THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CLARENDON COUNTY
Court of Common Pleas
Clifton B. Newman, Circuit Court Judge

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

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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. .....Third Party Defendants.

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# INITIAL BRIEF OF RESPONDENTS

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John S. Wilkerson III (SC Bar No. 6105)
Richard S. Dukes, Jr. (SC Bar No. 16563)
Turner Padget Graham Laney, PA
Post Office Box 22129
Charleston, SC 29413-2129
JWilkerson@turnerpadget.com
RDukes@turnerpadget.com
843-576-2810

William H. Johnson (SC Bar No. 15167)
The Law Offices of William H. Johnson, LLC
Post Office Box 137
411 North Brooks Street
Manning, SC 29102
*Attorneys for Respondents*

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II. DID THE CIRCUIT COURT PROPERLY GRANT SUMMARY JUDGMENT BECAUSE APPELLANT BABAYAN WAS BARRED FROM ANY RECOVERY OF MONEY DAMAGES BY THE SOUTH CAROLINA TORT CLAIMS ACT?

## STATEMENT OF THE CASE

Appellants commenced this action May 9, 2016. Respondents moved to dismiss the Complaint as barred by the South Carolina Post Conviction Relief Act, S.C. Code Ann. §§ 17-27-10, *et seq.*, and because neither Plaintiff had suffered any cognizable injury. The Circuit Court denied that motion, in part, on November 10, 2016. Respondents answered the Complaint and asserted a third-party claim for indemnification by the State of South Carolina.[1] The State moved to dismiss the third-party claim based upon sovereign immunity as provided for in the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10, *et seq.* Respondents opposed that motion.[2] Appellants amended their Complaint on July 27, 2017. Appellants filed their motion for class certification and for partial summary judgment on November 1, 2017. Appellants requested the Circuit Court's permission to defer notifying the class they sought to represent. Respondents opposed class certification and moved for judgment as a matter of law. Following full briefing on the matters and after conducting a hearing on the motions, Circuit Judge Newman denied Appellants' motion for partial summary judgment and denied Appellants' motion to certify. Judge Newman granted Respondents' motion for summary judgment. This appeal followed.

[1] *See* Answer and Third Party Claim.

[2] *See* Turbeville Opposition to Motion to Dismiss. The State's Motion to Dismiss was briefed and argued, but no ruling was made prior to judgment being entered.

## STATEMENT OF FACTS

On October 28, 2014, Appellant Rebecca Robbins was ticketed by the Town of Turbeville for driving sixty miles per hour in a forty-five mile per hour zone. While she was cited for violating Turbeville Town Ordinance 13-22, Robbins went to trial for her violation and was convicted of violating the State traffic statute.[3] She appealed that conviction to Circuit Court, where her conviction was reversed.[4] On remand, the Town decided to *nolle prosse* her charge and the case against Robbins was dismissed. Robbins does not contend she was innocent of the charges, but instead claims she was charged pursuant to an unconstitutional law.

Appellant Marie Babayan was ticketed for driving fifty-five miles per hour in a thirty-five mile per hour zone on August 16, 2015. Babayan, too, was cited for violating Town Ordinance 13-22, with a recommended bond amount of $388. Babayan pleaded guilty and received a reduced fine of $188. She did not appeal her conviction, nor did she seek review pursuant to the Post Conviction Relief Act. Babayan also asserts she was charged under an unconstitutional law.

On October 20, 2017, the Town of Turbeville repealed the Municipal Traffic Ordinances 13-22 and 13-23.

## STANDARD OF REVIEW

The general rule established in South Carolina is that class certification orders are not immediately appealable."[5] The South Carolina Supreme Court has, however, "reviewed interlocutory orders involving class certification when they contain other appealable issues."[6] Proponents of class certification bear the burden of proving five prerequisites under South

[3] Amended Complaint, ¶¶ 53 – 56.
[4] *See* Pls.' Amd. Compl., ¶ 59.
[5] *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008).
[6] *Id.* at 449, 661 S.E.2d at 85.

Carolina law.[7] "In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied."[8] On review, the appellate courts generally defer to the trial court's discretion in granting class certification absent an error of law.[9] Failure to establish any prerequisite is fatal to class certification.

