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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Clifton B. Newman, Circuit Court Judge

Lower Court Case No. 2013-CP-06-0059
Appellate Case No. 2019-000599

Lorenda Robinson, Elaine Nix, Archie Patterson,
And Tami Bollerman, ... Plaintiffs,

Of Whom, Archie Patterson and Tami Bollerman are the Respondents[redacted]

v.

South Carolina Department of Employment and
Workforce, ... Appellant[redacted].

FINAL BRIEF OF RESPONDENTS ARCHIE PATTERSON AND TAMI BOLLERMAN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....................iii

STATEMENT OF THE CASE/PROCEDURAL HISTORY....................1

STANDARD OF REVIEW....................6

ARGUMENT....................7

1. THE DEPARTMENT WAS REQUIRED TO PROMULGATE REGULATIONS TO IMPLEMENT AND ESTABLISH PROCEDURES FOR THE ONLINE WORK SEARCH REQUIREMENT. 7
   - A. Standard of Review.................... 7
   - B. Statutory Construction....................7
   - C. The Department is Required to Promulgate Regulations....................8
   - D. The Plain Language of the Proviso Only Evidences the General Assembly's Intent to Fund the Online Work Search Requirement....................11
   - E. Before Enactment of Budge Proviso 67.7, the Department Implemented Policies Establishing the Online Work Search Requirement and Procedures for its Enforcement....................13
   - F. The Policies and Procedures Established to Enforce the Online Work Search Requirement Constituted a Binding Norm and Violated Art. I, §22 of the Constitution and S.C. Code Ann §41-35-670....................14
2. RESPONDENTS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES AND THE COURT HAD SUBJECT MATTER JURISDICTION 16
   - A. Standard of Review.................... ...16
   - B. The Record Supports the Trial Court's Decision that Respondents were not required to Exhaust Administrative Remedies Before filing this Action. 17
   - C. The Court has the Authority to Hear this Case....................18
3. THE RECORD SUPPORTS THE TRIAL COURTS RULINGS ON CLASS CERTIFICATION, STANDING, AND THAT A CLAIMS PROCESS REQUIRING PROOF OF ENTITLEMENT TO BENEFITS WAS NOT NECESSARY....................21
   - A. Standard of Review....................21
   - B. The Records Shows All the Prerequisites of Class Certification Has Been Met. Likewise, the Class Representatives Have Standing. 22
     1. The record supports the trial court's finding of commonality. 23
     2. The record supports the trial court's finding of typicality. 26
     3. The record supports the trial court's finding

of adequacy. 28
4. The record supports the trial court's finding that the class representatives have standing. 29
C. The Record Supports the Trial Court's Finding That a Claim Procedure is Not Necessary Since Class Members Have Met Their Burden of Proof and Need to do Nothing Else to Show Their Entitlement to Benefits...31

CONCLUSION..34

TABLE OF AUTHORITIES

Cases

Adamson v. Richland County School District One, 332 S.C.121,
503 S.E.2d 752, (Ct. App. 1998)....................16

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).....28

Amisub of South Carolina v. South Carolina Dept. of Health and Environmental Control,
407 S.C. 583, 757 S.E.2d. 408 (2014)....................8, 11

Auto Owner's Ins. Co. v. Newman, 385, S.C.187, 684 S.E.2d. 541, (2009)....................7

Baddourah v. McMaster, Op. No. 28013(S. Ct. 2021)....................18

Bodman v. State. 403 S.C. 60, 742 S.E.2d. 363, (2013)....................29

Brown v. James, 389 S.C. 41, 697 S.E.2d. 604 (Ct. App. 2010)....................17, 18

Califano v. Yamasaki, 442 U.S. 682, 99 S. Ct. 2545, 61 L.Ed.176 (1979)....................22

Captains Quarters Motor Inn Inc. v. South Carolina Coastal Council 306 S.C.
488, 413 S.E.2d 13, (S.C. 1991)....................15, 18

Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 642 S.E.2d 751 (2007)..........7

Charleston Television, Inc. v. South Carolina Budget and Control Bd., 301 S.C. 468,
392 S.E.2d 671 (1990)....................15

Charleston Trident Home Builders, Inc. v. Town Council of Summerville, 369
S.C. 498, 632 S.E.2d 864 (2006)....................17

City of Arlington, Texas v. F.C.C., 569 U.S. 290, 133 S.Ct. 1863,
185 L.Ed 941 (2013))....................20

DeLeon v. Bank of America N.A. (USA) 2012 W.L. 2568142,
(Not reported in F.Supp.2d. (2012))....................33

Dema v. Tenant Physician Services – Hilton Head, Inc., 383 S.C.115,
678 S.E.2d. 430, (2009)....................19

Ex parte Allstate Ins. Co., 248 S.C. 550, 151 S.E.2d 849, (1966)....................18

Gardner v. South Carolina Department of Revenue, 353, S.C. 1, 577 S.E.2d. 190,
(2003)....................21, 22, 23

Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d.197 (2010)..........22

Hensley v. South Carolina Department of Social Services, 429 S.C. 144,
838 S.E.2d. 510 (2020)... 23

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)...8

Hospitality Management Associates, Inc. v. Shell Oil, Co., 356 S.C. 644,
591 S.E.2d. 611 (2004)..28

Hyde v. S.C. Dept. of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994)..............................16

Hyman v. S.C. Emp. Sec. Comm'n. 234 S.C. 369, 108 S.E.2d. 554 (1959)...........................1

In Re Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001)...8

Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000)..................................8

Joseph v. South Carolina Dept. of Labor, Licensing, and Regulation, 417 S.C. 436,
790 S.E. 2d 763 (2016)..10, 14, 20

Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001)..........................22

King v. American General 386 S.C. 82, 687 S.E.2d 321 (2009).....................................26, 27

Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348,
523 S.E.2d 781 (1999)..22, 33

Lozada v. South Carolina Law Enforcement Division, 395, S.C. 509,
719 S.E.2d. 258, (2011)..6

Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803)...................................18

McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986).....................................24

McIntyre v Securities Commissioner of South Carolina, 425 S.C. 439, 446,
823 S.E.2d 193, 196 (Ct. App. 2018)..15

Noisette v. Ismail, 299 S.C. 243, 384 S.E.2d 310 (Ct.App.1989) 6

Paris Mountain Water Co. v. City of Greenville, et. al., 110 S.C. 36, 96 S.E. 545 (1918).........8

Peoples Nat. Bank of Greenville v. South Carolina Tax Commission, 250
S.C. 187, 156 S.E.2d. 769 (1967)..8

Pope v. Heritage Communities, Inc., 395 S.C. 404, 717 S.E.2d 765 (Ct. App, 2011)............26

Responsible Economic Development v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E.2d 425 (2007)..........................15, 18

S.C. Dept. of Transp. v. Horry Cnty., 391 S.C. 76, 705 S.E.2d 21 (2011)..........................6

South Carolina Public Interest Foundation v. South Carolina Department of Transportation, 421 S.C. 110, 804 S.E.2d 854 (2017)....................................20, 29

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)...16

State v. Sweat, 386 S.C. 339, 688 S.E.2d 569 (2010)...8

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Tilley v. Pacesetter Corp., 333 S.C. 33, 508 S.E.2d 16 (1998)...............................21, 26

Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011)..........................8

Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 355 S.E.2d 531(1987)...............15

Waller v. Seabrook Island Property Owner's Ass'n, 300 S.C. 465, 388 S.E.2d. 799 (1990)... 28

Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000)..17

Wardlaw v. South Carolina Dept. Social Services, 427 S.C. 197, 829 S.E.2d 718 (Ct. App. 2019)...16

