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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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

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

v.

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

v.

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

FINAL REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Appellants Rebecca J. Robbins and Marie Babayan, individually and on behalf of all those similarly situated (collectively "Plaintiffs") hereby reply to the arguments presented by Respondents Town of Turbeville and the Turbeville Police Department (collectively "Defendants" or "the Town") in this matter. Respectfully, Defendants' arguments are incorrect, contrary to established law, and fail to acknowledge Plaintiffs' claims. For all of the reasons set forth in Appellants' Final Brief, and reiterated herein, the Court should issue an order reversing the lower court and entering appropriate relief as requested by the Plaintiffs.

ARGUMENTS IN REPLY

I. The Town Fails to Address the Fact that the Knowing Enactment and Enforcement of Invalid Municipal Ordinances is a Practice "Capable of Repetition Yet Evading Review."

In its cursory argument in favor of affirming the lower court's entry of summary judgment on mootness grounds, the Town fails to address the issue at hand: whether it was error for the lower court to enter judgment in favor of the Defendants when it failed to address Plaintiffs' contention that the matter still required review pursuant to two (2) long-established exceptions to the mootness doctrine.[1] Init. Resp. Br. at pp. 4-5 (§I.A).

By refusing to counter—or even address—the long line of cases which support the review of issues or controversies "*capable of repetition yet evading review*", the Town tacitly acknowledges the merits of such review by virtue of its failure to put forth any argument to the contrary.[2] Instead, the Defendants elect to focus on the fact that the Town elected to *nolle prosse*

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[1] It is undisputed that the Town repealed the ordinances following the commencement of this litigation and has never defended the ordinances on the merits as a result.

[2] *See, e.g.,* App. Init. Br. at pp. 10-16 (Plaintiffs' argument in favor of exceptions to mootness doctrine) (*citing Baddourah v. McMaster, Byrd v. Irmo High School, Evans v. S.C. Dep't of Social*

the charges against Robbins after the commencement of this lawsuit —again, missing the point that the Town's repealing of its own ordinances when challenged supports the need for judicial review in order to deter future unlawful conduct by municipalities. [3]

As noted in their Final Brief, Appellants submit that the constitutionality of the ordinances presents an important question of law and the failure to consider and rule upon the ordinances was error by the trial court. The importance of judicial review of municipal ordinances such as those implicated in the instant case is further supported by the recent decision of the South Carolina Supreme Court, in the case of *Alan Wilson, Attorney General, ex rel. State of South Carolina v. City of Columbia*, Op. No. 28056 (S.C. Supreme Court, filed Sept. 2, 2021), wherein the Court considered the following question relative to a city mask ordinance— "*may [a municipality] enact ordinances in direct conflict with state law? The answer is unsurprisingly and unequivocally "no.*"" Because there was substantial evidence in the record sufficient to support an exception to the mootness doctrine—and because judicial resolution of these questions would provide essential guidance on matters of substantial public concern—the Court should reverse the order of the lower court and enter judgment declaring the Town Traffic Ordinance and Penalty Ordinance unconstitutional and violative of state law and enter an award of attorneys' fees and costs pursuant to South Carolina law or, in the alternative, remand the matter to the lower court.

A. The Mere Cessation of Unconstitutional Conduct Does Not Support a Finding of Mootness.

Svcs; Found v. S.C. Dep't of Transpo.; Curtis v. State; Holden v. Cribb; Vicary v. Town of Awendaw.

[3]The chronology of events as they relate to Ms. Robbins is undisputed. This action was filed May 9, 2016. Defendants repealed the ordinance on October 20, 2017. Finally, Robbins' charge was *nolle prossed* November 17, 2016. Thus, Defendants' reliance on the post-lawsuit repeal of the ordinance to assert mootness fails. *See also* Resp. Init. Br. at p. 6.

