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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Opinion No. 5882 (S.C. Ct. App. filed December 22, 2021)

Southern States Police Benevolent Association, Inc., Petitioner,

v.

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

PETITION FOR CERTIORARI

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South Carolina Civil Procedure § 23.B.3 (2010)

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner, Southern States Police Benevolent Association, Inc. (“PBA”), petitions this Court to issue a writ of certiorari to review the opinion of the Court of Appeals in the case captioned *Donald Stanley and Sean Reiter, Individually and as Class Representatives, v. Southern States Police Benevolent Association, Inc.*, Op. No. 5882 (Ct. App. filed Dec. 22, 2021). For the reasons set forth below, the Petition should be granted and the opinion of the Court of Appeals should be reversed.

CERTIFICATION OF COUNSEL

Pursuant to SCACR 242(d)(1), counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 25, 2022.

QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in dismissing PBA’s appeal from the trial court’s order granting class certification;

(2) Whether the trial court erred in certifying an injunctive and monetary relief class where, among other things, there is no threat of imminent harm, one Plaintiff lacks standing to pursue the requested injunctive relief, neither named Plaintiff is a member of the proposed class, neither Plaintiff has sustained any recoverable damages, and Plaintiffs’ claims are riddled with individual issues that cannot be adjudicated on a class wide basis.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. The Parties

PBA is a 501(c)(5) non-profit, tax-exempt corporation organized and headquartered in Georgia. (R. p. 1177.) PBA operates as a labor organization for the welfare of its police officer members to improve working conditions, reduce the hazards of law enforcement, and enhance the

professionalism of law enforcement. (*Id.*) PBA is funded by membership dues, and its benefits from those dues include lobbying efforts, endorsement of candidates for office, accidental death benefits, publication of a police magazine, a legal defense benefit, and representation in grievance and disciplinary matters in the administrative context. (*Id.*) The legal defense benefit provided as part of the PBA Membership Plan (the “Plan”) provides, subject to terms and conditions, payment for an attorney to represent the member (at no cost to the member with no caps or limits) should a member ever be involved in a critical incident such as a shooting or sued as a result of actions taken as a result of employment as a law enforcement officer, including any criminal investigation or civil litigation. (R. pp. 1178, 31-39.)

Plaintiff Stanley is a lieutenant in the Charleston County Sheriff’s Office. (R. p. 628, lines 6-10.) He joined PBA in October 1994. (R. p. 638, lines 13-16.) At some point during his PBA membership, Stanley served as a board member for his local PBA chapter. (R. p. 641, lines 16-25.) In 2005, Stanley was accused of striking a child with his departmental vehicle. (R. p. 745, lines 12-25 through p. 746, lines 1-6.) The PBA assigned him an attorney, and Stanley testified he had no complaints with the representation. (R. p. 748, lines 18-20.) In 2016, Stanley was named as a co-defendant in a second lawsuit. (R. pp. 239-248.) Again, Stanley called PBA, which supplied him with counsel to defend him in the lawsuit. (R. p. 741, lines 6-15.)

Plaintiff Reiter worked for the Charleston County Sheriff’s Office from 2002 to 2007 and for the North Charleston Police Department from 2009 to 2016. (R. p. 779, lines 3-14.) While he was with PBA, he was elected a leader for his local chapter. (R. p. 768, lines 23-24.) In June 2016, he obtained a job in New Jersey as a “railroad police officer.” (R. p. 779, lines 22-25 through p. 780, lines 1-3, p. 785, lines 19-20.) At that point, he left PBA. (R. p. 790, lines 8-9.) In June 2004, Reiter had an automobile accident in which he struck and killed a pedestrian, and he

contacted PBA after the accident. (R. p. 793, lines 3-5.) PBA assigned him a lawyer, and Reiter agreed he was pleased with his lawyer's work on the case. (R. p. 793, lines 22-25.)