Constitutions, Statutes, and Rules

S.C. Const. art. 1, §22..10, 14, 15, 20, 24

S.C. Const. art. IV, § 21...11

S.C. Const. art. V, § 11..19

S.C. Code Ann. §1-23-10(4)..10

S.C. Code Ann. § 2-7-60..11

S.C. Code Ann. §2-15-10...9

S. C. Code Ann. §15-53-30...20

S. C. Code Ann. §15-53-130..20

S. C. Code Ann. §41-27-20 1

SC Code Ann. § 41-27-510 9

S.C. Code Ann. §41-29-10 1

S. C. Code Ann. §41-29-110 ....1, 9, 10, 20

S.C. Code Ann §41-29-300..19

S.C. Code Ann§41-29-300(C)(1)..19

S. C. Code Ann. §41-35-110 1

S. C. Code Ann. §41-35-110(1)..9

S. C. Code Ann. §41-35-110(3)...11, 12

S. C. Code Ann. §41-35-120(5)...11, 12

S.C. Code Ann. §41-35-670...3, 11, 14, 15, 24

SC Code Ann. § 41-35-610..9

S.C. Code Ann. §41-35-690..19, 20

S.C. Code Ann. §42-1-540..19

Act No. 91, 2015 S.C. Acts 912, §83.5...10

Act No. 101, 2013 SC Acts 1515, §83.6...10

Act No. 146, 2010 S.C. Acts..9

Act No. 146, 2010 S.C. Acts, §112 9

Act No. 286, 2014 S.C. Acts 3137, §83.6...10

Act No. 288, 2012 S.C. Acts 2617-2620 (Pt. 1A Approp. Act)...11

Act No. 288, 2012 S.C. Acts 2854, §67.7...10

S.C. Code Ann. Reg. §47-104..16

Rule 23, FRCP……………………………………………………………………..23

Rule 23(B), FRCP…. ………………………………………………………………22

Rule 23, SCRCP………………………………………………………… 22, 23, 34

Rule 23(a), SCRCP…………………………………………………………………22

Rule 23(a)(3), SCRCP……………………………………………………………26

Rule 23(a)(4), SCRCP……………………………………………………………28

Rule 23(d)(2), SCRCP……………………………………………………………21

Rule 57, SCRCP…………………………………………………………………..20

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199 (1st Ed. 1985)……………………………………………………………… 23

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STATEMENT OF CASE/ PROCEDURAL HISTORY

This case involves the duty of the South Carolina Department of Employment and Workforce (department) to promulgate regulations as required by statute to ensure the payment of benefits to unemployed persons who need it. The purpose of providing unemployment benefits is to lighten the burden caused by unemployment "...which so often falls with crushing force on the unemployed worker and his family...." S. C. Code Ann. §41-27-20 (1976, as amended). To facilitate this purpose, the legislature created the South Carolina Department of Employment and Workforce and charged it with the administration of the unemployment insurance laws of this state. S.C. Code Ann. §41-29-10 (1976, as amended). The department "... must promulgate regulations necessary to carry out the provision of the unemployment security laws." S. C. Code Ann. §41-29-110 (1976, as amended).

To be eligible to receive unemployment benefits, a claimant must be able to work, available for work and actively seeking work. S. C. Code Ann. §41-35-110 (1976, as amended). Claimants have the burden of proving they are entitled to receive benefits. *Hyman v. S.C. Emp. Sec. Comm'n.* 234 S.C. 369, 373, 108 S.E.2d. 554, 556 (1959) To meet this burden, the department requires claimants to certify weekly, by phone or online, their continuing entitlement to benefits (R. p. 1082, Para 5 & 6; R. pp. 1112-1113) and requires claimants to maintain a record of work seeking activities (Form UCB-303). (R. p. 1089) The department does not review these forms weekly but may periodically review them for compliance. (R. pp. 1082-1083, Para. 10 -12)

In March of 2012, the department revised its work search policy to require all claimants to search for employment though the South Carolina Works Online System (SCWOS). (Supp. R. p. 38) The department began enforcing this policy in August of 2012. As a result of this mandatory requirement, over 61,900 workers were denied benefits between August 2012 and early February 2013 (Supp. R. p. 35). This policy was not promulgated by regulation as statutorily required.

Respondents then filed this declaratory judgment action as a class action seeking a ruling that the department's failure to promulgate regulations implementing its online work search requirement resulted in a wrongful denial of unemployment benefits to themselves and others (R. p. 164). The department answered, objecting to class certification, and denying it was required to promulgate its online work search requirement as a regulation. It also asserted that respondents lacked standing, failed to exhaust administrative remedies, as well as other defenses (R. p. 157). This case was certified as a class action (R. pp. 93-100).

The record in this case consists of documentary evidence stipulated in the record, deposition testimony and live testimony taken before the court at hearings held upon the department's motion to take evidence on the issue of standing and exhaustion of remedies. This case was heard without a jury.

The record reflects that in March of 2012, the department revised its work search policy to require all claimants to make a minimum of four (4) job contacts per week.[1] At least one of the job contacts must be made through SCWOS. (Supp. R. p. 38)

Kevin Cummings, the department's Manager of UI (Unemployment Insurance) Policies and Procedures Unit and 30(b)(6) witness, also described the policy. According to Cummings, when a claimant is deemed out of compliance with the department's requirements for a given

[1] Procedure Transmittal Letter 1267-3, (Supp. R. p. 38) dated August 10, 2012

week, it takes a statement from the claimant on the reason for non-compliance. Then, either a disqualification or a determination of eligibility is issued by a claims adjudicator. (R. p. 1085, Para. 22-24) S.C. Code Ann. §41-35-670 allows the department to stop benefits only after the claims adjudicator makes a determination (ruling) that benefits are not due.

Cummings indicates this same procedure is used for a claimant's failure to conduct an online work search, but there are apparent differences. (R. p. 28) When the SCWOS system detects that a claimant did not conduct an online work search, it automatically stops payment of benefits in violation of S.C. Code Ann. §41-35-670.[2] Then, it sends a notice particular to the online work search requirement entitled: "Work Search Verification Failure – Benefits Stopped". (Supp. R. p. 25) The notice reads:

> WORK SEARCH VERIFICATION FAILURE – BENEFITS STOPPED
>
> YOU ARE REQUIRED TO MAKE AT LEAST ONE (1) OF YOUR FOUR (4) WEEKLY JOB CONTACTS USING THE DEPARTMENTS JOB SERVICE WORK SEARCH WEBSITE: SC WORKS ONLINE SERVICES (JOBS.SCWORKS.ORG). OUR RECORDS INDICATE THAT YOU FAILED TO MAKE AN SC WORKS JOB SEARCH CONTACT FOR THE CLAIM WEEK ENDING [claim week date]
>
> THEREFORE, YOUR BENEFITS HAVE BEEN STOPPED.
>
> PLEASE REPORT TO YOUR LOCAL SC WORKS CENTER IMMEDIATELY IF YOU WOULD LIKE TO RECEIVE FUTURE BENEFITS. BRING THIS NOTICE AND YOUR FORM UCB-303, REPORT OF WORK SEEKING ACTIVITIES, WHEN YOU REPORT.

This form was mailed to all claimants/class members who did not receive benefits because they purportedly failed to do an online job search. (Supp. R. p. 310, line 6 – p. 311, line 15; Supp. R. pp. 38-39). The notice does not inform claimant that the purpose of the meeting is to issue a ruling on whether they complied with the work search requirement.