Class certification pursuant to Rule 23 of the South Carolina Rules of Civil Procedure requires a plaintiff establish that (1) the class is so numerous that joinder of all members is impractical ("numerosity); (2) there are questions of law and fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately represent the interests of the class ("adequacy").[10] In addition, where, as here, the class representative is seeking monetary relief, South Carolina has a fifth additional requirement – the amount in controversy must exceed $100 for each class member.[11] The Circuit Court is required to conduct and apply a rigorous analysis to assure that Plaintiff has established each of the Rule 23 prerequisites.[12] Plaintiffs' failure to establish any one prerequisite is absolutely fatal to class certification.[13]

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7 *Gardner v. South Carolina Dep't of Revenue*, 353 S.C. 1, 20; 577 S.E.2d 190, 200 (2003); *Waller*, 300 S.C. at 467, 388 S.E.2d at 801, *citing General Tel. Co of Southwest v. Falcon*, 457 U.S. 147 (1982).

8 *Id.* at 21, 577 S.E.2d at 200.

9 *Id.*

10 Rule 23(a), SCRCP.

11 Rule 23(a)(5), SCRCP.

12 *Gardner v. South Carolina Dep't of Revenue*, 353 S.C. at 20; 577 S.E.2d at 200.

13 *Gardner*, at *Id.*; *see also Ferguson v. Charleston Lincoln/Mercury, Inc.*, 344 S.C. 502, 544 S.E.2d 285 (Ct. App. 2001) *and Waller v. Seabrook Island Prop. Owners Ass'n*, 388 S.E.2d 799, 801 (1990).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder."[14] "When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP."[15]

Rule 56(c), SCRCP, provides a circuit court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." "On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party."[16]

## ARGUMENT

### I. Summary judgment was appropriate as there exists no justiciable controversy at the time the Circuit Court entered judgment.

#### A. Appellants' claims for prospective declaratory and injunctive relief were properly dismissed because the repeal of the Traffic Ordinance renders their claims for prospective relief moot.

Appellants' claims are based entirely on the enactment and enforcement of Turbeville's Municipal Traffic Ordinance, 13-22 and 13-23. In their Complaint, Appellants sought a declaration that the Traffic Ordinances were invalid, unconstitutional, and unenforceable, as well as an injunction prohibiting Turbeville from enforcing the ordinances.[17] Turbeville repealed the Traffic Ordinances October 10, 2017. Because the Traffic Ordinance is no longer in effect, Appellants' claims for injunctive relief and prospective declaratory relief became moot. Any

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[14] *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 211, 826 S.E.2d 285, 290 (2019). (quoting *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

[15] *Id*. (quoting *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011)).

[16] *Id.* at 211-12, 826 S.E.2d at 290 (alteration in original) (quoting *George*, 345 S.C. at 452, 548 S.E.2d at 874).

[17] Amended Complaint, ¶ ¶ 1, 77-84.

prospective relief would amount to an advisory opinion, which the Circuit Court properly declined to render.[18]

Additionally, Appellant Robbins' entire claim was properly dismissed as moot. Robbins went to trial for her violation and was convicted of violating the State traffic statute.[19] She then appealed that conviction to Circuit Court, where her conviction was reversed.[20] On remand, the Town decided to *nolle prosse* her charge, and the case against Robbins was dismissed. Robbins' only claim in this case, then, were for injunctive and declaratory relief and, with the repeal of the Ordinance, her claims are moot in their entirety.

### B. Appellant Babayan's claims for a retroactive declaratory relief were properly dismissed as an impermissible collateral attack on her guilty plea and conviction under the Town Traffic Ordinance.

Marie Babayan's claims for a retroactive declaration that the Town Traffic Ordinance was invalid and unenforceable from the time it was adopted constituted an improper collateral attack on thousands of judgments that was correctly dismissed by the Circuit Court. Throughout the Amended Complaint, Plaintiffs allege that Turbeville Municipal Ordinance 13-22 and 13-23 are preempted by South Carolina law and that enforcement of the ordinance was invalid and illegal.[21]

Plaintiff Babayan (the only Plaintiff who paid her traffic ticket and forfeited her bond) essentially requested the Circuit Court to declare her conviction to be void and to order the Town to refund the fine she voluntarily paid. Yet, Appellant did not challenge the Ordinance at the time she was cited for speeding in Turbeville, nor did she go to trial or appeal her conviction.

