *Doe v. Bishop of Charleston*, No. 2017-001996 (S.C. Ct. App. March 3, 2021). "Where cross motions for summary judgment are filed, the parties concede the issue before [the court] should be decided as a matter of law." *Wiegand v. U.S. Auto Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). "Questions of law may be decided with no particular deference to the trial court." *Wiegand*, 391 S.C. at 163, 705 S.E.2d at 434 (2011) (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law." *Oblachinski v. Reynolds*, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011) (citations omitted). "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Mead v. Beaufort Cnty. Assessor*, 419 S.C. 125, 130, 796 S.E.2d 165, 168 (Ct. App. 2016) (citation omitted). To that end, a plaintiff may seek summary judgment "at any time after the expiration of 30 days from the commencement of the action." Rule 56(a), SCRCP. When a

[5] Plaintiffs further requested that the lower court defer providing class notice to class members until the conclusion of any likely appeal of the court's decision with respect to the constitutionality and legality of the Town Traffic Ordinance and the Penalty Ordinance. (Pl. Mot. for Summ. J. pp. 18-20.)

question of law is presented in a summary judgment motion, it is proper for the Court to summarily resolve the legal question. *Mead*, 419 S.C. at 130, 796 S.E.2d at 168; *see, e.g. Oblachinski*, 391 S.C. at 564, 706 S.E.2d at 857 (holding that it was appropriate for the Circuit Court to resolve the question of whether a duty exists at summary judgment).[6] In cases where summary judgment is sought on the grounds that the matter is moot, an appellate court may find that while the issue giving rise to the appeal is moot, "the controversy is capable of repetition yet will generally evade review." *Found v. S.C. Dept't. of Transp., et al*., 421 S.C. 110, 804 S.E.2d 854 (2017). In such instances, the appellate court may proceed with review on the merits of an issue in the interest of judicial economy, even though remand to the court below to consider the issues would be appropriate. *See Id*. at 122, 804 S.E.2d at 861 (citing *Furtick v. S.C. Dep't of Prob*., 352 S.C. 594, 576 S.E.2d 146 (2003) (addressing the merits of an issue in the interest of judicial economy even though the respondent was entitled to review by the lower court)).

[6] Plaintiffs acknowledge that an order denying summary judgment is interlocutory in nature and not generally appealable. *See, e.g., Skywaves I Corp. v. Branch Banking & Tr. Co*., 814 S.E.2d 643, 658-659 (S.C. Ct. App. 2018) (cert denied Nov. 9, 2018). However, given the unique facts of this case and the parties' agreement that the issues are ripe for determination as matters of law—as reflected in the cross-motions for summary judgment—Plaintiffs submit that this Court has the discretion to consider the *denial* of their motion for partial summary judgment because the order involves the merits of the case and affects a substantial right. *See, e.g., Brown v. Cnty. of Berkeley*, 366 S.C. 354, 622 S.E.2d 533 (2005). By way of example, there are two exceptions in which this Court may address an issue despite a finding of mootness below: 1) when the issue raised is capable of repetition, yet evading review, and 2) when the question considers matters of important public interest. *Curtis v. State of South Carolina*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). In determining whether an issue meets the requirements of the "public importance exception," our Supreme Court has held that it requires a case-by-case analysis and a finding that the "issue must present a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in "matters of important public interest." *Sloan v. Greenville County*, 361 S.C. 568, 570, 606 S.E.2d 464, 465- 66 (2004) (citing *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596). Plaintiffs respectfully submit that this issue is of "imperative and manifest urgency" and seek review accordingly.

"[A] trial judge's ruling on whether an action is properly maintainable as a class is within his discretion." *E.M.C. Waller v. Seabrook Isl. Prop. Own. Assoc*., 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). The appellate court will "generally defer to the trial court's discretion in granting class certification **absent an error of law**." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) (emphasis added) (citing *Waller, supra*).[7] "In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied." *Id.*

ARGUMENT

I. The Circuit Court Erred in Finding Plaintiffs' Claims for Equitable Relief Moot Where the Issues Remain Capable of Repetition and Evading Review and Judicial Resolution Would Provide Essential Future Guidance in A Matter of Important Public Interest.

In granting Defendants' motion for summary judgment and denying Plaintiffs' partial motion for summary judgment, the lower court concluded that Plaintiffs' claims were moot because the Town repealed the relevant ordinances after this lawsuit was filed. However, the lower court erred when it failed to address Plaintiffs' contention that the matter still required review pursuant to two long-established exceptions to the mootness doctrine. Because there was substantial evidence sufficient to support an exception to the mootness doctrine given the importance of ensuring such ordinances are never again enacted or enforced by municipalities, this Court should reverse the lower court's entry of judgment in favor of the Town; grant the

[7] Again, Plaintiffs acknowledge that orders under Rule 23, SCRCP, are generally considered interlocutory in nature and therefore appealable only in certain circumstances; however, this Court may review an interlocutory order when it contains other appealable issues, as is the posture of the instant case. *See, e.g., Ferguson v. Charleston Lincoln/Mercury, Inc.*, 344 S.C. 502 (S.C. Ct. App. 2001).

Plaintiffs' motion for summary judgment for the injunctive class and declare the ordinances unconstitutional and violative of state law; and award such fees and costs to Plaintiffs as allowable under South Carolina law.