[2] See 2/15/19 Order, page 13 (R. p. 36). This finding was not appealed.

Moreover, the department admitted its adjudication procedure used in issuing its rulings (determinations) is set forth in department guidelines but is not promulgated by regulation as statutorily mandated. (Supp. R. p. 312, line 25 – p. 314, line 11)

For class representatives who appeared at the department, determinations were then issued disqualifying them from receiving benefits. Out of the 61,900 persons who were denied benefits from August 2012 through February 2013, there were 214 successful appeals from the adjudicator's decisions. (R. p. 1085; Second Cummings affidavit, para. 25) Class representatives did not file an appeal, and the department would not have considered its failure to promulgate regulations on appeal had they done so. (R. p. 926, lines 16-25; Supp. R. p. 86 line 13 – p. 87, line 22)

The class representatives were denied weekly benefits because of their inability or failure to apply online through SCWOS for employment. No other reason was given for denial of benefits on the department's "Determination by Claims Adjudicator on Claim for Benefits" form issued to the class representatives. (Supp. R. pp. 23 & 24)

Tami Bollerman was notified by the department that her weekly benefits were stopped for the week of October 7, 2012, because of she failed to make an SCWOS (online) job search. Her file from the department contains the "Work Search Verification Failure-Benefits Stopped" form (Supp. R. p. 552) directing her to report to her local SC Works Center immediately if she would like to receive future benefits.

Ms. Bollerman (also known as Tammy Weber) complied with the notice and appeared at the department office and explained she did conduct an online job search. (R. p. 863, line 14, p. 868, line 4). Although she brought in her record of work seeking activities (form UCB-303), the

department representatives did not ask to see it. The whole discussion concerned compliance with the online work search requirement. (R. p. 877, line 15, p. 879, line 8)

As a result, Ms. Bollerman's benefits for the week 10/7/12 were denied. The sole reason given by the claims adjudicator for denying benefits was the failure to perform the online work search (R. p. 888, lines 6-16; Supp. R. p.23)

In August of 2012, Patterson's benefits were stopped for failing to conduct an online work search. (R. p. 804, line 24 – p. 806, line 5) Like Bollerman, Patterson's SCDEW file contains the "Work Search Verification Failure – Benefits Stopped" notice form telling him his benefits were stopped for failing to conduct an online work search. He was instructed to report to the department immediately with the notice and his UCB-303, Report of Work Seeking Activities. (Supp. R. p. 25)

Like Bollerman, Patterson appeared at the department pursuant to the Work Search Verification Failure Notice. As a result, a claims adjudicator issued a Determination denying benefits for the week of August 19, 2012, for failing to comply with the online work search requirement. The form gives no other reason for denial. (Supp. R. p. 24).

Mr. Patterson continued to receive benefits, but in 2013 became frustrated with the unemployment claims process and stopped applying for them. (R. p. 813, lines 6-24). At the time he stopped receiving benefits, Mr. Patterson had not exhausted his unemployment benefits. (R. p. 836, lines 18-21)

A hearing was held on October 31, 2018, regarding the merits of the Respondents' claim for declaratory judgment. The trial court addressed collateral matters, including whether class members would need to file a claim, at a subsequent hearing on February 5, 2018.

The court issued is Order on February 15, 2019 addressing the merits of the case, notice to the class, the claims procedure, and other issues raised by the parties. On the merits the court found the department was required to promulgate regulations before implementing the online work search requirement. From the February 5, 2019, hearing the court found a claims procedure was necessary since class members still had to prove their entitlement to benefits for the week denied. The claims process would have required class members to submit their record of work seeking activities, or a recreation of it, to prove entitlement to their benefit. (R. pp. 43-48)

Respondents filed a 59 (e) motion on the issue of the necessity of a claims process since class members had already made certification of their entitlement to benefits in the same manner as benefit claimants who were not part of the class. After hearing argument and reviewing the evidence previously submitted, the court agreed and found a claims procedure was not necessary. The court also altered the class definition to conform with its ruling. (R. pp. 5-10)

STANDARD OF REVIEW
(General)

A declaratory judgment action is neither legal nor equitable, and therefore the standard of review is determined by the nature of the underlying issue." *Lozada v. South Carolina Law Enforcement Division*, 395, S.C. 509, 511, 719 S.E.2d. 258, 259 (2011) (internal citations omitted). "Unless the cause of action and the relief sought in a declaratory judgment action are distinctly equitable, the action will be considered one at law." *Noisette v. Ismail,* 299 S.C. 243, 247, 384 S.E.2d 310, 312 (Ct.App.1989) When reviewing an action at law, our scope of review is limited to the correction of errors of law. *S.C. Dept. of Transp. v. Horry Cnty.,* 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011). "In an action at law tried without a jury, the appellate

court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." Auto Owner's Ins. Co. v. Newman, 385, S.C.187, 191, 684 S.E.2d. 541, 543 (2009)

ARGUMENT

As noted by the department, the issues in this case are straightforward. The issue of whether the department was required to promulgate regulations to establish procedures for its online work search requirement will be determinative of all class claims. Class relief is the most efficient method of adjudicating these claims. Class members have already met their burden of proving their eligibility to receive benefits. Identifying class membership is also straight forward and can be performed by a simple review the class member's file.[3] Exhaustion of any administrative remedy would have been futile, and declaratory relief is proper.

1. THE DEPARTMENT WAS REQUIRED TO PROMULGATE REGULATIONS TO IMPLEMENT AND ESTABLISH PROCEDURES FOR THE ONLINE WORK SEARCH REQUIREMENT.

A. Standard of Review

Statutory interpretation is a question of law and is reviewed de novo and the court is free to decide the issue without any deference to the lower court. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 642 S.E.2d 751(2007)

B. Statutory Construction

[3] All class members would have received the work search failure benefits stopped notice and the reason for denial of benefits would be failure to conduct the online search.

The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Moreover, statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. A budget proviso can temporarily suspend the operation of a permanent statute if the intent to do so is clearly manifest and if there is an irreconcilable conflict between the proviso and the permanent statute. Amisub of South Carolina v. South Carolina Dept. of Health and Environmental Control, 407 S.C. 583, 757 S.E.2d. 408 (2014), Hodges v. Rainey, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citations omitted). A statute cannot be construed in a manner which renders it unconstitutional. Peoples Nat. Bank of Greenville v. South Carolina Tax Commission, 250 S.C. 187, S.C. 156 S.E.2d. 769 (1967); Paris Mountain Water Co. v. City of Greenville, et. al., 110 S.C. 36, 96 S.E. 545 (1918) The use of the word "must" is considered mandatory under principles of statutory interpretation. In Re Matthews, 345 S.C. 638, 550 S.E.2d. 311 (2001).