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[18] *See e.g., City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E. 2d 210 (1957); and *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970).
[19] Amended Complaint, ¶ ¶ 53 – 56.
[20] Amended Complaint, ¶ 59.
[21] See, Amended Complaint, ¶ ¶ 1, 79, 82, 93.

Rather, she paid her ticket and forfeited that bond. Pursuant to S.C. Code § 56-5-6220, paying a traffic ticket or forfeiting the bond is the equivalent of entering a guilty plea, and she cannot seek retroactive vacatur of that guilty plea by way of a declaratory judgment action. As the South Carolina Court of Appeals has held: "[In] the case of traffic offenses, South Carolina has a specific statutory provision that payment of bond and the forfeiture of that bond prior to trial for traffic offenses shall have the same effect as a guilty plea and conviction."[22]

Appellant has made clear – she is not arguing she was not speeding – she is complaining that she got caught and received a citation for breaking the law. Every factual allegation in the Amended Complaint she contends supports a challenge to the validity of her ticket is a matter that could (and should) have been raised in the criminal proceeding and on appeal from her conviction. Instead, after pleading guilty to the charge, Babayan wants to dress up an impermissible collateral attack on her conviction as a civil action for a retroactive declaratory judgment.

The retroactive declaratory relief Appellant Babayan sought on behalf of herself and all other recipients of a ticket under the Town Traffic Ordinance is simply not available to her or to any of the members of the putative class she purports to represent.[23] Where, as here, a party voluntarily pays her ticket and thereby pleads guilty to the underlying offense, the only avenue of relief available to the offender is post-conviction relief. The PCR statute is explicit and unequivocal:

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[22] *State v. Truesdale*, 345 S.C. 542, 548 S.E.2d 896, 899 (Ct. App. 2001).

[23] Babayan cannot come to Court now and claim innocence when she admitted committing a crime, nor should she be permitted to challenge the Town's Traffic Ordinance in this proceeding – in clear contravention of the well-recognized doctrine of judicial estoppel. Her position is inconsistent with her previous guilty plea to speeding; her previous position was of fact – she was speeding; that position was accepted by the court; and, the decision to pay the fine and accept her guilt was intentional and not accidental. Because Babayan is barred from taking a contrary position to her guilty plea, her claims in this suit can go no further.

(A) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

(2) That the court was without jurisdiction to impose sentence;

(3) That the sentence exceeds the maximum authorized by law;

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

(B) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it 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. It shall be used exclusively in place of them.

S.C. Code Ann. § 17-27-20.

Having been ticketed for speeding and having paid the $188 fine, Marie Babayan's exclusive remedy for challenging the constitutionality of the Town Traffic Ordinance and the amount of the fine, was to initiate an action for Post-Conviction Relief. Simply put, an action for retrospective declaratory judgment is no substitute for a PCR action and is specifically prohibited by the clear terms of the PCR statute. Plaintiff Babayan had no remedy under South Carolina law to challenge an allegedly wrongful conviction other than that provided pursuant to the PCR

statute. The PCR statute expressly supersedes any right Babayan may have had to bring this civil action, and her sole remedy was to seek PCR review. For that reason, Babayan's claims for declaratory relief were properly dismissed.

## II. The Circuit Court properly granted summary judgment because Appellant Babayan was barred from any recovery of money damages by the South Carolina Tort Claims Act.

There is no legal or equitable basis for a Court to order a political subdivision of the State to reimburse or provide restitution to those who were cited for violations of the law (much less to those who voluntarily pay the fine in the first place!). As with the State, so too with the towns, municipalities, and other political subdivisions. There is no statute commanding, or even permitting, the government to pay back any fines it has collected. Nor is there any statute waiving the sovereign immunity of the Town of Turbeville for any act alleged in the Amended Complaint. In fact, the clear terms of the Tort Claims Act afford the Town complete immunity from liability to Plaintiff Babayan and her proposed class.

The Tort Claims Act, S.C. Code Ann. §§ 15-78-60, *et seq.*, specifically prohibits Appellant Babayan's claim for money damages. The pertinent provisions of the Tort Claims Act are as follows:

> The governmental entity ***is not liable for a loss resulting from:***
>
> (1) legislative, judicial, or quasi-judicial action;
>
> (3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;
>
> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;

> (23) institution or prosecution of any judicial or administrative proceeding;

S.C. CODE ANN. § 15-78-60.