Although justiciable controversies must exist for any action, our courts recognize several exceptions to mootness. First, a court may exercise its jurisdiction in spite of mootness if the issue in controversy is capable of repetition yet evading review. *See Baddourah v. McMaster*, Case No. 2017-002576 (S.C. March 10, 2021) (although mooted by post-filing events, Court applied exception to mootness to "bring[] clarity to the questions before the Court" since it was "highly desirable for all concerned."); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (adopting the "less restrictive approach" to the evading review exception in a case involving a student's suspension, noting that even though the suspension had been cleared from the student's record and he had returned to school, the issue of short-term student suspensions was capable of repetition and, by their very nature, such suspensions would likely always be resolved long before judicial review could be had); *Evans v, S.C. Dep't of Social Servs.*, 303 S.C. 108, 399 S.E.2d 156 (1990) (action moot but Court addressed where controversy presented issue in which Court needed to clarify law). Second, a court may exercise jurisdiction over a moot controversy to establish a rule for future conduct in matters of important public interest. *Found v. S.C. Dep't of Transp & John V. Walsh,* 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017) (finding error by the Court of Appeals in concluding a matter was not justiciable simply because the defendants admitted their conduct was wrongful, noting that the controversy fell within the exceptions to the mootness doctrine and reversal was therefore required); *Curtis v. State*, 345 S.C. 557, 568,549 S.E.2d 591, 596 (2001). Although only one of the exceptions need apply, both exceptions to mootness apply in the case at bar, necessitating this Court's

exercise of jurisdiction and reversal of the Order below.

A. This Controversy is Capable of Repetition Yet Evading Review.

The procedural history below reveals Defendants' efforts to evade judicial review of its ordinances. When Plaintiff Robbins challenged the validity of her ticket in traffic court, the local judge *sua sponte* changed the charge to a state speeding charge. After Robbins appealed and the circuit court reversed her speeding conviction, the Town *nolle prossed* the illegal ticket. None of this is disputed. Indeed, Defendants explicitly cited the ticket's dismissal in support of their argument that Robbins' claims are moot. (Defs' Mot. for Summ. J., p.2). Further, evidence that the Town repealed the ordinances rather than defend them in court is just as telling. Defendants initially responded to this lawsuit by filing a motion to dismiss on July 8, 2016, that claimed there was "no conflict" between its ordinances and state law. Def. Mot. to Dismiss p. 2. However, by February of 2018, Defendants had repealed the subject ordinances and changed their tune, declining to support any prior claim of constitutionality and merely relying on their assertion that "the traffic ordinances are 'no longer necessary'[.]" (Defs' Mot. for Summ. J. Ex. 1, p.3.)

In order to meet the "evading reviewing" exception to the mootness doctrine, "[t]he party bringing the action need only show the issue raised is *capable* of repetition and is not required to prove there is a reasonable expectation' the issue will arise again." *Found v. S.C. Dep't of Transp & John V. Walsh*, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017) (citations omitted). Here, that standard most certainly is met where Defendants responded to this litigation by voiding their unconstitutional ordinances after the filing of the lawsuit but prior to a determination on the merits (thereby leaving open the possibility that similar ordinances could be enacted and enforced in the future by other towns—or even Turbeville itself—in an effort to

generate additional revenue.)

In *Byrd*, the Supreme Court applied the evading review exception, noting the short-term nature of the student suspension issue which "are completed long before an appellate court can review the issues they implicate." *Byrd*, 321 S.C. at 433, 468 S.E.2d at 864. Similarly, in *Found*, the Supreme Court, applying the evading exception, reversed the Court of Appeals' affirmance of mootness. There, the Court reasoned that since the issues involving bridge inspections typically rendered matters moot prior to appellate review, the "controversy is capable of repetition yet will generally evade review." *Found*, 421 S.C. at 122, 804 S.E.2d at 861.

The situation here is analogous to that present in *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (Ct. App. 2002), where the Court of Appeals addressed a claim of mootness after a plaintiff withdrew her successful bid in a judgment sale. The Court addressed the merits in *Holden* despite the claim having been rendered moot by the withdrawal of the bid based in part on the plaintiff's claim that the same question would be presented if she elected to bid on the property again. *Id*. at 137-138, 637-638 (Ct. App. 2002). Here, the same issues would present themselves in the event Turbeville reenacted its same ordinance, or something similar, which, in reality it has every reason to do given the lack of a final judicial determination on this matter and the undisputed financial incentives.

Finally, the South Carolina Supreme Court's decision in *Vicary v. Town of Awendaw* supports judicial review. That matter involved the related concept of standing but discussed a principle applicable herein. In *Vicary*, plaintiff's standing to challenge an annexation of property was contested and the Supreme Court held a plaintiff would be conferred with standing if the plaintiff could demonstrate "nefarious conduct" by the annexing body. 425 S.C. 350,358-359, 822 S.E.2d 600, 604 (2018). Turbeville's conduct in the instant matter certainly fits this "nefarious"

standard as it seeks to avoid judicial review.

B. Judicial Resolution Would Provide Future Guidance in A Matter of Important Public Interest.

A separate exception to the mootness doctrine, also unaddressed by the lower court, further supports an examination of the merits of this action. In our state, a court may exercise jurisdiction over a moot controversy to establish a rule for future conduct in matters of important public interest. *Found v. S.C. Dep't of Transp & John V. Walsh,* 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017); *Curtis v. State*, 345 S.C. 557, 568,549 S.E.2d 591, 596 (2001). This exception applies, where, as here, there exists "questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Found,* 421 S.C. at 121, 804 S.E.2d at 860 (citations omitted).