B. The Slager Events and Case

This case springs from the arrest and conviction of Michael Slager, an officer in the North Charleston Police Department who, in 2015, shot and killed an unarmed African American man. *See generally United States v. Slager*, 912 F.3d 224, 227-32 (4th Cir. 2019) (describing facts). In 2019, the Fourth Circuit Court of Appeals affirmed Slager's 240-month sentence for depriving the victim of his civil rights under color of law. *See id.* at 232-38. Because Slager was a member of PBA at the time of his arrest, he requested that PBA defend him in the criminal proceedings. (R. pp. 951-952.) Ultimately, PBA concluded it would not provide coverage because, PBA determined, the Plan's intentional acts exclusion applied as Slager had committed an "intentional violation." (R. pp. 952-953.) Slager then sued PBA in federal court in South Carolina; the parties settled that lawsuit out of court. *See Slager v. So. States Police Benevolent Ass'n*, Case No. 2:15-cv-4536-DCN, D.E. 41 (D.S.C. May 2, 2017) (order of dismissal).

C. Plaintiffs' Claims

Plaintiffs assert numerous contract and tort claims against PBA. (R. pp. 215-220, ¶¶ 83-127.) The trial court's Order Certifying Plaintiff Class ("Class Certification Order") states Plaintiffs allege the Plan was actually either (1) a policy of insurance; or (2) a "prepaid legal services plan," neither of which PBA was authorized to sell. (R. p. 5.) They allege PBA did not comply with the legal services plan requirements under South Carolina law because it provided legal defense counsel to its members from a panel of defense attorneys rather than notifying its members they could choose their own attorneys. (*Id.*) They further allege PBA failed to disclose to its members the Plan permitted PBA to withhold benefits its members pay for if it determines

that the member “has committed an intentional, deliberate, and/or illegal act.” (R. pp. 5-6.) Plaintiffs seek “injunctive relief and damages, namely a rescission of the Plan and a refund of member dues or premiums paid, together with additional relief.” (R. p. 6.)

In reality, however, Plaintiffs simply do not like the fact PBA withdrew its defense of Slager, as both Plaintiffs testified in their depositions. (R. p. 653, lines 18-24; R. p. 784, lines 22-24.) Beyond the Slager events, however, neither Plaintiff identified any instance in which PBA ever failed to provide them with the benefits of their membership nor that PBA committed any wrongful acts toward them. (R. p. 804, lines 19-21; R. p. 798, lines 16-18; R. p. 807, lines 10-15; R. p. 813, lines 8-10, 16-19; R. p. 814, lines 9-22; R. p. 824, lines 2-5, 8-10; R. p. 677, lines 21-25 through p. 678 lines 1-4, p. 679, lines 16-18, p. 703, line 25 through p. 704, lines 1-2; R. p. 677, lines 22-25 through p. 678, lines 1-6; R. p. 678, lines 10-12; R. p. 692, lines 11-16.)

II. PROCEEDINGS IN THE CASE

Stanley filed his complaint on August 4, 2016, in the Court of Common Pleas for the Ninth Judicial Circuit, Charleston County. (R. pp. 17-44.) In November 2016, an amended complaint was filed, which added Reiter as a named Plaintiff. (R. pp. 45-80.) PBA filed a motion to dismiss and Plaintiffs filed a motion to strike PBA’s answer; the trial court denied both motions in July 2017. (R. pp. 365-395, 1-2.) PBA filed a summary judgment motion, which the trial court denied in November 2017. (R. pp. 432-33, 1055-1128, 3.) Plaintiffs filed their motion for class certification on November 13, 2017. (R. pp. 434-449.) On December 31, 2018, following briefing and argument, the trial court entered the Class Certification Order (R. pp. 4-15), which certified a class of “[a]ll residents of South Carolina who participated in the Defendant’s Legal Defense Benefit Plan by paying ‘member dues’ to the Defendant in exchange for benefits of said Plan from August 4, 2013 to August 4, 2016” while excluding from the class “Defendant’s current and former

executive and local board members or executive level officers, employees, and persons that timely and properly exclude themselves from the class.” (R. p. 15.) The trial court ordered that “no party shall communicate with the class members regarding this class action and the allegations contained therein.” (*Id.*) PBA moved for reconsideration of the Class Certification Order on January 14, 2019, which was denied. (R. pp. 468-892, 16.)

On February 6, 2019, PBA filed its notice of appeal of the Class Certification Order. The parties briefed PBA’s appeal and the Court of Appeals heard oral argument on the appeal on November 10, 2021. On December 22, 2021, the Court of Appeals entered an order dismissing PBA’s appeal for lack of appellate jurisdiction without ruling on the merits of PBA’s appeal.