C. The Department is Required to Promulgate Regulations

In Act No. 2010 S.C. Acts 146, the S.C. General Assembly made substantial revisions to the unemployment law. Among these revisions were amendments to various statutes mandating the department to promulgate regulations. Prior to the 2010 amendments, regulations were permissive. SC Code Ann.§ 41-27-510 (1976, as amended) now provides: "[t]he department **must promulgate regulations** applicable to unemployed individuals, making distinctions in the procedures regarding total unemployment, part-total unemployment, partial unemployment of the individuals attached to their regular jobs and other forms of short-time work as the department considers necessary." (emphasis added) Section 41-29-110 provides: "[t]he department **must promulgate regulations necessary** to carry out the provisions of Chapters 27 through 41 of this title, employ personnel, make expenditures, require reports not otherwise provided for in these chapters, conduct investigations or take other action as it considers **necessary or suitable** to administer its duties and exercise its powers pursuant to the title." (emphasis added) Section 41-35-610 provides: "[a] request for determination of insured status, a request for initiation of a claim series in a benefit year, a notice of unemployment, a certification for waiting-week credit, and a claim for benefits **must be made pursuant to regulations the department promulgates**." (emphasis added) Section 41-35-110(1) provides "[a]n unemployed insured worker is eligible to receive benefits with respect to a week only if the department finds he... has made a claim for benefits with respect to that week **pursuant to regulations prescribed by the department.**" (emphasis added)

Moreover, Section 112 of 2010 Act 146 directed the Legislative Audit Council[4] to perform independent management audits of the department's finance and operations. At a

[4] The Legislative Audit Counsel (LAC) was created by the General Assembly and is charged with review of operation of state agencies to assist the General Assembly. SC Code Ann § 2-15-10, et.seq. (1976)

minimum, the audits were required to ... "(4) examine the unemployment eligibility benefit process for efficiency and **compliance with law** and agency policy" (emphasis added)

In its May 2014 report entitled "*A Management Review of the Department of Employment and Workforce*", the Legislative Audit Council found that the department had not promulgated regulations for policies that have general applicability to the public. Citing S.C. Code Ann. §41-29-110 (providing the department must promulgate regulations to carry out its duties) the report noted that the department had not put its job search requirements, including its online job search requirement, into regulation. (Supp R. pp. 212-213)

"Regulation" includes "... each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of an agency...." S.C. Code Ann. §1-23-10(4). A policy or guideline has the force of law if it creates a binding norm. *Joseph v. South Carolina Dept. of Labor, Licensing, and Regulation*, 417 S.C. 436, 453, 790 S.E. 2d 763, 772 (2016).

The department asserts a regulation was not necessary because of Budget Provisos enacted in fiscal years 2012-2013 (Proviso 67.7), 2013-2014 (Proviso 83.6), 2014-2015 (Proviso 83.6), and 2015-2016 (Proviso 83.5).[5] On appeal, it does not argue the Provisos created an irreconcilable conflict with the permanent statutes requiring it to promulgate regulations which would suspend their operation. Rather, the department asserts these Provisos "hit the bullseye" and no further action on its part was necessary. This argument ignores the plain language of the Provisos. Moreover, it ignores that the department did - and in fact had to - implement policies and procedures necessary to enforce the online work search requirement. These policies and procedures were implemented without promulgating regulations and violated Art. I, §22 of the

[5] Act No. 288, 2012 S.C. Acts 2854, §67.7; Act No. 101, 2013 S.C. Acts 1515, §83.6; Act No. 286, 2014 S.C. Acts 3137, §83.6; Act No. 91, 2015 S.C. Acts 912, §83.5, respectively.

South Carolina Constitution, the Administrative Procedures Act, as well as South Carolina Code Ann. §41-35-670.

D. The Plain Language of the Proviso Only Evidences the General Assembly's Intent to Fund the Online Work Search Requirement

"[T]he General Assembly must structure each appropriations act so that each item or section designates an amount of money allocated for a particular function." *Amisub of South Carolina, Inc. v. South Carolina Department of Health & Environmental Control*, 407 SC 583, 592, 757 S.E. 2d. 408,413 (2014) citing S.C. Code Ann. § 2-7-60 (2005) and S.C. Const. Art. IV, § 21(other citations omitted). The 2012-13 Appropriations Act did just that. Part IA of the 2012-2013 Appropriations Act[6] provided a specific amount to be allocated to the department for its operations, including the SUTA[7] contingency assessment fund, and Part IB, Proviso 67.7 directed a percentage of that fund to be spent on enforcement of §41-35-110(3) and §41-35-120(5). But it did nothing more. The Proviso did not establish policies and procedures necessary for the enforcement of the online work search requirement. Nor did it suspend the department's statutory duty to establish these procedures by regulation.

> The 2012-2013 Proviso 67-7 and subsequent Provisos provided:
>
> (DEW: SUTA Contingency Assessment Funds) **Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement** of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code, via Eligibility Reviews, Random Verification of Job Contacts and Wage Cross Matches during those weeks covered by the South Carolina State Unemployment Tax Authority (SUTA), and to ensure seated meetings with Unemployment Insurance claimants **and requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified.** The agency must also inform claimants in advance that Eligibility Reviews and Random Verification of Job Contacts will be used by the

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[6] Act No. 288, 2012 S.C. Acts 2617-2620

[7] State Unemployment Tax Act

Department to verify compliance with laws administered by the agency. (emphasis added)

A plain reading of the Proviso indicates it is a funding mechanism.[8] The Proviso begins with "Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement of Section 41-35-110(3) and Section 41-35-120(5) …." It then lists five (5) ways of enforcement: 1) Eligibility Reviews; 2) Random Verification of Job Contacts; 3) Wage Cross matches; 4) to ensure seated meetings with Unemployment Insurance claimants; and 5) requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS) so that it can be electronically verified. While it is clear the Proviso is directing the department to Spend 30% of the (SUTA) Contingency Assessment Funds on the five listed items to enforce §41-35-110(3) and 120(5), the Proviso neither defines these items nor does it give any direction or instruction for the implementation of these items or establish any mode of procedure for their enforcement. Moreover, there is no language which expressly or by implication suspends the department's duty to promulgate regulations. All the Provisos do is direct the expenditure of monies from the contingency assessment funds for the specific purposes outlined above.[9] The Provisos are silent on how they are to be implemented. In fact, the department, by necessity, did

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[8] Laura Robinson, the Assistant Executive Director in charge of the Unemployment Insurance Department, who is no longer employed with the department, testified in her deposition that the Proviso was a **funding mechanism.** (Supp. R. p. 129, line 1 – p. 133, line 15). In its 30(b)(6) Deposition, the department's witness designated as the most knowledgeable regarding the Budget proviso testified: **"The only thing I know about this particular proviso is that it directed us to use 30 percent of the contingency fund collections for specific unemployment insurance program efforts."** (Supp. R. p. 45 [condensed deposition p. 13, line 16 – p. 14, line 1]).

[9] The department has taken inconsistent positions regarding the meaning of the Proviso. In its response to the LAC's management report that it had failed to promulgate regulations regarding the online work search requirement, the department claimed the proviso was a directive of the General Assembly, Yet, in response to the LAC's finding that the department had wrongly suspended eligibility reviews - which were funded by the same proviso - the department indicated it was part of a "laundry list of exemplary integrity initiatives."(Supp. R. pp. 268-269) As noted by the trial court, the proviso cannot be a directive for one of the listed items and a suggestion for another. (R. p. 39)

establish policies and procedures to implement and enforce compliance with the requirement.

E. Before Enactment of Budget Proviso 67.7, the Department Implemented Policies Establishing the Online Work Search Requirement and Procedures for its Enforcement

To implement and enforce the online work search requirement, it was necessary for the department to establish policies and procedures. These policies and procedures are set forth in the Second affidavit of Kevin Cummings, as well as the exhibits in the affidavit, and department's Procedural Transmittal Letter, Number 1267-3. According to this letter: "In March of 2012 [the department's] work search policy was revised to require all claimants to make a minimum of four (4) job contacts per week. At least one (1) of the contacts must be made via SC Works Online Services...and all job contacts must be documented on the Form 303, Record of Work Seeking Activities." (Supp. R. p. 38) This policy implementing procedures for the online work search requirement was adopted by the department three months before enactment of the 2012-2013 Appropriations Act and Budget Proviso 67.7.