Thus, the Tort Claims Act specifically prohibits this action against the Town. Issuing the traffic citations themselves falls under the protections of § 15-78-60(4), and it does not matter whether the now-rescinded Traffic Ordinance was valid or invalid. Collecting the fines for violating the Ordinance falls squarely within the immunity afforded pursuant to §§ 15-78-60(3) and 15-78-60(23), for the Town cannot be liable for collecting judicially ordered fines or prosecuting crimes. And, Babayan's claims arising from the Town's enactment of the Ordinance are also entirely barred by § 15-78-60(4). In short, the Tort Claims Act immunizes the Town from all Babayan's claims and immunizes it from any claim for money damages on any theory. Babayan's claims for herself and her putative class must fail as a matter of law.

Notwithstanding the express immunity granted by the Tort Claims Act, Plaintiff Babayan's claim for damages resulting from an alleged wrongful and unconstitutional conviction still must fail as a matter of law. On April 17, 2019, in *Palmer v. State*, the Court of Appeals held ***there is no civil cause of action based upon a wrongful conviction***.[24] After the Supreme Court reversed his conviction, Robert Palmer commenced a civil action for damages and declaratory relief (seeking a declaration that the federal and state constitutions required that there be a remedy for damages) against the State. The Court of Appeals held that neither the South Carolina nor federal constitution requires that there be a civil monetary remedy for a wrongful conviction. The Court of Appeals also declined to create an implied right of action for money damages. In doing so, the Court of Appeals declined to invade the province of the Legislature and noted the General Assembly has refused to enact legislation creating a cause of action for

[24] *Palmer v. State*, 427 S.C. 36, 829 S.E.2d 255 (Ct. App. 2019).

wrongful conviction.[25] With the Court of Appeals' pronouncement, Babayan's claim for damages failed as a matter of law.

Finally, any refund of fines paid by Appellant Babayan, or her proposed damages subclass, would require an appropriation by the Town Council. The law is clear that the judicial branch cannot command a legislative body to appropriate money. Neither the Town nor the State can be compelled to refund the fines paid by Babayan or anyone else.[26] Irrespective of Tort Claims Act immunity, the Circuit Court properly dismissed her claim for money damages (or restitution) as a matter of law because Appellant simply cannot force the Town to appropriate funds to repay her (or her putative class) the fines they paid for traffic tickets.

### A. Appellants' Motion to Certify was properly denied because they failed to establish each prerequisite imposed by Rule 23, SCRCP.

#### 1. No classes could be certified because the Circuit Court would have been required to conduct myriad individual inquiries that defeat commonality.

The Circuit Court correctly denied class certification because Appellants could not establish there are common issues of law or fact that bind the class together and ultimately determine the case. Rather, because of the impenetrable morass of individual issues, Appellants failed to satisfy the burden of showing sufficient common issues of law or fact to support class certification. In short, there is no reliable way to determine whether any individual should be

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[25] The Court of Appeals specifically noted that "[a] bill creating a cause of action for wrongful conviction was introduced in the South Carolina Senate but was not passed. *See* S. 1037, 119th Gen. Assem., Reg. Sess. (S.C. 2012) to amend Chapter 13, Title 24 of the South Carolina Code to read 'Article XXII Compensation for a Wrongful Conviction.' The bill passed in the senate but did not pass the house of representatives." *Palmer v. State*, Op. 5641 at fn. 2.

[26] *See Culbertson v. Blatt*, 194 S.C. 105, 9 S.E.2d 218, 220 (1940) (it is not within the power of the judiciary to impinge upon the power vested in the legislative branch); *Town of Hilton Head Island v. Coalition of Expressway Opponents*, 307 S.C. 449, 415 S.E.2d 801, 805 (1992) (the tripartite system of government precludes the judicial branch from usurping the function of the legislative).

considered part of some class. Only an individual inquiry into all 10,000 files will reveal that information. As the *Gardner* Court made clear – such a detailed individual inquiry completely undermines any common issues of law or fact that may seem to exist.

**a) Guilty plea, *nolo contedere*, or *Alford* plea?**

Marie Babayan pleaded guilty, as she admitted. The vast majority of deponents who went to Court over their citations pleaded guilty. As noted above, pursuant to S.C. CODE ANN. § 56-5-6220, those who simply paid their ticket are deemed to have pleaded guilty and been convicted of violating the law.