ARGUMENT

I. THE COURT OF APPEALS’ DISMISSAL OF PBA’S APPEAL SHOULD BE REVERSED BECAUSE THAT COURT HAD APPELLATE JURISDICTION.

In Opinion No. 5882, issued December 22, 2021, the Court of Appeals 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. No. 5882 at 1. The Court of Appeals 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 the dismissal of the appeal should be reversed for two reasons.

A. The Issue of the Trial Court’s Injunction on Communications with Class Members Was Properly Preserved for Appeal.

First, the Court of Appeals’ holding that PBA failed to preserve the “communications ban” issue should be reversed. This Court has 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). Thus, under *Dutton*, 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.

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 this 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)); *accord, Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640 n.3, 817 S.E.2d 273 n.3 (2018); *Church v. McGee*, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (2011) (quoting *Wilder*).

This 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. So. Car. Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis original); *see also State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 226, 837 S.E.2d 910, 918 (2019) (quoting *Elam*). *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. The Court should grant the petition and order the Court of Appeals to address the injunction argument – and the other issues on appeal – on the merits.

B. Even If the Communications Ban Issue Was Not Preserved, the Court of Appeals Erred in Not Exercising Its Discretion to Address the Appeal.

Second, and alternatively, the Court of Appeals erred in refusing to exercise its discretion to review the merits of PBA’s appeal. Indeed, as this Court has advised, 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”). Thus, “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 issue, “for purposes of judicial economy we address the merits of the issue here”); *Jeter v. So. Car. 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 of Appeals should have addressed the merits of PBA’s appeal in the interests of

judicial economy. This lawsuit was filed in August 2016 – over five-and-a-half years ago – and it likely will be several years before an appellate 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 services 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. These facts support a decision of the merits of the appeal regardless of any alleged preservation issues. *See, e.g., So. 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.”); *see also 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”).

II. UPON PLENARY REVIEW, THE COURT SHOULD CONCLUDE THAT THE TRIAL COURT REVERSIBLY ERRED IN CERTIFYING A CLASS.

“Proponents of the class certification bear the burden of proving [that the] prerequisites of class certification have been met.” *Waller v. Seabrook Island Prop. Owners Ass’n*, 300 S.C. 465,

467, 388 S.E.2d 799, 801 (1990). Rule 23(a), SCRC, sets forth the five prerequisites: (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. So. Carolina Dept. of Revenue*, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003). Furthermore, it is “imperative” that “the court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied.” *Waller*, 300 S.C. at 469, 388 S.E.2d at 802; *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 (“In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied”).

A. Trial Court Erred in Certifying an Injunctive Relief Class.

Plaintiffs seek injunctive relief “to bar Defendant PBA from operating as an insurer without proper authority and license, including barring Defendant PBA from soliciting, marketing, selling and issuing insurance contracts and adjusting claims unless Defendant obtains proper authority and licensing from the states in which it is operating.” (R. p. 64, ¶ 127.) The trial court not only certified a class without the requisite rigorous analysis, it also entered an injunction ordering that “no party shall communicate with the class members regarding this class action and the allegations contained therein.” (R. p. 15.) It is well settled an injunction “is a drastic remedy issued by a court in its discretion to prevent irreparable harm suffered by the plaintiff.” *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). To obtain an injunction, the movant “must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate

remedy at law.” *Id.*, 603 S.E.2d at 908. The trial court made no effort to analyze any, let alone all, of those elements.

Moreover, Plaintiffs failed to cite any legal authority entitling them to injunctive relief. In their Amended Complaint, Plaintiffs assert the future irreparable injury to the class would be PBA’s “acting without any regulatory oversight whatsoever,” and they seek injunctive relief to “bar [PBA] from operating” and issuing the Plan “unless Defendant obtains proper authority and licensing[.]” (R. p. 64, ¶¶ 125, 127). PBA has sought proper authority for providing the Plan under South Carolina law, and it is currently regulated by the State through the South Carolina Department of Consumer Affairs. Thus, Plaintiffs’ request for an injunction based on an alleged “lack of oversight” (R. p. 700, lines 24-25) is moot. An appellate court ““will not pass on moot and academic questions or make an adjudication where there remains no actual controversy . . . A case becomes moot when judgment, if rendered, will have no practical legal effect upon [an] existing controversy. This is true when some event occurs making it impossible for [a] reviewing [c]ourt to grant effectual relief.”” *Shah v. Richland Memorial Hosp.*, 350 S.C. 139, 151, 564 S.E.2d 681, 687 (Ct. App. 2002) (quoting *Mathis v. South Carolina State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 714-15 (1973)). The injunctive relief claim, therefore, was erroneously certified on this basis.¹