Absent a judicial determination of Plaintiffs' declaratory claims, nothing prevents or deters Turbeville from re-enactment of the unconstitutional ordinances. Nothing prevents other municipalities from following this same pattern of "enact and evade" as well.[8] Indeed, a hearing transcript from a wholly unrelated federal matter that the Town attached to their motion for summary judgment involves the town of Ridgeland, South Carolina - another small town, with another apparently nefarious ordinance. In that transcript, the lawyer for the Town of Ridgeland argued "*And,you know, all the municipalities here in South Carolina have enacted these careless operation laws, because it allows them to charge a fine, but the motorist doesn't have points assessed against their driver's license*." (Def. Mot. for Summ. J. Ex.2, p.11, lines 21-24). The same transcript suggeststhat Ridgeland followed the same playbook as Turbeville—it dismissed the illegal tickets of people who challenged their validity, such that the town simply never held any

[8] As addressed further in this Initial Brief, the record reflects that Turbeville is hardly alone in enacting ordinances of questionable legality.

trials and therefore evaded review.[9]

Local traffic ordinances remain an ongoing and widespread problem of great public concern in South Carolina. Indeed, attached to the Complaint are two advisory opinions and a letter from then-Chief Justice Jean H. Toal referencing multiple other advisory opinions on this same general topic—local traffic ordinances, fines for local traffic ordinances, and speeding tickets issued under local ordinances. The letter from then-Chief Justice Toal acknowledges that judicial challenges to such ordinances and practices remain unlikely because the ticketed individuals are often told they will not receive points on their driver's license (and can thereby avoid a perceived increase in their insurance premiums as a result). (Amend. Compl. ¶¶43-45 (Ex. D)).

In sum, there exists a compelling need for judicial guidance for the public—and particularly local governments—regarding the constitutionality of the issues presented in this lawsuit, including the proper scope of local traffic ordinances and whether such ordinances are pre-empted by the Uniform Traffic Act. In *Sloan v. Greenville County*, the Supreme Court found no manifest need to review the legality of Greenville's procurement ordinance after repeal, noting that the parties had the benefit of two previous decisions giving "ample guidance" for future cases. 361 S.C. 568, 606 S.E.2d 464 (2004). Here, no previous decisions exist—only advisory opinions and correspondence from the former chief justice. Taken together, the record reflects a significant need for judicial guidance. Indeed, Defendants appear to acknowledge this lack of guidance by attaching the transcript from the unrelated Town of Ridgeland federal case to their motion, thereby suggesting that the legality of local speeding ordinances is the type of recurring

[9] In that federal court matter, defendant's counsel asserted a lack of jurisdiction yet recognized declaratory state court review as appropriate. *Id*. at 33.

dilemma requiring this Court's immediate attention. *See Evans v. S.C. Dep't of Soc. Servs.*, 303 S.C. 108, 110 n.1, 399 S.E.2d 156, 157 n.1 (1990) (court reviewed moot issue that presented a recurring dilemma in order to clarify the law).

II. The Circuit Court Erred in Failing to Enter Judgment in Favor of the Plaintiffs on the Equitable Claims and Declare the Traffic Ordinances Unconstitutional as a Matter of Law.

In response to Plaintiffs' Motion for Class Certification and Partial Summary Judgment and in their own cross-motion for summary judgment, Defendants never once attempted to defend the merits of the ordinances. (*See* Def. Mot. for Partial Summ. J. (filed Feb. 14, 2018) ("Because the Traffic Ordinance is no longer in effect, Plaintiffs' claims for injunctive relief and prospective declaratory relief are now moot."); (Def. Opp. To Pl. Mot. for Class Cert. (filed June 20, 2019) ("Because Turbeville has repealed the challenged local laws, her purported claim for prospective injunctive and declaratory relief are moot.")). The lower court's denial of Plaintiffs' Motion for Summary Judgment and granting of Defendants' cross-Motion for Partial Summary Judgment similarly failed to address the merits of the matter. Collectively, these issues raise matters of law and require no factual development for their resolution by this Court. *See Found,* 421 S.C. at 122, 804 S.E.2d at 861 (declining to remand for consideration of merits and instead "in the interest of judicial economy" proceeding with review). Put simply, the Traffic Ordinances are either legal or illegal. There is no middle ground: Defendants' motives, or the circumstances surrounding the adoption of the Traffic Ordinances, are irrelevant to the legal questions before the Court.

Specifically, Plaintiffs' first cause of action seeks a declaration on behalf of the named Plaintiffs and the Injunctive Class that: (a) It was unconstitutional for Defendants to adopt and enforce the Town Traffic Ordinance and Penalty Ordinance, which are in conflict with, and

preempted by, State law; and (b) It was unconstitutional for Defendants to adopt and enforce the Town Traffic Ordinance and Penalty Ordinance, which impose greater or lesser penalties for traffic violations than those set forth by the General Assembly in the Uniform Traffic Act and related statutes. (Am. Compl. ¶ 79). Plaintiff's second cause of action seeks a permanent injunction, on behalf of the named Plaintiffs and the Injunctive Class, prohibiting Defendants from enforcing the Town Traffic Ordinance or Penalty Ordinance.