- At least one class member deponent testified she pleaded *nolo contendere*.[27]
- One other deponent said he asked for a "plea bill."[28]
- No deponent testified they entered an *Alford* plea, but with 10,000 members of the putative class there is no telling how many there are.

But to know whether each individual entered a guilty plea in open court, or are deemed by law to have pleaded guilty; whether they pleaded no contest; or whether they entered an *Alford* plea, the Court would have had to conduct an individual inquiry into the individual files on each recipient of a citation to determine the disposition of each. These individual circumstances, which are impossible to ascertain, surely call into question whether Plaintiff can establish there are any common issues of law or fact that bind the class together.

**b) Did the class member have a lawyer?**

The Record revealed at least two of the putative class members whom counsel deposed are active members of the South Carolina Bar and one other sought legal advice before paying his fine.

[27] Deposition of Charlotte Daniels, 8:6-9.
[28] Deposition of Garry Ludwick, 5:25 – 6:17.

David Gravely testified he asked the police officer to reduce his fine. When the officer rebuffed him, and told him only the judge could reduce his fine, he asked to speak with the presiding judge and said "I talk to judges all the time. I've been a lawyer for 40-plus years." Ultimately, Mr. Gravely spoke with the clerk's office and got his charge reduced to "illegal equipment or something like that. It was a non-point violation."[29] Thus it is not at all clear that Mr. Gravely was even cited for violating the challenged Town Traffic Ordinance.

David Wells also is a practicing attorney. He admitted he was speeding and said he simply mailed in his $87 fine. He did not contact the Court, nor did he appear for trial. He did not appeal his conviction.[30] He did not file a PCR action.

Finally, Keith Porter sought legal advice from a friend, attorney Frank Epps. After getting advice from Mr. Epps, Porter paid his $560 fine. He did not go to court, nor did he seek to have his fine reduced.

Clearly, members of the putative class – perhaps many of them – obtained legal advice or assistance in handling their traffic citations. Whenever and however recipients of citations obtained legal advice, or had a lawyer take action on their behalf, they cannot now attack the Town Traffic Ordinance through this litigation. Their lawyers could have advised them regarding any Constitutional challenge. Instead they might have one of two remedies: either a PCR *habeas corpus* action claiming ineffective assistance of counsel under *Strickland v. Washington*[31], or by filing a malpractice claim against their attorney.[32]

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[29] Deposition of David Gravely, 6:24 – 7:25.
[30] Deposition of David Wells, 5:23 – 7:13.
[31] *Strickland v. Washington*, 466 U.S. 668 (1984).
[32] As before, the PCR statute is all-encompassing on collateral attacks of convictions, as S.C. Code Ann. § 17-27-20(6) provides that a PCR action is the exclusive remedy for any challenge:

> That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion,

Without an extensive individual inquiry, no one can determine which members of the putative class must be excluded because they either are an attorney; whether they had an attorney write or call the Court on their behalf to negotiate plea terms; or whether they had legal assistance at their court appearance. As before, that individual inquiry effectively destroys Plaintiff's claim of commonality.

**2. Plaintiff cannot satisfy her burden of showing that every member of her proposed class has an amount in controversy in excess of $100.**

Appellant Babayan sought restitution or a refund of all the fines levied by the Town of Turbeville for violations of its Ordinance. Yet, neither she, nor nearly any of the class members who were deposed in discovery, denied their guilt. In fact, virtually every person who sat for deposition admitted guilt. Because Babayan is not challenging her guilt, only the law under which she was convicted, the only proper measure of the real value of the relief is the difference between the fine that each individual class member paid as part of their guilty plea and conviction under the Town Traffic Ordinance and the fine they would have received under State law.[33] In order to determine whether any of the putative class members satisfy the amount in controversy requirement, the Court would have been required to conduct an impermissible individual inquiry into each and every traffic citation. The Court would have to determine: the

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petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

Additionally, in vesting jurisdiction over PCR matters, § 17-27-30 specifically refers to *habeas corpus* proceedings.