Furthermore, the record testimony does not remotely rise to the level of injunctive relief sufficient to permit an injunctive relief class because there is no threat of immediate harm, which

¹ Plaintiffs went further in their depositions and demanded that PBA be dismantled, with all membership agreements rescinded and all membership dues refunded. In other words, Plaintiffs seek a mandatory injunction, which “is an especially drastic remedy and is rarely granted.” *Johnson v. Phillips*, 315 S.C. 407, 417, 433 S.E.2d 895, 901 (1993), *aff’d in part, rev’d in part on other grounds by Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995). Plaintiffs have made no effort to fit their case within the “rare[]” circumstances under which the “especially drastic remedy” of a mandatory injunction could be obtained.

is required for an injunction. First, Plaintiff Reiter has no basis to pursue an injunction because he is no longer a member of PBA. (R. p. 790, lines 8-9.) He is no longer paying dues to PBA as he now lives in New Jersey. (R. p. 780, lines 22-25 through p. 781, lines 1-3, p. 785, lines 19-20.) Accordingly, there is simply no legal basis for Plaintiff Reiter to obtain injunctive relief pertaining to the structure, management, and operations of an organization, PBA, of which he is no longer a part. *See, e.g., Meehan v. Meehan*, 2006 WL 7285712, *2 (S.C. Ct. App. Feb. 10, 2006) (in action challenging conveyance of deeds, court upheld trial court’s dismissal of case for lack of standing where plaintiff “did not own the . . . properties at the time [his] Mother transferred them to [his siblings]”).

Similarly, Plaintiff Stanley has not come close to establishing the type of imminent harm that would warrant an injunctive relief class. To obtain an injunction, Plaintiffs “must establish (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.” *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 908. Plaintiffs are pursuing an adequate remedy at law, which dooms any injunctive relief request on that basis alone. Furthermore, Plaintiffs do not come close to meeting the “irreparable harm” component for an injunction. Stanley, for example, testified he will not suffer *any* harm absent an injunction other than purely speculative and conjectural “harm.” (R. p. 692.) Conjectural “concerns” are not a proper basis for an injunction.

B. The Trial Court Erred in Certifying a Class for Monetary Relief.

1. The Trial Court Reversibly Erred in Ruling Plaintiffs Satisfied the Commonality Standard.

As the leading scholar of South Carolina civil procedure has observed:

The commonality requirement is a condition of class action status, but common questions alone are not sufficient. The class action must be a better procedural mechanism for resolving the litigation than the joinder of named parties or

individual cases. The court should first determine the existence of common questions, and then whether they are sufficiently central to justify the class action.

James F. Flanagan, *South Carolina Civil Procedure* § 23.B.3 (2010). Under South Carolina law, a court “determines the existence of commonality” by “examining the plaintiffs’ claims and the defendants’ anticipated defenses.” *Gardner*, 353 S.C. at 22, 577 S.E.2d at 201. The Court in *Gardner* observed “a representative plaintiff cannot establish commonality ... if the court must investigate each plaintiff’s individual claim.” 353 S.C. at 21-22, 577 S.E.2d at 201 (quotations omitted). Because “[a] court determines the existence of commonality among defendants by examining the plaintiffs’ claims and the defendants’ anticipated defenses,” the court must consider the elements of Plaintiffs’ claims and PBA’s defenses “within the context of the facts of the case.” *Id.* at 22, 577 S.E.2d at 201. “In practical terms this means the party must articulate the existence of significant common, legal, or factual issues which bind the proposed class together.” *Id.* (quotations omitted). In cases where the “factual differences” between class members’ claims “are the crux of a predominant legal issue,” commonality does not exist. *Id.*

a. Plaintiffs’ Tort Claims Are Inappropriate for Class Certification.

Plaintiffs assert four claims sounding in tort: breach of fiduciary duty, fraudulent inducement, negligence, and negligent misrepresentation. None is certifiable.