Defendants' reliance upon what is essentially a "no harm, no foul" argument as it pertains to the Town's "*nolle prosse*" of Plaintiff Robbins' charges—months after this lawsuit was filed—fails to meet the heavy burden placed upon a defendant seeking to assert a mootness defense in the class action context. Class action lawsuits present particularized questions regarding mootness, including those situations where a defendant unilaterally attempts to moot a plaintiff's claim and where the nature of plaintiff's claim is "inherently transitory" or short-lived.[4]

In the recent decision in the case of *Brown v. Lexington Cnty.* (C/A 3:17-1426-MBS) (D.S.C. Mar. 5, 2021), the District Court found that "the voluntary cessation of the challenged conduct moots a case **only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur**, and the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again [lies…with Defendants]. Voluntary cessation will not render a case moot **unless interim events have completely eradicated the effects of the alleged violation. A defendant fails to meet its heavy burden to establish that its allegedly wrongful behavior will not recur when the defendant retains the authority and capacity to repeat the alleged harm**." *Id.* (*quoting Cnty. Of Los Angeles v. Davis*, 440 U.S. 625, 632 (1979)) and *Porter v. Clark*, 852 F.3d 358, 364 (4th Cir. 2017)) (emphasis added).

Here, the Town most certainly "*retains the authority and capacity to repeat the alleged harm*" absent judicial resolution. Further, the District Court's decision comports with those decisions of the United States Supreme Court, which has long recognized that exceptions for

[4] South Carolina courts have acknowledged class actions require these particularized rules in the context of mootness exceptions. *See, e.g., In the Matter of Angela Suzanne*, 286 S.C. 186, 332 S.E.2d 542 (S.C. Ct. App. 1985) (recognizing that class actions demand special examination of the repetition yet evading review exception).

mootness in a class action arena require flexibility, including in connection with matters evading review. *See, e.g., U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980); *Sosna v. Iowa*, 419 U.S. 393, 399-402 (1975).

II. Plaintiffs Do Not Seek Post-Conviction Relief and the Court Should Ignore this Proverbial "Red Herring."

Defendants devote significant effort to their assertion that Plaintiffs are seeking to have the trial court void their convictions, thereby running afoul of South Carolina's PCR statute. Resp. Init. Br. at pp. 6-9.[5] However, nowhere in the Amended Complaint is there a request to void the convictions of either Marie Babayan or others similarly situated; instead, the Amended Complaint seeks only the equitable remedy of disgorgement by way of claims for unjust enrichment and refund (i.e., forfeiture by the Town of the illegal fines it collected).[6]

As our Supreme Court has explained, the PCR statute "comprehends and takes the place of all other common law, statutory, or other remedies heretofore available **for challenging the validity of the conviction or sentence**." *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999) (*citing* S.C. Code Ann. §17-27-20(b)) (emphasis added). Here, there is no "challenge" to the "validity" of the conviction or sentence and the Court should disregard this attempt to confuse statutory post-conviction relief with claims lying in equity for unjust enrichment.

The PCR statute is clear and unambiguous—it applies to **challenges to the validity of a conviction or sentence**. The record reflects that this action is not a wrongful conviction case, nor

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[5] "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...The PCR statute expressly supersedes any right Babayan may have had to bring this civil action...." Resp. Init. Br. at pp. 8-9.

[6] See Amend. Compl. at ¶¶85-95 (asserting claims for unjust enrichment and refund) (R. pp. 99-100)

do Plaintiffs seek exonerations or a declaration of innocence from the State. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. The primary purpose in construing a statute is to ascertain legislative intent. The legislature's intent should be ascertained primarily from the plain language of the statute. The first question of statutory interpretation is whether the statute's meaning is clear on its face. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the Court has no right to impose another meaning. [T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. When the terms of a statute are clear, the court must apply those terms according to their literal meaning." *Eagle Container Co. v. County of Newberry*, 366 S.C. 611, 621-622, 622 S.E.2d 733,738 (Ct. App. 2005) (internal citations omitted).

Defendants' reliance upon the case of *State v. Truesdale* is misplaced, as that case considered an analogy to a Uniform Traffic Ticket issued under S.C. Code Ann. §56-7-10.[7] In *Truesdale*, Mr. Truesdale was convicted in magistrate court of writing a fraudulent check and appealed to the circuit court, alleging he was coerced into pleading guilty in magistrate court by agreeing to pay restitution plus court costs, after consistently asserting his right to a jury trial. The circuit court ordered the matter remanded for trial, finding no evidence of a valid guilty plea.