The department also established procedures for enforcement of this policy. If the claimant failed to make an online search on the SCWOS system, the department mailed the WORK SEARCH VERIFICATION FAILURE – BENEFITS STOPPED notice to them. This notice is set forth above on Page 3. Both class representatives and all class members were mailed this letter, as well as all class members. (Supp. R. p. 25; Supp. R. p. 310, line 6 – p. 318, line 4; Supp. R. p. 38) While the notice instructs the claimant to appear if he/she wishes to receive future benefits, the purpose of appearance is to conduct a determination hearing-after the fact- to stop benefits. (id) It does not notify the claimant that a statement will be taken, that a hearing will be conducted or the true purpose of reporting to the department's office. After the hearing,

class members were issued a determination letter stating that benefits were stopped for failing to conduct an online work search. As discussed below, these procedures were binding on the department.

F. The Policies and Procedures Established to Enforce the Online Work Search Requirement Constituted a Binding Norm and Violated Art. I, §22 of the Constitution and S.C. Code Ann. §41-35-670.

A policy or guideline has the force of law if it creates a binding norm. *Joseph v. South Carolina Dept. of Labor, Licensing, and Regulation*, 417 S.C. 436, 453, 790 S.E. 2d 763, 772 (2016). The key inquiry is:

> the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm. *Id*. 417 S.C. 454, 790 S.E. 772.

The department's policy of requiring online work searches is a mandatory requirement for all unemployment claimants as are its procedures for enforcement of the policy. The department consistently refers to the policy as a requirement and denies benefits if its computer system detects a claimant did not make the search. In fact, Procedure Transmittal Letter 1267-3 states: "Warnings are NOT acceptable for SCWOS searches." (Supp. R. p. 38). Since the department bound itself to follow this policy, it has the force of law and constitutes an invalid regulation.

As a creature of statutes, an agency of the state only has the powers conferred upon it by the legislature. If regulations are mandated, the agency must promulgate regulations to carry out its duties. *Captains Quarters Motor Inn Inc. v. South Carolina Coastal Council* 306 S.C. 488,

490, 413 S.E.2d 13, 14 (S.C. 1991). Any action taken by [the agency] outside of its statutory and regulatory authority is null and void. *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 553, 641 S.E. 425, 428 (2007), citing *Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). See also *Captains Quarters* above, and *Charleston Television, Inc. v. South Carolina Budget and Control Bd.*, 301 S.C. 468, 392 S.E.2d 671 (1990) (failure to promulgate regulations for competitive bidding as mandated by statute rendered agency's lease approval invalid).

The department failed to promulgate regulations regarding the online work search requirement and, therefore, was without authority to implement and enforce it. Moreover, the procedure the department used to notify and adjudicate class members claims for failing to conduct an online search was not by a mode of procedure prescribed by the General Assembly as required by Article I, Section 22 of the S.C. Constitution.[10] In fact, the department admitted the adjudication process used by claims adjudicators had been established by department guidelines, not by regulation. (Supp. R. p. 313, line 10 – p. 314, line 16) The failure to promulgate rules regulating the procedure for administrative hearings violates Article I, Section 22. *McIntyre v Securities Commissioner of South Carolina*, 425 S.C. 439, 446, 823 S.E.2d 193, 196 (Ct. App. 2018) Further, the department's procedure of stopping payment before a determination was made violated S.C. Code Ann. §41-35-670 (requiring a redetermination or subsequent determination before payments are stopped).[11] The General Assembly could not have intended this result. Moreover, construing the Proviso to suspend the department's duty to promulgate

[10] A regulation promulgated by an agency and approved by the General Assembly would satisfy the requirements of Art. 1, §22.

[11] On page 13 of the February 15, 2019 Order, (R. 36) the trial court found the department's procedures violated S.C. Const. Art I, Section 22 and S.C. Code 41-35-670. These findings have not been appealed.

regulations in violation of this constitutional provision could not have been the intent of the General Assembly.[12]

2. RESPONDENTS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES AND THE COURT HAD SUBJECT MATTER JURISDICTION

A. Standard of Review

The doctrine of exhaustion of administrative remedies is generally considered a rule of policy and discretion, rather than one of law. _Stinney v. Sumter School District 17_, 382 S.C. 52, 358, 675 S.E.2d 760, 763 (2009), citing _Adamson v. Richland County School District One,_ 332 S.C.121, 125, 503 S.E.2d 752, 754 (Ct. App. 1998). The doctrine is not jurisdictional. *Id.* Whether administrative remedies must be exhausted is a matter within the trial court's sound discretion and its decision will not be disturbed on appeal absent an abuse of discretion. _Id_, citing _Hyde v. S.C. Dept. of Mental Health,_ 314 S.C. 207, 208, 442 S.E.2d 582, 582–83 (1994).

Although not set forth in its Statement of Issues, the department asserts the court does not have subject matter jurisdiction to adjudicate this case. Nevertheless, the court may consider the issue of subject matter jurisdiction at any time _State v. Gentry_, 363 S.C. 93, 610 S.E.2d 494 (2005). While the "failure to exhaust administrative remedies goes to the prematurity of a case, subject matter jurisdiction refers to a court's power to adjudicate a case. _Wardlaw v. South Carolina Dept. Social Services_, 427 S.C. 197, 829 S.E.2d 718 (Ct. App. 2019) The issue of

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[12] In 2016, the department finally promulgated S.C. Code Ann. Reg. §47-104 establishing the online work search requirement. The regulation is sparse and mirrors the language of the Budget Proviso. While it does allow the department to waive the online requirement, it still does not provide a mode of procedure to enforce the requirement. Moreover, the department has yet to promulgate any regulation establishing procedures for its claims adjudication process. The class period ends July 1, 2016. This case does not involve the adequacy of the 2016 regulation, nor the department's procedures after enactment of the regulation and those issues are not before this Court.

subject matter jurisdiction is a matter of law, id.

B. The Record Supports the Trial Court's Decision that Respondents were not required to Exhaust Administrative Remedies Before filing this Action.

When exhaustion of remedies is statutorily mandated, the exceptions to exhaustion are few, and legislative intent prevails. Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000). Since the legislature would not require a futile act, a generally recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act." Id 343 S.C. at 19, 538 S.E.2d at 247. "Futility... must be demonstrated by a showing comparable to the administrative body taking a hard and fast position that makes an adverse ruling a certainty." Brown v. James, 389 S.C. 41, 54, 697 S.E. 604, 611(Ct. App. 2010)

Moreover," ...[a] party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." Charleston Trident Home Builders, Inc. v. Town Council of Summerville, 369, S.C. 498, 502, 632 S.E.2d 864, 867 (2006). In such an instance, exhausting remedies would be futile.

Romi Robinson serves as the department's Chief Administrative Hearing Officer and presides over the Lower Authority Appeals Department which hears appeals from the claims adjudicator level. Ms. Robinson testified that the department's appeals process would not have addressed the legal issue in this case – whether it was required to promulgate regulations prior to implementing its online work search requirement. Ms. Robinson testified that the department's Appellate Panel only has the power to resolve factual disputes. It would not resolve issues of law pertaining to the authority of the department to implement the online work search requirement without first promulgating regulations. (R. p. 926, lines 16-25; Supp. R. p. 86, line 13 – p. 87,

line 22) Therefore, appealing to the Appellate Panel would not have afforded the Respondents a remedy and would have been futile.