(1) The Breach of Fiduciary Duty Claim Is Not Certifiable.

To prevail on a claim for breach of fiduciary duty, Plaintiffs “must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff[s] by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012). Plaintiffs offer no authority for the proposition that a fiduciary duty between PBA and Plaintiffs exists in the first place. The Amended Complaint simply states, in a conclusory manner, that PBA owed a fiduciary

duty to the class, and that PBA breached the fiduciary duty of good faith and fair dealing by issuing insurance policies without a license. (R. p. 61, ¶¶ 98-99.) Plaintiffs wrongly assume the existence of a fiduciary duty based on their allegation PBA acted as an unlicensed insurer.² But under South Carolina law, an insurance relationship *does not* ordinarily give rise to a fiduciary duty. *See Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 331, 574 S.E.2d 502, 508 (Ct. App. 2002). There is nothing in the record that would warrant any court departing from the general rule that the relationship here – whether characterized as insurer-insured, organization-member, or any other status – is one of a fiduciary nature. Even if Plaintiffs could prove the existence of a fiduciary duty between PBA and the class, proving breach and damages would necessarily require individualized assessment. *See Kitchens v. U.S. Shelter*, 1988 WL 108598, *3 (D.S.C. June 30, 1988) (reciting that court denied class certification to fiduciary duty claim).

(2) The Fraud in The Inducement Claim Is Not Certifiable.

Plaintiffs' fraud in the inducement claim is inherently uncertifiable. Indeed, to prevail on that claim, Plaintiffs must prove *nine* elements to establish fraud *alone*, along with an additional three to establish fraud in the inducement:

To prevail on a cause of action for fraud, a Plaintiff must prove by clear, cogent and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its

² The “unlicensed insurer” issue is, if anything, a red herring because it does not supply Plaintiffs with a basis to recover damages simply because PBA allegedly was not licensed as an insurer at relevant points in time. The Court of Appeals' opinion in *Lenz v. Walsh*, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005), is instructive, as the court there addressed, in a matter of first impression, “whether a homeowner may recover payments made to an unlicensed builder under a residential construction contract.” The court held that “generally, a homeowner may not recover payments already made to an unlicensed contractor merely because the contractor did not hold a license when the contract was executed.” *Id.* The reasoning and holding from *Lenz* should apply here – assuming the legal defense benefit is a policy of insurance, Plaintiffs cannot recover their payments (i.e., dues) simply because the PBA was not licensed as an insurer when certain PBA members joined the Plan. They received the benefit of their bargain – cost-free and effective representation – either way.

truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. ***To establish a claim or defense of fraud in the inducement, a plaintiff must prove the nine elements of fraud as well as the following three elements:*** (1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him.

Moseley v. All Things Possible, Inc., 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010), *aff'd*, 395 S.C. 492, 719 S.E.2d 656 (2011) (internal quotations omitted) (emphasis added). It is inconceivable that each of those twelve elements could be resolved on a class wide basis, and the trial court made no effort to argue they can be – and neither did Plaintiffs.

The first – and dispositive – problem is that Plaintiffs admitted PBA has not defrauded them or made any misrepresentation to them. (R. p. 807, lines 10-15 (Reiter); R. pp. 677, lines 21-25 through p. 678, lines 1-4, p. 678, lines 22-25 through p. 679, lines 1-6, p. 679, lines 10-12, 16-18, p. 703, line 25 through p. 704, lines 1-2 (Stanley).) “Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence.” *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Plaintiffs’ failure to provide any evidentiary support for a fraud claim is reason enough to reverse certification of a fraud-based class.

Regardless, the reliance element of the fraud claim precludes certification. The law is settled on the individualized nature of fraud-based claims, particularly as to establishing reliance, the reasonableness of such reliance, and any injury and damages. In a case applying South Carolina law, the Fourth Circuit Court of Appeals rejected certification of fraud-based claims:

Indisputably, negligent misrepresentation and fraud require proof of reliance. *See Robertson v. First Union Nat’l Bank*, 350 S.C. 339, 565 S.E.2d 309, 313-14 (Ct. App. 2002) (recounting elements of negligent misrepresentation and fraud claims under South Carolina law). To establish fraud, a plaintiff must prove, *inter alia*, that the hearer relied on the truth of a fraudulent statement, and had a right to rely thereon. *Id.* To establish negligent misrepresentation, a plaintiff must prove, *inter alia*, that the plaintiff “justifiably relied on [a false] representation, and ... the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the

representation.” *Id.* at 14. Thus, both theories of liability require that the plaintiff demonstrate (1) actual reliance **and** (2) that the plaintiff had a right to rely on the misstatement (in the case of fraud) or that such reliance was justifiable under the circumstance (in the case of negligent misrepresentation). Almost inevitably, establishing these elements requires an individualized inquiry.