[33] It is important to note that State law mandates a number of assessments that must be added to the uniform traffic statute – Babayan could have been fined between $50 and $75 for speeding (S.C. CODE ANN. § 15-5-1520(G)(3), plus the mandatory fee for the Victim's Compensation Fund ($25) (S.C. CODE ANN. § 14-1-211), the conviction charge ($25) (S.C. CODE ANN. § 14-1-212), the Criminal Justice Academy fee ($5) (S.C. CODE ANN. § 14-1-240), and the mandatory Assessment of 107.5% of the base fine (S.C. CODE ANN. § 14-1-208). Thus Babayan's State penalty would have ranged between $158.75 and $210.63.

speed the person was traveling; the speed limit; where the violation would fit in the Uniform Traffic Act's scheme; what the fine would be for a State citation; and, whether the difference between the Town citation and the State citation is greater than $100. That individual inquiry alone prevented class certification.

As important, through the depositions of a sampling of members of the putative class members, counsel discovered the following fines actually paid:

- Wayman Goudy $69[34]
- David Gravely $87[35]
- Ursula Hertz Around $100[36]
- William Kellett $87[37]
- Delores Lancaster $50 or $75[38]
- Britney Lynn $80[39]
- Jose Padilla $90[40]
- Mary Pittman $25[41]

Additionally, many of the deponents testified they went to Court and their fines were greatly reduced to between $100 and $155. Again, determining the amount in controversy for each member of the putative class demanded an individual inquiry, not just into the amount stated on the citation, but also into the Clerk of Court's records to determine exactly what fine

[34] Goudy deposition, 7:6. Goudy testified that he showed proof that his dashboard gauges were not working properly and all he had to pay was Court costs, without a guilty plea. 6:3-6.
[35] Gravely deposition, 8:6-10.
[36] Hertz deposition, 7:14-15.
[37] Kellett deposition, 6:2-4.
[38] Lancaster deposition, 9:23-25.
[39] Lynn deposition, 8:9-10.
[40] Padilla deposition, 7:1-3.
[41] Pittman deposition, 8:1; 12:23-13:1.

each recipient of a traffic citation paid. This would require a grueling examination of each individual transaction, and a general individualized reconciling of the Town's accounts.

In any event, Appellant *could not* establish the requisite $100 amount-in-controversy for every class member. Because of that failure of proof, the decision to deny class certification must affirmed.

### B. The Circuit Court properly denied class certification because Babayan is not an adequate representative of the putative class.

As mentioned above, Rebecca Robbins is not a member of either the proposed retroactive declaratory relief class or the proposed damages class. Miss Babayan is the only class representative appearing on behalf of those proposed groups. As set forth above, because Babayan paid her fine, the law holds her to have entered a guilty plea and been convicted of her offense. For that reason, and because her exclusive remedy would have been to commence a post-conviction relief action, she has no claim against the Town and cannot be an adequate representative for any class.

Notwithstanding that critical issue, of perhaps greater concern regarding her adequacy as a fiduciary and representative of the class, lies in her request in her Motion for Class Certification:

> Finally, Plaintiffs ask the Court to defer providing class notice to the class members until the conclusion of the likely appeal of the Court's decision with respect to the constitutionality and legality of the Town Traffic Ordinance and the Penalty Ordinance.[42]

Due process mandates that the class receive notice in the best practicable manner, "including individual notice to all members who can be identified through reasonable effort."[43] In this case, because the parties know the names and addresses of every putative class member,

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[42] Plaintiff's Motion for Class Certification, p. 2.

[43] *See Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173-74 (1974).

each must receive actual notice of class certification. Publication notice will not withstand due process scrutiny. As the Supreme Court of the United States held:

> Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.[44]

Due Process concerns mandate actual notice to known putative class members. Plaintiff's effort to subvert this requirement via delaying the notification process to the detriment of her similarly situated plaintiffs further emphasize her inadequacy as the class representative.

## CONCLUSION

For the reasons stated herein, as well as those put forward at any oral argument the Court will entertain, the judgment below should be affirmed.

Respectfully submitted,

September 29, 2021 By: *s/ Richard S. Dukes, Jr.*

John S. Wilkerson III (SC Bar No. 6105)
Richard S. Dukes, Jr. (SC Bar No. 16563)
Turner, Padget, Graham & Laney, P.A.
Post Office Box 22129
Charleston, SC 29413-2129
JWilkerson@turnerpadget.com
RDukes@turnerpadget.com
843-576-2810

William H. Johnson (SC Bar No. 15167)
The Law Offices of William H. Johnson, LLC
Post Office Box 137
411 North Brooks Street
Manning, SC 29102
*Attorneys for Respondents*

[44] *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 316 (1950) "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected."