THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Trial Court Judge

Appellate Case No. 2019-000182

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

v.

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

PETITION FOR REHEARING AND REHEARING *EN BANC* OF APPELLANT SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION, INC.

Pursuant to Rules 240, 219 and 221 of the South Carolina Appellate Court Rules, Appellant, Southern States Police Benevolent Association, Inc. ("PBA") hereby files this Petition for rehearing and rehearing *en banc*. Appellant respectfully submits that rehearing or reversal of the trial court's decision is warranted. The grounds for this petition are the Panel overlooked or misapprehended matters of law. In Opinion No. 5882, issued December 22, 2021, the panel dismissed PBA's appeal of the trial court's class certification order, holding the order was not appealable even though it contained what PBA contended was an injunction stating "no party shall communicate with the class members regarding this class action and the allegations contained herein." Op. at 1. The Panel held the issues concerning this "provision of the trial court's order

limiting communication" (*id.* at 2) were not properly preserved for appeal. *Id.* PBA respectfully submits rehearing or rehearing *en banc* is warranted for two reasons.

I. THE ISSUE OF THE TRIAL COURT'S INJUNCTION ON COMMUNICATIONS WITH CLASS MEMBERS WAS PROPERLY PRESERVED FOR APPEAL.

First, the Court's holding that PBA failed to preserve the "communications ban" issue should be revisited. In a case the Court cited in its Order, the Supreme Court articulated the general rule as follows: "We have adhered to the rule that where an issue has not been ruled upon by the trial judge ***nor*** raised in a post-trial motion, such issue may not be considered on appeal." *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993) (emphasis added); *see also Caldwell v. Wiquist*, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013) (quoting *Dutton*). Stated in the affirmative, the *Dutton* rule states an issue is preserved in one of two scenarios: (1) the issue has been "ruled upon by the trial judge"; ***or*** (2) the issue was "raised in a post-trial motion." Unquestionably, the communication ban issue was "ruled upon" by the trial judge; the judge explicitly ordered a ban on all communications "with the class members regarding this class action and the allegations contained herein." At that point, the ruling was made and the issue was preserved for appeal.

In other words, the purpose of a post-trial motion is to alert the trial judge to an issue the judge *has not ruled on* and to provide the judge the opportunity to issue a ruling in the first instance. As the Supreme Court has held: "Post-trial motions *are not necessary to preserve issues that have been ruled upon at trial*; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (emphasis added) (citing *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939)); *accord*, *Church v. McGee*, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (2011) (quoting *Wilder*). The Supreme Court

confirmed this principle as recently as 2018. *See Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640 n.3, 817 S.E.2d 273 n.3 (2018).

The Supreme Court has explained motions for reconsideration under Rule 59(e) as follows:

> [O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis original); *see also State Farm Mutual Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 226, 837 S.E.2d 910, 918 (2019) (quoting *Elam*). As this Court explained in *Goyeneche*, *Elam* recognized two distinct kinds of Rule 59(e) motions – (1) a "permissive motion for reconsideration" and (2) "a mandatory motion necessary to preserve an unaddressed error." *Goyeneche*, 429 S.C. at 227, 837 S.E.2d at 918. Because the trial court's communications injunction was not an "unaddressed" ruling, as the court indisputably entered a communications ban as part of certifying the class, it was not "mandatory" for PBA to file a Rule 59(e) motion to preserve that error. Any motion for reconsideration on the communication ban would have been permissive, *i.e.*, a situation where PBA "believe[d] the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue." *Elam*, 361 S.C. at 24, 602 S.E.2d at 780. But that does not, under *Elam*, constitute a failure to preserve the issue concerning the trial court's injunction on communications with class members.[1] The Court should grant rehearing and address the injunction argument – and the other issues on appeal – on the merits. *See, e.g.*, *Spence v. Wingate*, 381 S.C. 487, 489, 674

[1] It is important to note that although it was not required to do so, PBA did file a Rule 59 motion that sought reversal of the trial court's order as a whole – which included the communication injunction.