Gunnells v. Healthplan Servs., 348 F.3d 417, 434-35 (4th Cir. 2003) (emphasis original). Here, the trial court could not possibly make an accurate determination as to all twelve factors of the fraudulent inducement claim for 2,300 class members in one sitting. Accordingly, the trial court reversibly erred in holding Plaintiffs satisfied commonality with respect to their fraud claim.

(3) Plaintiffs’ Negligence and Negligent Misrepresentation Claims Require Individualized Assessment.

Nor are Plaintiffs’ negligence and negligent misrepresentation claims certifiable. Generally, claims of negligence and negligent misrepresentation pled simultaneously are “essentially subsumed in the negligent misrepresentation cause of action.” *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010). To prove their negligent misrepresentation claim, Plaintiffs must establish six factors:

(1) [T]he defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Quail Hill, 387 S.C. at 240, 692 S.E.2d at 508 (quotations omitted). Plaintiffs have not alleged any actionable false representation to satisfy the first element. Individual issues permeate the other elements of this claim, particularly as to whether justifiable reliance occurred: Plaintiffs must establish each member of the class justifiably relied on a representation by PBA. “A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties.” *Id.* at 241, 692 S.E.2d at 508. The position and relation of PBA to individual members necessarily differ based on the totality of the circumstances

surrounding that member's involvement with PBA and cannot be determined on a classwide basis. Determining what constitutes justifiable reliance in these different contexts requires individualized inquiry. *See Spelman v. Bayer Corp.*, 2012 WL 13047524, *4 (D.S.C. Dec. 17, 2012) ("Because proof of reliance is generally individualized to each plaintiff allegedly defrauded ... negligent misrepresentation claims are not readily susceptible to class action treatment, precluding certification of such actions as a class action.") (quotations omitted)).³

b. The Contract-Based Claims Are Not Appropriate for Certification.

(1) The Contract Claim Requires Individualized Assessment.

To prove claims for breach of contract, Plaintiffs must show "the existence of a contract, its breach, and damages caused by such breach." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015). Whether PBA breached a contract with a member of the Plan must be examined individually. Individual circumstances also dictate the amount of damages, if any, caused by any alleged breach.

Plaintiffs' Amended Complaint does not allege PBA breached a contract as to any putative class member through wrongful denial of any benefit under the Plan. Rather, Plaintiffs claim PBA was not authorized to enter into the contracts and, therefore, breached the implied covenants of good faith and fair dealing. (R. p. 59, ¶ 85.) "However, there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Hotel & Motel Holdings*, 414 S.C. at 653, 780 S.E.2d at 273 (quoting *Adams*

³ To the extent Plaintiffs purport to plead a claim sounding purely in negligence, that claim is barred by the economic loss rule, which precludes damages in negligence actions "where there is neither personal injury nor property damage." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). Furthermore, a negligence claim cannot be certified because "such a claim raises questions of causation and injury which would require individual proof of causation." *Spelman*, 2012 WL 13047524, *4.

v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995)). Accordingly, to demonstrate a breach of the covenant, members of the class must show that PBA acted outside the provisions of their individual contracts. This necessarily requires an even more heightened level of fact-intensive, individualized inquiry, precluding class treatment.

To the extent PBA could be found to have breached a duty by failing to seek proper guidance on licensure, any potential breach has since been cured. PBA sought proper authority for providing the Plan under South Carolina law, and it is currently regulated by the state through the South Carolina Department of Consumer Affairs. The element of breach is moot and, therefore, cannot be common to the class. The breach of contract claim is not certifiable.

(2) Plaintiffs' Unjust Enrichment Claim Is Not Certifiable.