In addition, the legislature would not require exhaustion of administrative remedies when an agency is acting outside of its authority. "As a creature of statutes, regulatory bodies ... have only the authority granted them by the legislature.... Any action taken ... outside of its statutory and regulatory authority is null and void." *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) (internal citations omitted). In such an instance, an exception would exist to any statutorily mandated requirement to exhaust administrative remedies, since the conduct complained of would be beyond the administrative agency's authority. *Brown v. James* 389 S.C. 41, 55, 697 S.E.2d 604, 612 (2010) ("Another exception to the exhaustion requirement is recognized when an agency has acted outside of its authority"). The issue of whether an agency is acting outside the scope of its authority is a matter of law and excuses any failure to first seek administrative remedies. *Ex parte Allstate Ins. Co.*, 248 S.C. 550, 568, 151 S.E.2d 849, 855 (1966). The department was without authority to implement the online work search requirement without first promulgating regulations, since it is statutorily mandated to do so. See *Captain's Quarters, supra*. Respondents are therefore not required to exhaust administrative remedies.

C. The Court has the Authority to Hear this Case.

"A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question." *Baddourah v. McMaster*, Op. No. 28013(S. Ct. 2021) "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803)

"South Carolina trial courts are vested with general original jurisdiction in civil cases, except those cases in which exclusive jurisdiction shall be given to inferior courts. S.C. Const. art. V, § 11. In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." *Dema v. Tenant Physician Services – Hilton Head, Inc.*, 383 S.C.115, 120, 678 S.E.2d. 430, 433 (2009).

The department points to S.C. Code Ann. §41-35-690 which provides:

> The procedure provided in this chapter for appeals from a determination or redetermination to the appeal tribunal and for appeals from the tribunal, first to the Department of Employment and Workforce Appellate Panel, as established by Section 41-29-300, and afterward to the administrative law court, pursuant to Section 41-29-300(C)(1), is the sole and exclusive appeal procedure.

However, as the circuit court found, this action was not an appeal from an initial determination, redetermination or subsequent determination. (R. pp. 42-43) Moreover, the statute does not say the procedure mentioned above is the sole and exclusive remedy as it has in other situations.

For example, S.C. Code Ann. §42-1-540 of the Worker's Compensation Act provides: "[t]he rights and remedies granted by [the Worker's Compensation Act] to an employee... shall exclude all other rights and remedies of such employee ... as against his employer, at common law or otherwise, on account of such injury, loss of service or death." This section clearly and unequivocally provides worker's compensation is the sole remedy against an employer for an employee's injuries and illustrates the General Assembly knows how to limit remedies when they intend to do so. The language of §41-35-690 does not apply to all remedies and limits only the appeal process.

The Declaratory Judgment act provides: '[a]ny person...whose rights, status or other legal relations are affected by a statute...may have determined any question of construction or

validity arising under the...statute...and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. §15-53-30 The declaratory judgment Act is remedial and to be liberally construed and administered. S.C. Code Ann. §15-53-130. "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." S.C.R.C.P. 57. "A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character." *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 120, 804 S.E.2d 854, 860 (2017)

Much more is at issue in this case than individual claims for benefits. The subject matter of this case is whether the department was required to promulgate regulations prior to implementing and establishing procedures for its online work search requirement. Declaratory relief is therefore appropriate and necessary in this case.

The department's argument that the court lacks subject matter jurisdiction would allow an administrative agency to avoid judicial oversight of its enforcement of statutory provisions. Moreover, the department's failure to promulgate regulations to establish its policies and procedures as mandated by §41-29-110 and ultimately Art. I §22, allows it to avoid legislative oversight, since the General Assembly would have an opportunity to review a proposed regulation. Such a result ignores the checks and balances of our Constitution. See *Joseph, supra*. At 417 S.C. 458, 790 S.E.2d. 774-775 (Kittridge concurrence - "[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny." citing C.J. Roberts dissent in *City of Arlington, Texas v. F.C.C.*, 133 S.Ct. 1863, 1877, (2013)) This could not have been the intent of the General Assembly in enacting §41-35-690, which by its very terms applies only to an appeals process.

3. THE RECORD SUPPORTS THE TRIAL COURT'S RULINGS ON CLASS CERTIFICATION, STANDING, AND THAT A CLAIMS PROCESS REQUIRING PROOF OF ENTITLEMENT TO BENEFITS WAS NOT NECESSARY

This case begs for class treatment. The legal issue regarding the department's duty to promulgate regulations is straightforward and determinative. When this case is remanded, all that will be required to identify class members will be a simple review of the department's records during the claim period for the Work Search Verification Failure – Benefits Stopped notice and the Determination of Benefits form stating the reason benefits were not paid. The notice procedure established by the trial court is also simple, straightforward, and devoid of an unnecessary claims process since class members have already established their entitlement to benefits.

A. **Standard of Review**

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). See also _Gardner v. South Carolina Department of Revenue_, 353, S.C. 1, 21, 577 S.E.2d. 190, 200 (2003) ("We generally defer to the trial court's discretion in granting class certification absent an error of law.") A reading of Rule 23 makes it clear that orders regarding the administration of the class are within the discretion of the trial court. The Rule provides "[t]he court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." S.C.R.C.P. 23(d)(2) The "use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be

given any other meaning in the present statute." *Kennedy v. South Carolina Ret. Sys.*, 345 S.C. 339, 352–53, 549 S.E.2d 243, 250 (2001)

B. The Records Shows All the Prerequisites of Class Certification Haves Been Met. Likewise, the Class Representatives Have Standing.

Class actions are favored in this state: *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d.197 (2010) "[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Id*, at 390 577, 204, citing *Califano v. Yamasaki*, 442 U.S. 682, 701, 99 S. Ct. 2545, 2557, 61 (1979)

The prerequisites of class certification under South Carolina law are:

> (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 v. South Carolina Department of Revenue*, 353 S.C. 1, 20, 577 S.E.2d. 190, 200 (2003), citing S.C.R.C.P. 23 (a).

"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 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*, at 390 S.C. 576, 703 S.E.2d. 204, citing *Littlefield v. South Carolina Forestry Comm'n*, 337 S.C. 348, 354–55, 523 S.E.2d 781, 784 (1999).

The department challenges the trial court's findings on commonality, typicality, and adequacy of class representatives. In addition, presumably as an element of the adequacy requirement, it challenges standing. After a rigorous analysis, the trial court determined that Respondent had satisfied all 5 prerequisites for class certification and standing. The court also properly determined a claims procedure was not necessary since class members had already certified their entitlement to benefits. The record supports its findings.

1. The record supports the trial court's finding of commonality.

To establish commonality, a party must show that "there are questions of law or fact common to the class." Rule 23, SCRCP. In practical terms this means the party must articulate the existence of "significant common, legal, or factual issues" which bind the proposed class together.... Critically, "[n]ot every issue in the case must be common to all class members."... Commonality is met only where the class shares a determinative issue *Gardner*, at 353 S.C. 21, 577 S.E.2d. 200.

"Though our Rule 23 does not specifically require the common issues "predominate,"[as FRCP 23 does] there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote." *Hensley v. South Carolina Department of Social Services,* 429 S.C. 144, 152, 838 S.E.2d. 510, 514 (2020) "[T]he class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation." *Id.* quoting Harry M. Lightsey and James F. Flannigan *South Carolina Civil Procedure,* 199 (1st Ed. 1985)

"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" McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 158 (Ct. App. 1986) (quoting Lightsey & Flanagan, *supra* at 198)); Hensley, at 429 S.C.153, 838 S.E.2d 515.