S.E.2d 169, 170 (2009) ("We hold the Court of Appeals erred in finding the issue was not preserved for appeal.").

II. EVEN IF THE ISSUE CONCERNING THE COMMUNICATIONS BAN WAS NOT PRESERVED, THE COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE MERITS OF THE APPEAL.

Second, the Court should grant rehearing and exercise its discretion to review the merits of PBA's appeal even if it concludes the issue of the injunction on communications with class members was not preserved. Indeed, as the Supreme Court has instructed courts, issue preservation rules should be approached with a "practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011); *see also Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing "concerns about a hypertechnical application of a procedural bar to appellate arguments"). Consequently, "an exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances." *State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (2012); *see also Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, n.9, 757 S.E.2d 399, n.9 (2014) (despite preservation problem, "for purposes of judicial economy we address the merits of the issue here"); *Jeter v. So. Carolina Dept. of Transp.*, 369 S.C. 433, n.6, 633 S.E.2d 143, n.6 (2006) ("Regardless of any preservation problems we address this issue in the interest of judicial economy.").

The Court should address the merits of PBA's appeal in the interests of judicial economy. This lawsuit was filed in August 2016 – roughly five-and-a-half years ago – and it likely will be several years before the Court can entertain any other appeal to correct the trial court's erroneous class-certification order. In the meantime, the parties will be forced to spend hundreds of thousands of dollars in legal fees and expenses on a case that derives from a single, isolated incident that occurred seven years ago in 2015 and which did not involve either Plaintiff. Absent review of the

merits of its current appeal, PBA, a non-profit that serves over 2,000 South Carolina police officers, faces further disruption of its service to its law enforcement officer members, while the trial court will be allowed to conduct what almost certainly would be an unconstitutional trial given each Plaintiff's admission he has not sustained any damages as a result of anything PBA did or said to him. This case will be before this Court again, which supports the proposition that the Court should address the merits of the appeal now. *See, e.g., Southern Bell Tel. and Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) ("[S]ince this issue would be raised to the Court at some future time and since both parties have fully briefed the issue, we find that it is in the interest of judicial economy to decide the matter now.").

In short, PBA respectfully submits it preserved the injunction prohibiting communications with class members. Regardless, the Court's refusal to address the merits of the appeal implicates the concerns of "hyper-technical" and "overzealous" reliance on issue preservation rules that serve only to delay justice to litigants. *See Atlantic Coast Builders and Contractors*, 398 S.C. at 332-33, 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part) ("In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice. . . . This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests."). The Court should grant rehearing in these circumstances.

CONCLUSION

This Court overlooked or misapprehended the law concerning issue preservation, and the Court should review the merits of the appeal in the interests of judicial economy regardless whether it concludes the injunction on communications with class members was preserved. For these reasons, PBA respectfully requests this Court grant its petition for rehearing.

Respectfully submitted,

January 6, 2022

s/James Edward Bradley

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PROOF OF SERVICE

I, Lynn G. Ivey, an employee of the Moore Bradley Myers Law Firm, P.A., certify that I have served the Appellant's Petition for Rehearing and Rehearing En Banc of Appellant Southern States Police Benevolent Association, Inc. on the Respondents by depositing a copy of same in the United States Mail, postage prepaid and via electronic mail (email), on January 6, 2022, addressed to their attorney of record as follows:

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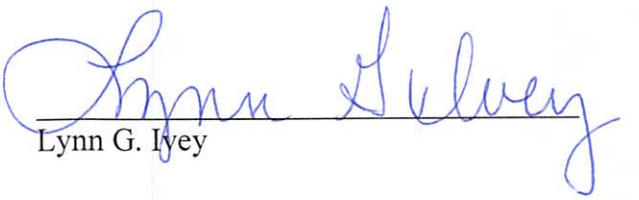

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