As detailed herein, the first cause of action raises questions of law about the constitutionality of the Traffic Ordinances. In the interest of judicial economy, this Court should examine the text of the Traffic Ordinances and the relevant law. In so doing, Plaintiffs submit that the Court must find the Traffic Ordinances unconstitutional, and, as a result, respectfully request that the Court reverse the order of the lower court, enter judgment in favor of the Plaintiffs, and award such attorneys' fees and costs as provided under law or, in the alternative, remand the matter to the lower court for a determination of same.[10]

A. The Town Traffic Ordinance and Penalty Ordinance are Unconstitutional and in Violation of State Law.

"An ordinance is a legislative enactment and is presumed to be constitutional." *S. Bell Tel. & Tel. Co. v. City of Spartanburg*, 285 S.C. 495, 497, 331 S.E.2d 333, 334 (1985). "The burden of proving the invalidity of a municipal ordinance is on the party attacking it." *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 133, 694 S.E.2d 213, 215 (2010). "Determining whether a local ordinance is valid is a two-step process." *Bugsy's, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 93, 530 S.E.2d

[10] Although Plaintiffs contend that this ruling can be made prior to class certification, Plaintiffs simultaneously moved below for class certification out of an abundance of caution *See, e.g., Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) ("It is reasonable to consider a Rule 56 motion [prior to class certification] when early resolution of a motion for summary judgment seems likely to protect both the parties and the court from needless and costly further litigation.").

890, 893 (2000). "The first step is to determine whether the municipality had the power to adopt the ordinance." *Id*. "If no power existed, the ordinance is invalid." *Id*. "If the municipality had the power to enact the ordinance, the second step is to determine whether the ordinance is consistent with the Constitution and general law of the State." *Id*. (citation omitted).

As detailed below, the General Assembly has thoroughly legislated in the area of traffic offenses. The Uniform Traffic Act expressly declares that municipalities are only authorized to enact traffic regulations to the extent that the ordinance does not conflict with the provisions of the Act. S.C. Code Ann. § 56-5-30. Accordingly, the Town did not have the authority to adopt the Traffic Ordinances, the Traffic Ordinances are inconsistent with both the Constitution and general laws of the State, and this Court should reverse the lower court and enter judgment in favor of the Plaintiffs.

Reflecting our Legislature's expansive legislative authority concerning traffic issues, the Uniform Traffic Act provides as follows:

> The provisions of this chapter shall be **applicable and uniform throughout this State and in all political subdivisions and municipalities therein**, and **no local authority shall enact or enforce any ordinance, rule or regulation in conflict** with the provisions of this chapter unless expressly authorized herein.

S.C. Code Ann. § 56-5-30 (emphasis added).

The Act further provides limitations on maximum and minimum speed limits and provides that a person violating the speed limits is guilty of a misdemeanor and subject to various fines. S.C. Code Ann. § 56-5-1520(G). To that end, a person convicted of exceeding the speed limit by less than ten miles per hour is subject to a fine of not less than fifteen dollars nor more than twenty-five dollars, a person convicted of exceeding the speed limit by between ten and fifteen miles per hour is subject to a fine of between twenty-five and fifty dollars, a person convicted of exceeding the speed limit by between fifteen and twenty-five miles per hour is subject to a fine of between

fifty and seventy-five dollars, and a person convicted of exceeding the speed limit by more than twenty-five miles per hour is subject to a fine of between seventy-five and two-hundred dollars or imprisonment for not more than thirty days. *Id*. These fines are in addition to assessments imposed by state law.

Additionally, the Uniform Traffic Act "establishe[s] a point system for the evaluation of the operating record of persons to whom a license to operate motor vehicles has been granted and for the determination of the continuing qualifications of these persons for the privileges granted by the license to operate motor vehicles. S.C. Code Ann. § 56-1-720. For example, a person convicted of exceeding the speed limit by less than ten miles per hour is to be assessed two points, a person convicted of exceeding the speed limit by between ten and twenty-five miles per hour is to be assessed four points, and a person convicted of exceeding the speed limit by more than twenty-five miles per hour is to be assessed six points. *Id*. The South Carolina Department of Motor Vehicles may suspend, for not more than six months, the driver's license and privileges of a person who has accumulated a total of twelve points. S.C. Code Ann. § 56-1-740.

The above-cited legislation demonstrates how thoroughly the State has occupied the field of regulating traffic. Perhaps the natural result of such legislation is that both the Attorney General's Office and the Supreme Court of South Carolina have, on numerous occasions, addressed situations in which municipalities attempt to overstep the Legislature's authority.

Looking first to the Attorney General's Advisory Opinions, the weight of authority is uniformly against Defendants.[11] For example, on May 29, 2013, the Attorney General addressed the authority of a local government to enact an ordinance that would have imposed a fine of between $100 and $300 for certain traffic violations such as speeding. Op. S.C. Att'y Gen., 2013

[11]Plaintiffs recognize such advisory opinions are not binding legal authority.