In its May 5, 2016 Order certifying the class, the trial court found the class shared a determinative issue. The court found: "[e]ach member of the class would be eligible for unemployment benefits under the regulations and statutes but were denied benefits because they failed to meet the requirements of the new policy [the online work search requirement]." The determinative issue therefore was whether the department was required to promulgate regulations for the new policy. (R. pp. 96-97)

In subsequent orders, the court made findings further supporting its earlier conclusions. To summarize, the court found that when the department's SCWOS system detected a claimant's noncompliance with the work search requirement, it would send a notice to the claimant informing them why their benefits were denied and directing them to appear at the department if they wanted to receive future benefits. The court further found this notice form was mailed to all class members, and that it did not inform the class member of the real purpose of the hearing. (R. pp. 28-29 [2/15/19 Order]; R. p. 7, footnote 1 [3/21/19 Order]) The court also found that this process violated §41-35-670, in that it stopped payment before a hearing, and S.C. Const. Art I, §22, in that its procedures for notifying and adjudicating class members claims was not by a mode of procedure prescribed by the General Assembly.[13] (R. p. 36)

[13] These findings were not appealed.

In opposing a finding of commonality, the department first asserted the class could not be certified because there could have been other reasons for denying class members claims, such as failure to conduct one of the other four work searches. The court found that the definition of the class was limited to exclude claimants denied benefits for any reason other than failure to conduct an online work search. (R. p. 97) The department then refined its argument to assert that all class members would still have to prove they had conducted 4 work searches for the claim period (week) in question.

Ultimately, the court rejected this argument, noting that class members had already satisfied their burden of proof by complying with the same requirements of other claimants for that claim week. (R. pp. 7-9) The court noted it had found in its 2/15/2019 Order that all claimants are required weekly by phone, or online, to certify their continuing entitlement to benefits, as well as maintain a record of work seeking activities (form UCB-303). In its March 21, 2019 Order, the trial court elaborated and noted and found that the Record of Work Seeking Activities forms are only randomly or periodically reviewed. (R. p. 6) Further, according to the form itself, failure to adhere to this policy **could** result in a denial of benefits. – as opposed to automatically causing a denial of benefits. (R. p. 1091) The court found that class members, like all other claimants had certified their entitlement to benefits, subject to the random audit process. (R. p. 8)

Clearly all claims in the class are determined by the same issue of law - whether the department was required to promulgate regulations to implement and establish procedures for its online work search requirement. If the answer to this question is "no", all class members lose. On the other hand, if the answer is "yes", class members are entitled to the benefit they would have received. Their entitlement to benefits and membership in the class is shown by the "Work

Search Verification Failure-Benefits Stopped notice mailed them and the determination form showing why benefits were stopped. Regardless of the answer, the case is resolved in a far more efficient manner than joinder of claims or individual suits. The South Carolina Supreme Court has affirmed certification of forms cases such as this one. See *King v. American General* 386 S.C. 82, 687 S.E.2d. 321 (2009) *Tilley v. Pacesetter*, 333 S.C. 33, 508 S.E.2d. 16. These cases involved a determinative question of law, coupled with a determination of whether a form existed, and if so, what it said.[14] This simple process was superior to individualized trials.

The trial court properly exercised its judgment in finding commonality. There is no abuse of discretion.

2. The record supports the trial court's finding of typicality.

To establish the typicality requirement, the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." *Pope v. Heritage Communities, Inc.,* 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Ct. App, 2011), citing S.C.R.C.P. 23(a)(3). See also *King*, supra.

In *Pope*, this court found typicality existed, since both the class representative and class members claimed damages from construction defects and loss of use of their property. *Pope* at 395 S.C. 422, 717 S.E.2d 775. In *King*, the Supreme Court found, the trial court's decertification of a class for lack of typicality to be error. The issue in *King* was the timing of an attorney preference disclosure which was required by statute to be given at the time of loan application. The Supreme Court found the attorney preference statute created a bright-line approach for compliance since it required the notice to the consumer of their right to choose their closing

[14] In *King*, discussed below, an attorney preference form was reviewed to determine the timing of the attorney preference disclosure.)

attorney to be given at the time of application. Therefore, the class representatives' claims were typical of the class members claim - even though the notices may have been given at differing times in the closing process - since they were not given at the time of application. *King* at 386 S.C. 91, 687 S.E.2d. 325.

In its Class Certification Order, the trial court found typicality existed, since class representatives and class members had suffered the same type of harm caused by the work search policy and were seeking the same relief. (R. p. 97). In its 2/15/2019 Order, the court found that the department denied Patterson's and Bollerman's benefits because of their failure to conduct an online work search. (R. pp. 29-31) Each named class representative was mailed a "Work Search Verification Failure-Benefits Stopped" notice and each appeared at the department and were issued a determination denying benefits. (Supp. R. p. 25; Supp. R. pp. 23-24) The procedure used to deny each class representative's benefits is the same procedure used for all class members as reflected by the procedure set forth in Procedural Transmittal Letter 1267-3. (Supp. R. p. 38) As in *King*, there may be inconsequential differences between Patterson and Bollerman's claim and the claims of class members. The central issue – whether the department was required to promulgate regulations to implement and establish procedures for its online work search requirement – is the same.[15]

[15] During the litigation, there were other named plaintiffs who were dismissed from the case because they lacked typicality or were not adequate representatives. Fred Alexander and Elaine Nix had exhausted benefits. Lorinda Robinson's claim had been denied for failing to report part time work in addition to the online work search requirement. Pamela Wooten determined for personal reasons she could not serve as a class representative. The determination that Alexander, Nix and Robinson were not proper class representative involved a simple and straight-forward review of the department's records.

The trial court committed no error in finding class representative's claims were typical of class members claims.

3. The record supports the trial court's finding of adequacy.

To certify a class, it must be shown that "the representative parties will fairly and adequately protect the interests of the class." S.C.R.C.P. 23 (a)(4) In making this determination, the court must consider whether the named plaintiff has interests that are antagonistic or adverse to the rest of the class, as when the class representative has a claim which conflicts with the economic interests of the class. *Waller v. Seabrook Island Property Owner's Ass'n,* 300 S.C. 465, 468, 388 S.E.2d. 799,801 (1990) (internal citations omitted).

"[T]he adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." ... Significantly, a class representative "must be part of the class and possess the same interest and suffer the same injury as the class members....Furthermore, "[t]he adequacy heading also factors in competency and conflicts of class counsel." *Hospitality Management Associates, Inc. v. Shell Oil, Co.*, 356 S.C. 644,664, 591 S.E.2d. 611,622 (2004). citing *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The issue of adequacy is a question of fact to be determined on a case-by-case basis. *Waller, id*. (Citation omitted)

The trial court in this case found no antagonistic interest between the class representatives and members of the class. The court also found the class representatives shared the same interests as class members. (R. p. 98) Moreover, the department in its brief points to nothing antagonistic between the class representatives or class members. It does not argue either class representatives' interests are adverse to class members. Class representatives are part of

the class, have the same interests as the class have suffered the same injury - the loss of unemployment benefits - as the class has suffered. Finally, there has been no assertion that class counsel are not competent or that they have a conflict in protecting the interests of the class.

The record in this case supports the trial court's finding of adequacy.

4. The record supports the trial court's finding that the class representatives have standing.

Standing is a separate concept from adequacy of class representatives but is "a fundamental requirement to institute any action. ...[T]here are three ways in which a party can acquire standing: (1) by statute; (2) through what is called "constitutional standing"; and (3) under the public importance exception. *Bodman v. State*. 403 S.C. 60, 66, 742 S.E.2d. 363, 366 (2013)

A party has constitutional standing if he can show: (1) he suffered an invasion of a legally protected interest, which is concrete and particularized, and actual or imminent; (2) a causal connection between the injury and the challenged conduct; and (3) it is likely the injury will be redressed by a favorable decision. *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 117, 804 S.E.2d. 854, 858 (2017).