[7] See Resp. Init. Br. at p. 7, fn 22 (*citing State v. Truesdale*, 345 S.C. 542, 548 S.E.2d 896 (Ct. App. 2001)).

On appeal, the State asserted that the circumstances were "no different from the procedure for forfeiting bond and entering a conviction when a defendant is issued a Uniform Traffic Ticket and pays the bond before trial." The Court of Appeals disagreed, noting that the Uniform Traffic Ticket statute enumerates certain offenses that can be charged under the ticket (not including bad check charges). *Truesdale*, 548 S.E.2d at 548 (Ct. App. 2001). Here, it goes without saying that the Town of Turbeville tickets issued to Plaintiffs were not "Uniform Traffic Tickets" issued pursuant to South Carolina law but were rather illegal and unconstitutional citations designed solely to increase revenue at the expense of state coffers.[8] Thus, Defendants' reliance upon section 56-5-6220 of the South Carolina Code governing payment of traffic fines is misplaced. *See* Resp. Init. Br. at p. 7. Put another way, Defendants cannot attempt to ignore the South Carolina motor vehicle and public safety statutes when it suits them and then turn around and seek to benefit from the provisions contained therein.

Again, Plaintiffs do not challenge their convictions; rather, Plaintiffs seek to have done in equity what should be done.[9] "The principle 'equity regards as done that which ought to be done' applies in cases where the party seeking equitable relief establishes 'a clear obligation based upon a valuable consideration that another do some act which he has failed to perform.' The notion 'equity looks to substance rather than form' evolved out of judicial regard for that which ought to

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[8] *See, e.g.,* App. Init. Br. at p. 5 (discussion of multiple advisory opinions issued by the South Carolina Attorney General's Office, including "one requested by State Treasurer Loftis that addressed a decrease in court fines and fees remitted by municipalities in recent years."). This is further evidenced by the tickets themselves, which specifically struck out section #3 on the reverse of the ticket directing drivers to visit the www.sc.gov website to pay fines online. *See also* Amend. Compl. at Ex. F, Ex. I (R. pp. 141, 154).

[9] Defendants' assertion that "[Plaintiff] is complaining that she got caught [speeding] and received a citation for breaking the law" is a blatant attempt at misdirection; this case is not about whether Plaintiffs were speeding—it is about the knowing enactment and enforcement of unconstitutional and illegal ordinances by a municipality and its retention of the ill-gotten profits therefrom.

be done. This maxim applies by 'dispensing with pure formalities which would otherwise defeat the equity.' When applying this principle, courts look to the substance and intent of the parties and give a construction consistent with such intent. After a party establishes an equitable right, the court may dispense with pure formalities which would otherwise defeat the equity. A court of equity should scrutinize the conduct of the plaintiff with the utmost care, to ascertain he has done everything which ought to have been done to secure the action requested. This maxim has at times guided a court to relieve a party from the consequences of accident, mistake, and fraud." *Regions Bank v. Wingard Properties*, 394 S.C. 241, 253-254, 715 S.E.2d 348 (Ct. App. 2011) (internal citations omitted).

III. Attempts at Classifying this Lawsuit as a Tort Action Should be Rejected.

The Amended Complaint fails to allege any claim or cause of action comprising a tort. *See* Amend. Compl. Accordingly, Defendants' efforts to claim immunity under the South Carolina Tort Claims Act fails under a plain reading of the statute, which reflects that the application of the Act is limited as "the exclusive and sole remedy for any **tort** committed by an employee of a governmental entity while action within the scope of the employee's official duty." S.C. Code Ann. §15-78-200 (emphasis added).

Defendants rely upon section 15-78-60(4) of the South Carolina Code, which provides, in part:

> The governmental entity is not liable for a loss resulting from:
>
> > (1) legislative, judicial, or quasi-judicial action or inaction;
> > (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
> > (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.