WL 2450878 (May 29, 2013). In concluding that such an ordinance would be invalid, the Attorney General comprehensively addressed the state of the relevant law:

> The UTA [Uniform Traffic Act] sets forth numerous traffic offenses and prescribes the penalties for violations thereof. For example, a person convicted of a first offense speeding violation pursuant to [§ 56-5-1520(G)] may be punished by a fine of fifteen to twenty-five dollars for the least offense under that subsection, and a fine of seventy-five to two hundred dollars or imprisonment for not more than thirty days for the greatest offense. A person convicted of a first offense for failing to stop when signaled by a law enforcement officer "must be fined not less than five hundred dollars or imprisoned for not less than ninety days nor more than three years." § 56-5-750(B)(1). A violation of any provision of the UTA for which a penalty is not specifically set forth is punishable "by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days." § 56-5-6190.
>
> . . .
>
> Here, the Legislature has expressly provided the parameters within which local governments may enact ordinances dealing with the regulation of traffic. *See* § 56-5-30, *supra*; *see also Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 134, 694 S.E.2d 213, 215 (2010) ("In S.C. Code Ann. § 56-6-30 . . . the General Assembly authorized local authorities to act in the field of traffic regulation if the ordinance does not conflict with the provisions of the Uniform Traffic Act"). The UTA has occupied the field of traffic regulation as far as penalties for violations of the UTA are concerned. The proposed ordinance imposes a fine which, in many or most cases, is either greater or less than the penalties permitted for the numerous traffic offenses set forth in the UTA. Consistent with authorities previously mentioned, the proposed ordinance, if enacted would violate Article VIII, § 14 of the S.C. Constitution. Therefore, we believe the City lacks the authority to enact the proposed ordinance.

Id.

Significantly, the Supreme Court of South Carolina has invalidated a municipal ordinance under circumstances similar to those in the case at bar. In *Aakjer v. City of Myrtle Beach*, the Supreme Court addressed the constitutionality of Myrtle Beach Ordinance 2008-64, "which required that any person riding a motorcycle wear a protective helmet and eyewear (the Helmet Ordinance)." 388 S.C. 129, 131, 694 S.E.2d 213, 214 (2010). While noting the general law applicable to the constitutionality of municipal ordinances, including the presumption of

constitutionality, the Supreme Court emphasized that the State had already enacted legislation addressing motorcycle helmet and eyewear requirements. *Id*. at 133, 694 S.E.2d at 215 (*citing* S.C. Code Ann. §§ 56-5-3660, 56-5-3670).

Referencing the limitation on municipal authority in section S.C. Code Ann. 56-5-30 of the South Carolina Code, the Supreme Court held that "[e]ven assuming, as the City contends, that the Helmet Ordinance does not conflict with the Uniform Traffic Act, we find that the ordinance may not stand as the need for uniformity is plainly evident in the regulation of motorcycle helmets and eyewear." *Id.* at 134, 694 S.E.2d at 215. "Were local authorities allowed to enforce individual helmet ordinances, riders would need to familiarize themselves with the various ordinances in advance of a trip, so as to ensure compliance. . . . Moreover, local authorities might enact ordinances imposing additional and even conflicting equipment requirements. Such burdens would unduly limit a citizen's freedom of movement throughout the State. Consequently, the Helmet Ordinance must fall under the doctrine of implied preemption." *Id.*

Similarly, here Turbeville's Town Traffic Ordinance criminalizes the "operat[ion] [of] any vehicle without care, caution, and full regard for safety of persons or property. . .. The operation of any vehicle when the same or any of its appliances is not in proper or safe condition shall be prima facie evidence of the violation of the Town Traffic Ordinance." Put simply, the Town Traffic Ordinance attempts to regulate a matter that is thoroughly preempted by the Uniform Traffic Act. The State already has a reckless driving statute. *See* S.C. Code Ann. § 56-5-2920 ("Any person who drives any vehicle in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property is guilty of reckless driving."). Similarly, the State has a number of laws requiring that a vehicle be in proper or safe condition. *See, e.g.*, S.C. Code Ann. § 56-5-4410 ("It shall be unlawful for any person to drive or move or for the owner to cause or knowingly

permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such an unsafe condition as to endanger any person or property or which does not contain those parts or is not at all times equipped with lights, brakes, steering and other equipment in proper condition and adjustment as required in this article or which is equipped in any manner in violation of this article or for any person to do any act forbidden or fail to perform any act required under this article."). In light of the Uniform Traffic Act's overwhelming regulation of traffic safety, it was error for the lower court to deny Plaintiff's motion for summary judgment and refuse to find the Town Traffic Ordinances preempted as a matter of law. Accordingly, this Court should correct such error below by reversing the lower court and declaring the Town Traffic Ordinance unconstitutional as a matter of law. *See Aakjer*, 388 S.C. at 134, 694 S.E.2d at 215.

Moreover, here the Town's Penalty Ordinance imposes a fine of up to $500 for violating the Town Traffic Ordinance. Thus, the Penalty Ordinance imposes penalties that may be lesser or greater than those prescribed by State law and is therefore illegal on its face. The South Carolina Supreme Court has unequivocally stated that ordinances that set forth greater or lesser penalties than State law are illegal and preempted by the State law. *See, e.g.*, *City of N. Charleston v. Harper*, 306 S.C. 153, 156, 410 S.E.2d 569, 570–71 (1991) (affirming the circuit court's striking of a city ordinance regarding simple possession of marijuana as unconstitutional and in direct conflict with state law, noting that "[t]his [state] legislation occupies the field as far as penalties for this offense are concerned. Local governments may not enact ordinances that impose greater or lesser penalties than those established by these parameters. . . . The City has attempted to set aside a penalty the legislature has found to be appropriate to punish persons . . . .").

In light of the above, Plaintiffs respectfully request that the Court reverse the lower court and declare as a matter of law that the Town Traffic Ordinance and the Penalty Ordinance

unconstitutional and violative of the Uniform Traffic Act and enter an award of attorneys' fees and costs pursuant to South Carolina law or, in the alternative, remand the matter to the lower court for an appropriate determination of same.[12]

III. The Circuit Court Erred in Finding Plaintiffs' Claims Barred by the Uniform Post-Conviction Relief Act Where Plaintiffs Only Seek the Equitable Remedy of Disgorgement.

The lower court erred when it held that Plaintiffs' claims constituted improper collateral attacks of their convictions, relying on the incorrect contention that Plaintiffs requested that the Court void their convictions. (Order pp. 4-5.) This characterization wholly misconstrues Plaintiffs' claims, which do not comprise collateral attacks on convictions but instead allege that Defendants unlawfully retained, through an excessive and illegal fine over and above the amount allowed by State law, an unjust benefit that should be forfeited in equity (*i.e.*, disgorgement). Plaintiff Babayan, individually and on behalf of those similarly situated, seeks nothing more than disgorgement, on her behalf and on behalf of the as yet-uncertified Damages Class, of any proceeds the Town has retained.

As explained by our Supreme Court, the PCR statute "comprehends and takes the place of all other common law, statutory, or other remedies heretofore available *for challenging the validity of the conviction or sentence*." *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999) (citing S.C. Code Ann. § 17-27-20(b). On the face of the pleadings, Plaintiffs' allegations, both individually and as putative class representatives, do not challenge the validity of individual convictions or sentences, but instead assert the state's preemption of matters in the traffic safety arena under existing state law. (Amend. Compl. ¶¶85-95.)

[12] *See* Amend. Compl. p. 17 (requesting, as part of prayer for relief, an award of attorneys' fees and costs under sections 15-77-300 and 15-53-100 of the South Carolina Code of Laws.)

In *Thompson v. State*, 415 S.C. 560, 785 S.E.2d 189 (2016), the Supreme Court found that the Uniform Declaratory Judgments Act—not the PCR Act—applied to questions involving sex offender registry status. The Supreme Court expressed support for the distinction, noting that the PCR Act simply did not apply to each and every challenge arising out of criminal proceedings. *Thompson*, 415 at 565, 785 S.E.2d at 191.[13]

Even if the Court were to find that a literal reading of the PCR Act necessitated its application to this claim, precedent acknowledges that the Act does not preclude the requested relief, as the Act does not, and cannot, preclude *all* remedies. Our Supreme Court still recognizes extraordinary writs, as acknowledged in *Butler v. State,* 302 S.C. 466, 468, 397 S.E.2d87, 88 (1990) (issuing writ of habeas corpus where circumstances reflected a denial of fundamental fairness shocking to the universal sense of justice.) Precedent also acknowledges that a court sitting in equity has "the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible."*Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983).

In their Partial Motion for Summary Judgment, Defendants correctly noted that Ms. Babayan did not challenge the ordinances at the time she was convicted, did not go to trial, did not appeal, and did not file for PCR. See Def. Mot. at p. 3. Nevertheless, had Babayan undertaken such actions, the record supports the reasonable conclusion that Turbeville's response to such action would likely have been to either wrongfully attempt to convert her ticket to one complying with State law or, alternatively, dismiss the ticket entirely in order to avoid scrutiny of its ordinances (thereby allowing the continue collection of fines from people who lack the information, means, time, or

[13] S.C. Code Ann. § 15-53-30 provides: "Any person … whose rights, status or other legal relations are affected by a statute … may have determined any question or construction or validity arising under the [] statute … and obtain a declaration of rights, status or other legal relations thereunder."

opportunity to assert their rights.) Equity has the power to do what should be done. Respectfully, Plaintiffs assert this Court has the power to disgorge any illegally retained benefits from the Town. *See, e.g., Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976) (noting in an action in equity, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence).

IV. The Circuit Court Erred as a Matter of Law in Holding Plaintiffs Failed to Establish the Rule 23 Requirements for Class Certification.

The trial court denied Plaintiffs' Motion for Class Certification, finding that Plaintiffs failed to meet the requirements for class certification contained in Rule 23, SCRCP. Because the lower court erred in its assessment of the Rule 23 factors and failed to apply the "rigorous analysis" required under South Carolina law, this Court should reverse the decision of the lower court, enter judgment in favor of the Plaintiffs, and remand the matter to the lower court for further action in compliance with its rulings.[14] While an appellate court generally defers to the trial court's discretion in granting class certification, such deference cannot be maintained where an error of law is found. *See Gardner v. S.C. Dep't. of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003).

Certification of a class action in South Carolina state court is governed by Rule 23 of the South Carolina Rules of Civil Procedure. That rule provides:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to

[14]This Court may review interlocutory orders involving class certification when they contain other appealable issues. *See Ferguson v. Charleston Lincoln/Mercury, Inc*., 564 S.C. 558, 564 S.E.2d 285 (Ct. App. 2001) (*aff'g as modified* 344 S.C. 502, 544 S.E.2d 285 (Ct. App. 2001)).