The trial court found both class representatives had suffered a concrete and particularized injury since both had lost unemployment benefits because of the online work search requirement. The court also found that a favorable decision would allow them to recover their benefits. (R. pp. 39-40; R. pp. 83-90)

The department however argues Patterson is not a proper class representative because after his benefits were denied for failing to conduct the online work search, he stopped applying

for benefits. Indeed, Patterson did testify that he was not familiar with computers and had become frustrated with the process. The department asserts Patterson either failed to mitigate his damages or that he waived entitlement to benefits because he could have continued to apply for benefits. The fact that Patterson may have been able to receive other benefits but chose not to apply for them does not change the fact that he lost benefits for the week he was denied. Moreover, had he applied for and received other benefits, it would not have restored the benefit he lost because of the online work search requirement. The fact that Patterson chose not to apply for benefits, which he may or may not have been entitled to receive, does not relieve the department of the obligation to pay benefits which he was wrongly denied.

The department asserts Bollerman is not a proper class representative for two reasons. First, it asserts Bollerman could have appealed the decision and her benefits would have likely been restored. The department points to Paragraphs 25 and 26 of the 3/3/2014 affidavit of Kevin Cummings which states between August of 2012 and February of 2013, there were 214 reversals of disqualifications. The affidavit then speculates Bollerman's denial may have been overturned if it was the result of a computer error. However, there were over 61,000 claims denied during this same period for failing to conduct an online work search. (Supp. R. p. 35) Out of the 61,000 denied claims 214 were successfully appealed - a 0.35 percent success rate. Moreover, Romi Robinson, the Chief Administrative Hearing Officer for the Lower Authority Appeals Department who hears appeals from claims adjudicators, testified the department's appeal process would not have addressed the legal issue of whether the department was required to promulgate regulations before implementing the online work search requirement.

Secondly, it asserts Bollerman did not provide documentation showing she had conducted job searches when she appeared at the department pursuant to the work search failure notice.

However, Bollerman's uncontradicted testimony was that she did have the Record of Work Search Activities form with her when she appeared, but the department's employees did not ask to see it. (R. p. 877, line 15 – p. 878, line 4) The focus at that meeting was solely on compliance with the online work search requirement.

The record supports the trial court's finding both Patterson and Bollerman had standing to pursue this matter. A justiciable controversy exists as discussed in Argument 2 above, and this case was properly filed as a declaratory judgment.[16]

C. The Record Supports the Trial Court's Finding That a Claims Procedure is Not Necessary Since Class Members Have Met Their Burden of Proof and Need to do Nothing Else to Show Their Entitlement to Benefits

When the trial court issued its February 15, 2019 Order, It defined the class in part as all persons "who were denied a benefit between August 6, 2012 and July 1, 2016 for failure to perform an online work search; and... **can document that they were actively seeking work during the week or week[sic] for which a benefit was denied, by producing a contemporaneously-kept Form UCB-303 or a recreated UCB-303 that presents substantial evidence that the four on-line work searches were actually made...** "(R. p. 43) (emphasis added)

This requirement would have had class members locate records up to 6 years old or recreate the same. To recreate the record, class members would have had to remember for a given week in 2012 through 2016 where he/she had searched for work. Such a task would have

[16] The trial court also found public importance standing. (R. pp. 87-90) This case is necessary for future guidance since the department has an ongoing statutory duty to promulgate regulations. This applies not only to the online work search requirement, but to all other policies and procedures necessary to carry out its duties. Respondents rely on the order of the trial court and its conclusions with regard to public importance standing.

been daunting at best. More importantly, it would have been completely unnecessary since class members had already certified to the department their entitlement to benefits for that week.

Respondents filed a 59 (e) motion asking the court to reconsider the necessity of a claims process in light of the record before it. The court reviewed evidence of the department's processes and from the record determined that class members had already met their burden of proof to receive benefits by completing the certification procedure required of all claimants:

1. All claimants, including class members, were required weekly to certify to the department whether they are able, available, and seeking work, either online or by telephone. (R. p. 5-6; citing Cummings Aff. Ex. F at R. pp. 1112-1113).
2. In addition to this certification, claimants are required to document their work seeking activities on a Form UCB-303. The purpose of the form is to allow the department to audit a claimant's work seeking activities. (R. p. 5-6; citing Cummings Aff. Para. 7 at R. p. 1082)
3. The department randomly audits the forms and failure to present the form may result in a denial of benefits. In other words, according to its own forms, denial of benefits is not automatic or determinative. (R. p. 6; citing Cummings Aff. Para 10 at R. p. 1082 and Aff. Ex. A & B at R. pp. 1089-1091)
4. When the SCWOS system detected a claimant failed to appear, it mailed the work search failure notice to them. (Supp. R. pp. 38-39) The notice directed the claimant to appear at the department if claimant wished to receive future benefits.
5. When the claimant appeared, the department would take a statement regarding compliance with the work search requirement and would have had the opportunity to

review the record of work search activities (Form UCB-303) (R. p. 28; citing Cummings Aff. Para. 22 at R. p. 1085)

From the record, the court concluded that class members had met their burden by their weekly certification that they were able, available, and actively seeking work. (R. pp. 7-9) The court noted that for claimants who were not class members, all that was required was weekly certification of their entitlement to benefits, and that any review of their Form UCB-303 (Record of Work Seeking Activities) would have been periodic or random. (R. p. 6) The court also noted that the department's claims adjudicators would have had the opportunity to review the record when class members reported to the department.(R. pp. 6-7)

Since claimants were only required weekly to certify their entitlement to benefits, requiring a greater level of proof from class members who were wrongly denied benefits violates the class members rights of equal protection. *Littlefield v. South Carolina Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1999) It is also unlikely that class members would still have the forms or be able to recreate them with any accuracy which would make it difficult for a class member to comply with the claims process. Courts should avoid imposing unnecessary hurdles on potential claimants since strict eligibility conditions are likely to deter members from obtaining benefits. 4 *Newberg on Class Actions* §12-21 (5th ed.) Courts should ...[w]atch for situations where class members are required to produce documents or proof that they are unlikely to have access to or to have retained." *DeLeon v. Bank of America N.A.* (USA) 2012 W.L. 2568142, Not reported in F.Supp.2d. (2012).

Since class members met their burden of proof at the time they filed their claim, there is no need for a claims process requiring additional proof that class members are entitled to the benefits wrongly denied them. Since the goal is to get the relief into the hands of the class, the

process which requires the least should be the priority, and the court should consider whether it is even necessary to file a claim. 4 *Newberg on Class Actions*, §12:18 (5th ed.)

The record supports the trial court's findings that a claims procedure in not necessary since it has already been proved class members are entitled to benefits.

CONCLUSION

For the reasons set forth in this brief, this Court should dismiss the appeal and remand this case to the trial court to administer the class per S.C.R.C.P. 23 and the Orders of the trial court.

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Barnwell, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Clifton B. Newman, Circuit Court Judge

Lower Court Case No. 2013-CP-06-0059
Appellate Case No. 2019-000599

Lorenda Robinson, Elaine Nix, Archie Patterson,
And Tami Bollerman, ... Plaintiffs,

Of Whom, Archie Patterson and Tami Bollerman are the Respondents/Appellants,

v.

South Carolina Department of Employment and
Workforce, ... Appellant/Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

August 19, 2021

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