However, the Town—in asserting that the issuance of the fraudulent traffic citations themselves falls under the purview of subsection (4)—fails to acknowledge the unconstitutionality of the ordinances behind such citations and ignores South Carolina law finding that conduct such as that presented by the instant case fails to qualify for immunity under the SCTA. The case of *Wortman v. City of Spartanburg*, 310 S.C. 1, 2 (S.C. 1992) is particularly instructive to the case at bar. In *Wortman,* "a Spartanburg Public Safety officer confiscated envelopes containing Florida lottery tickets that he found taped to the counter of a local restaurant. Wortman appeared at police headquarters on August 28, 1989, claimed to be the owner of the tickets, and demanded their return. Police arrested Wortman for "possession of lottery tickets." Several hours later, Wortman was served with a warrant charging him with playing a gambling game at a public place in violation of S.C. Code Ann. §16-19-40 (1985). The charge was dismissed by the arresting officer on the day of trial."

Mr. Wortman subsequently sued the City of Spartanburg, alleging, among other things, that his arrest was unlawful because possession of lottery tickets was not illegal. The City moved for summary judgment and the trial judge found that the City was exempt from liability under sections 15-78-60(3) and (4) of the South Carolina Tort Claims Act. The Supreme Court reversed, finding that "the City cannot claim that Wortman's arrest for possession of lottery tickets resulted from its attempt to enforce a law **absent a showing that a law exists that prohibits the possession of lottery tickets.**" *Wortman v. City of Spartanburg*, 310 S.C. 1, 3 (S.C. 1992) (emphasis added).

Similarly, here there is no showing that "*a law exists*"—promulgated by the Town of Turbeville—that actually prohibited speeding. Rather, a facially unconstitutional ordinance was enacted by a town and quickly abandoned once challenged. Accordingly, Defendants' reliance

upon the Tort Claims Act is misplaced. *See also Hallenbeck Sisters, LLC v. Hall*, Appellate No. 2013-001280, at *4 (S.C. Ct. App. Sep. 9, 2015) (*per curiam*) (reversing order granting summary judgment in favor of Charleston County's Delinquent Tax Collector under the SCTCA, reasoning that "[t]he setting of a deadline **that is not authorized by law is an act of *not* enforcing the law** and thus is not entitled to immunity under Section 15-78-60..." (quoting *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 37-38, 577 S.E.2d 202, 206 (2003)).[10] Similarly, here there is no valid speeding law—only an illegal ordinance that wholly contravenes the South Carolina motor vehicle laws promulgated by the Legislature.

IV. Defendants Admit that 10,000 Files Implicate the Now-Repealed Town Ordinances, Further Demonstrating that the Failure to Apply the Requisite "Rigorous Analysis" Under Rule 23 was Clear Error.

In their Initial Brief, Defendants contend that "**only an individual inquiry into all 10,000 files will reveal" whether "any individual should be consider part of some class."** Resp. Init. Br. at pp. 11-12 (emphasis added). Given the sheer number of individuals impacted by these illegal ordinances, the lower court's denial of class certification was clear error. Class actions are favored in South Carolina, *see Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010) and Rule 23(a), SCRCP, identifies five (5) factors which the Court must consider when certifying a class.

While Defendants strenuously urge the Court to find dispositive of the class certification issue whether a person entered a guilty plea, *nolo contendere*, or *Alford* plea—or whether the person may have been an attorney or been represented by one—this argument merely seeks to

[10] Plaintiffs are aware that citation to unpublished opinions is disfavored under Rules 220(a) and 268(d)(2), SCACR; however, Plaintiffs respectfully submit that this *per curiam* decision may be relevant to the Court in its consideration of the issues herein.

argue the merits of each person's claim, which is forbidden at the certification stage.[11] Resp. Init. Br. at pp. 11-14. In inappropriately arguing the merits, Defendants again rely upon section 56-5-6220 of the South Carolina Code of Laws in asserting that by paying a Uniform Ticket, class members are "deemed to have pleaded guilty"; of course, such argument again neglects the obvious fact that the Plaintiffs were never charged under the Uniform Traffic Act nor actually issued tickets pursuant to same (even though the Town used the tickets themselves as citations for the local ordinances). Furthermore, Defendants, like the trial court, decline to address two (2) out of the five (5) requisite factors under Rule 23: namely, numerosity and typicality. Because there exists clear evidence that all of the Rule 23 factors were met, the lower court's denial of class certification was clear error requiring reversal.

A. Arguments Relating to a Possible "Grueling" Examination of Each Individual Transaction and "A General Individualized Reconciling of the Town's Accounts" are Unpersuasive.

Defendants devote significant time to their theory that because each putative class member may have ultimately paid differing amounts to resolve their tickets—some allegedly under $100—class certification was inappropriate.[12] As part of its argument, Defendants argue that a comparison between the amounts levied by the Town's unlawful ordinances and those assessed under State law would be a necessary part of the court's determination of whether any putative class members satisfy the amount in controversy requirement. Resp. Init. Br. at pp. 14-15. As

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[11] Defendants' argument is contrary to long-established South Carolina law holding that "[a] court may not look to the merits when determining whether to certify a class." *See Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998); *Smith v. Progressive Halycon Ins. Co.*, Op. No. 2015-UP-392 (S.C. Ct. App., filed Aug. 5, 2005).

[12] Such argument flies in the face of the Town's own admission that the minimum fine charged for violation of the Town's ordinance totaled $155.00. *See* Def. Turbeville Police Dept. Resp. to Req. for Prod. (Mem. From J. Coleman to Chief Chappell) (R. pp. 229-230, 234).

previously noted, Defendants continued reliance upon South Carolina's Uniform Traffic Act is wholly unpersuasive given that the Town ordinances were enacted in an effort to circumvent the State's exclusive jurisdiction in this area. *See* App. Init. Br. at pp. 5-6 ("The issuance of Multiple Advisory Opinions").

South Carolina courts favor class actions as a way to save the resources of the courts and permit litigation to proceed in an economical fashion. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010). While Defendants may have cherry-picked a few depositions of a "sampling" of members of the putative class who testified they may have paid less than $100, such testimony is merely one piece of evidence that is hardly dispositive of whether a class should be certified. As this Court is well aware, claims for injunctive and declaratory relief by the Injunctive Class do not require an amount in controversy. *See* Rule 23(a)(5), SCRCP; *See also* Amend. Compl. Further, Defendants acknowledge that "many of the deponents testified they went to Court and their fines were greatly reduced to **between $100 and $155**." Resp. Init. Br. at pp. 14-16 (emphasis added).

B. Defendants' Assertion that Plaintiffs Seek to "Subvert" the Notification Process is Wholly Without Merit and Irrelevant to Any Analysis Under Rule 23, SCRCP.

Defendants assert that because Plaintiffs' motion for class certification requested the lower court defer providing class notice to class members until the conclusion of any likely appeal, Plaintiffs have somehow sought to "subvert" the notice requirements under the law and violate the Due Process rights of class members. Resp. Init. Br. at pp. 16-17. Respectfully, Plaintiffs' Motion merely sought to advise the Court of a potential mode and manner of class notification that would conserve resources and promote judicial efficiency. No ruling was ever entered by the lower court as to the request and this "issue" represents yet another effort to divert the Court's attention from

the real issues at hand—namely, the conduct of the Town and the errors committed by the court below.

CONCLUSION

As the Supreme Court recently noted, "[t]he government of a municipality is created by the laws of the State of South Carolina, and the creature cannot be greater than its creator, and the laws of a municipality to be good must not be inconsistent with the laws of the State." *Alan Wilson, Attorney General, ex rel. State of South Carolina v. City of Columbia*, Op. No. 28056 (S.C. Supreme Court, filed Sept. 2, 2021) *(citing McAbee v. S. Ry. Co.*, 166 S.C. 166, 168, 164 S.E. 444, 444 (1932)). While "[t]he state has granted local governments broad power to enact ordinances respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities, . . . the grant of power is given to local governments with the proviso that local law not conflict with state law." *Id. (citing City of N. Charleston v. Harper*, 306 S.C. 153, 410 S.E.2d 569 (1991)). If municipalities are allowed to enact unconstitutional laws with impunity—and rescind those same laws with nary a penalty—then the rule of law is threatened anywhere and everywhere. Accordingly, for all the reasons contained herein and in their Final Brief, Appellants respectfully request that the Court reverse the order of the lower court, enter judgment declaring the Town Traffic Ordinance and Penalty Ordinance unconstitutional and violative of state law, award such statutory attorneys' fees and costs as permissible under the law, and remand the matter to the lower court to determine issues of class certification and restitution.

-Signature Page to Follow-

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