> the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP.

As our Supreme Court has acknowledged, South Carolina's rule for determining if an action should proceed as a class action differs significantly from its federal counterpart:

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

Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 576–77, 703 S.E.2d 197, 204 (2010). The *Grazia* court reiterated that class actions are favored in South Carolina: "The class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Id.* It is within a trial court's discretion whether a class should be certified. *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1998). "A court may not look to the merits when determining whether to certify a class." *Id.*; *See also Smith v. Progressive Halycon Ins*. Co., Op. No. 2015-UP-392 (S.C. Ct. App., filed Aug. 5, 2005) (vacating finding by circuit court, in support of its decision decertifying class, that the plaintiff had no viable individual claim as it involved an analysis of the merits of the lawsuit).[15]

[15] Plaintiffs are aware that unpublished opinions have no precedential value and that citation to such unpublished opinions is disfavored. See Rules 220(a) and 268(d)(2), SCACR. However, because the Court in *Smith v. Progressive* relied upon both *Tilley* and *Gardner v. S.C. Dep't of Revenue* in finding error on the part of the trial judge, Plaintiffs respectfully submit that the opinion may be relevant to this Court's review of the lower court's order.

The first four criteria contained in the Rule are often referred to as the requirements for numerosity, commonality, typicality and adequacy of representation. *Gardner v. S.C. Dep't Rev.*, 353 S.C. 1, 577 S.E.2d 190 (2003).

The Plaintiffs seek certification of a class consisting of "all persons who have been charged with violating, or who have paid fines for violating, the Town Ordinance and/or the Penalty Ordinance from May 9, 2013 to present ("the Injunctive Class")." Plaintiffs further seek certification of a subclass of "all persons who have paid fines for violating the Town Traffic Ordinance and/or Penalty Ordinance from May 9, 2013 to present (the Damages Subclass")." (*See* Am. Compl. ¶ 67). In denying Plaintiffs' Motion for Class Certification, the Court abused its discretion where it addressed only the commonality, adequacy of representation and amount in controversy factors.[16] Further, because the Court erred as a matter of law in finding the Plaintiffs' claims for injunctive relief and declaratory judgment were rendered moot by the repeal of the ordinances and further erred in finding their claims barred under the South Carolina Tort Claims Act and the PCR Act, this Court must reverse the lower court's denial of class certification and remand the matter to the circuit court for further disposition in accordance with its rulings .

A. Commonality of Questions of Law Exist.

To establish commonality, a party must show "questions of law or fact common to the class." Rule 23(a)(2), SCRCP. Commonality does not require every issue in the case to be common to all class members. *Gardner,* 353 S.C. at 21, 577 S.E.2d at 200–01. Rather, commonality is met when the class shares a determinative issue. *Id.*; *See also McGann v. Mungo,* 287 S.C. 561, 568, 340 S.E.2d 154, 157–58 (Ct. App. 1986) (discussing the commonality requirement of Rule 23 and

[16] Plaintiffs assert the factors unaddressed by the lower court, specifically numerosity and typicality, have been met in the instant case.

stating it is not necessary that all questions of law and fact be common, only that common issues exist among the class).

The court below erroneously concluded, without explanation or factual basis, that commonality did not exist in the case at bar due to the need for individualized inquiry. (Order pp. 6-7.) In fact, no individualized inquiry is necessary or required because this lawsuit focuses on the central, class-wide issue of enforcement of the preempted and facially invalid ordinances.

The named Plaintiffs and all members of the Injunctive Class received traffic tickets issued pursuant to the Town Ordinances, neither of which complied with the Uniform Traffic Act. Plaintiffs allege all of these tickets were issued in contravention of State law. In addition, Plaintiffs allege the Town Ordinance and Penalty Ordinance are preempted by State law. These two determinations predominate over any possible question unique to any single class member, and the answer to these questions is determinative of the Plaintiffs' individual claims, as well as the claims of all Injunctive Class members.

The claims of Plaintiff Babayan and the Damages Subclass are likewise determined by common inquiries: Are Plaintiff Babayan and the Damages Subclass entitled to a refund of some or all of the fine paid to the Town of Turbeville? Was the Town of Turbeville unjustly enriched by reason of keeping Plaintiff Babayan's fine? The answers to these questions determines Plaintiff Babayan's right to restitution by way of a refund of the monies she paid to the Town, plus interest. The same answers to these questions are also determinative of the rights of the members of the Damages Subclass to recover, with interest, the amount of the fines they each paid as a result of the Town's wrongful conduct. The mere fact that members of this Subclass may have paid different amounts of fines should not defeat certification where the amount of those fines can be easily determined by reviewing the Town's own payment records. Under South Carolina law, a single

individual inquiry does not defeat certification where the questions in common with the Plaintiff and subclass are determinative, as they are here. *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (1986) (*quoting* H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE at 171, 190 (2d ed. 1985). ("The essence of a class action is common questions of law and fact and Rule 23(a)(2) reflects this"). It is important to note that the subsection does not demand that all questions of law and fact be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status. There is no qualitative or quantitative test in the Rule. Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.")

B. Plaintiffs are Adequate Class Representatives.

The lower court erroneously concluded that Plaintiffs were not adequate class representatives because their claims could not succeed as a matter of law. This conclusion arose as a result of the lower court's inappropriate consideration of the merits of this case, as reflected in its erroneous determination of mootness and its flawed application of both the PCR Act and the Tort Claims Act to the action below, as discussed *infra*, and should be reversed by this Court.

> "In determining whether a particular named plaintiff will adequately represent a proposed class pursuant to Rule 23(a)(4) one factor we must consider is whether the named plaintiff has interests that are antagonistic or adverse to those of the rest of the class . . . . The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class. The issue of whether a named plaintiff will adequately protect the interests of the class members is a question of fact which depends upon the circumstances of each case."

Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990) (citations omitted).

Here, the record reflects that the named Plaintiffs will fairly and adequately represent the interests of the absent class members. Neither of the named Plaintiffs has interests—economic or otherwise—antagonistic or adverse to those of the rest of the Injunctive Class and Damages Subclass members. Specifically, the named Plaintiffs seek a declaration that the Ordinances are legally unenforceable and an injunction against future attempts to enforce the Ordinances. They have retained competent and experienced counsel to assist in this endeavor.[17] Additionally, Plaintiff Babayan seeks a return of the fine she paid the Town of Turbeville based on the Town's enforcement of the challenged Traffic Ordinances. She additionally seeks refunds for all members of the Damages Subclass who paid fines that should have never been imposed. The Plaintiffs' interests do not conflict, but instead overlap with and complement, the interests of the Injunctive Class and Damages Subclass they seek to represent.

C. The Amount in Controversy is Satisfied and the Restitution Subclass is Not Barred by the South Carolina Tort Claims Act.

The court below held that Plaintiffs' subclass failed as matter of law, finding that Plaintiffs' claims for disgorgement were barred by the South Carolina Tort Claims Act. In so holding, the court relied upon S.C. Code Ann. § 15-78-60(4), erroneously concluding that this section provides that a governmental entity is not liable for a loss arising from enactment of its ordinances.

To the contrary, Plaintiffs' claims do not implicate the Tort Claims Act, which expressly limits its application as "the exclusive and sole remedy for any **tort** committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code

[17] Courts have held that "[t]he burden is on Defendants to establish inadequate representation." *McGlothin v. Connors*, 142 F.R.D. 626, 633–34 (W.D. Va. 1992).

Ann. § 15-78-200 (emphasis added). Plaintiffs' Amended Complaint does not allege any claim or cause of action comprising a tort. As such, the Tort Claims Act is not applicable to the instant matter and the lower court erred in finding otherwise.

Furthermore, the lower court's conclusion that the Plaintiffs could not meet Rule 23(a)(5)'s requirement of an adequate amount in controversy was clear error and requires reversal. Again, the circuit court erred in applying the Tort Claims Act to the case at bar. Further, as a threshold matter, the claims of the Injunctive Class for injunctive and declaratory relief do not require an amount in controversy. Finally, Defendant Turbeville Police Department admitted in discovery that the minimum fine for violation of the Town's ordinance totaled $155.00. *See* Def. Turbeville Police Dept. Resp. to Req. for Prod. (Mem. From Judge Coleman to Chief Chappell).[18]

Accordingly, while the claims of the members of the proposed Subclass seeking refunds of fines paid may arguably implicate the requirement that the amount in controversy exceed one hundred dollars for each class member, the evidence reveals that such requirement is easily met here. Accordingly, the trial court erred when it found that each class members' individual damages would fail to exceed one hundred dollars, given that Plaintiffs seek restitution and refund of the entire amount paid to the Town. (*See* Amend. Compl.)

South Carolina courts favor class actions as a means of saving the resources of both the courts and the parties by permitting litigation to proceed in an economical fashion. *See e.g.*, *Grazia*, 390 S.C. at 576–77, 703 S.E.2d at 204. The Plaintiffs, having satisfied all requirements of Rule 23(a), SCRCP, respectfully request that this Court reverse the lower court's denial of Plaintiffs'

[18] By way of background, Plaintiffs alleged that the amount of each fine exceeds one hundred dollars. (*See* Am. Compl. ¶ 73). In their Answer, Defendants denied these allegations. However, the Turbeville Police Department subsequently provided documentation in discovery reflecting that the minimum fine charged for violation of the Town Ordinance was one hundred fifty-five dollars ($155.00).

motion for class certification and remand the matter to the circuit court for further disposition in accordance with its ruling herein.

CONCLUSION

This lawsuit concerns issues of compelling public import which have garnered the attention of the Office of the Attorney General; the former Chief Justice of the South Carolina Supreme Court; and the Treasurer of the State of South Carolina, never mind their impact upon those everyday citizens who were wrongfully ticketed for violations of local ordinances that contravene established statutory and constitutional requirements. For all of the reasons stated herein, the Court should reverse the order of the lower court, enter judgment declaring the Town Traffic Ordinance and Penalty Ordinance unconstitutional and violative of state law, award such statutory attorneys' fees and costs as permissible under the law, and remand the matter to the lower court for proceedings to determine issues of class certification and restitution consistent with the Court's opinion.

Respectfully submitted,

s/ John S. Simmons
John S. Simmons (SC Bar No. 10260)
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201
jsimmons@simmonslawfirm.com
(803) 779-4600

Counsel for Appellants Rebecca J. Robbins and Marie Babayan, individually and on behalf of all those similarly situated

July 29, 2021
Columbia, South Carolina