Nor is Plaintiffs' unjust enrichment claim certifiable. Unjust enrichment is an equitable doctrine, which requires Plaintiffs to prove (i) the class members conferred a benefit upon PBA; (ii) PBA realized that benefit; and (iii) PBA retained the benefit under circumstances that make it unjust for PBA to retain the benefit without paying the class member its value. *See Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009); *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003).

Plaintiffs allege, on behalf of themselves and the putative class, PBA was unjustly enriched by collecting dues from its members for participation in the Plan, because it acted as an unlicensed insurer. (R. p. 61, ¶ 103.) By its very nature, an unjust enrichment claim is unsuitable for classwide resolution. *See Melton ex rel. Dutton v. Carolina Power & Light Co.*, 283 F.R.D. 280, 290 n.7 (D.S.C. 2012) (concluding that because an unjust enrichment claim required the factfinder to make numerous "individualized determinations" that it was unlikely any "supposed common question" would be capable of classwide resolution). Adjudicating the unjust enrichment claim would require the court to investigate the individual circumstances surrounding each putative class

member's claim. The court would have to determine whether, based on each class member's unique circumstances, it would be "unjust" for PBA to retain that individual's membership dues from the time period in question. Making such a determination would require the court to consider, among other things, whether each class member received the bargained-for benefits in exchange for his Plan membership dues, or whether PBA unjustly retained that member's monthly dues.⁴

Put succinctly, there are many benefits funded by the membership dues collected by PBA, and if a Plan member received his benefits, PBA was not unjustly enriched by that member. Even if PBA acted in an unlicensed capacity, Plaintiffs are not presumed to have suffered injury. *Cf. Dema*, 383 S.C. at 124, 678 S.E.2d at 43 ("Whether HHRMC was authorized to perform TCCs was irrelevant to Appellants' need for the procedure, and Appellants would have received the TCCs from another provider had HHRMC not administered them. In other words, Appellants have suffered no injury even if HHRMC has been unjustly enriched. For these reasons, we must affirm the trial court's dismissal of Appellants' unjust enrichment claim."). Accordingly, Plaintiffs' unjust enrichment claim is not certifiable.

c. PBA's Defenses to Plaintiffs' Claims Are Highly Individualized and Further Preclude Class Certification.

Additionally, PBA's defenses to each of Plaintiffs' causes of action are individualized and constitute an independent basis to reject certification. They are riddled with individual issues that defy resolution on a classwide basis. For example, such defenses as waiver and estoppel

⁴ A class member may have received the benefit of their PBA membership dues in several ways, such as: receiving the Blue Review publication; being updated on legislation concerning police officers from PBA's monitoring efforts; benefiting from the efforts of lobbyists hired by PBA; receiving accidental death benefits from PBA; receiving representation in an internal disciplinary or grievance proceeding by PBA; receiving the opportunity to join a local police officer advocacy group organized by PBA; or receiving legal representation from a lawyer whose services were paid for by PBA. (R. pp. 1018-1019, ¶ 4.)

demonstrate a lack of commonality. Waiver may occur when a party “possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.” *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992). Similarly, estoppel “applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury.” *State v. Hinojos*, 393 S.C. 517, 523, 713 S.E.2d 351, 354 (Ct. App. 2011). Plaintiffs’ own facts and testimony demonstrate the viability of a waiver defense. Plaintiff Stanley seeks a refund of all of the dues he has paid to PBA over a 20-year period – even while he willingly accepted the benefits of cost-free, Plan-funded legal representation that, in 2019, extricated him from a legal matter in which he was a named defendant. Some PBA plan members, moreover, may have learned about the alleged “secret exclusion” in PBA insurance policy and continued to pay monthly fees, thereby waiving their claims that they were “lied to” or otherwise not receiving the benefit of their bargain. Others may have accepted benefits with knowledge of such a provision and not paid them back, in which case they may be estopped from asserting the present claims. In *Melton*, the court cited *Janasik* and *Hinojos* in denying certification due to the presence of waiver and estoppel defenses. *See* 283 F.R.D. at 293. The same result should obtain here.

PBA’s voluntary payment defense also is individualized. Generally, “money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered back merely because the aggrieved party was ignorant of the law relating to his liability.” *Moody v. Stem*, 214 S.C. 45, 60, 51 S.E.2d 163, 169 (1948). Here, neither Plaintiff has alleged duress or compulsion, and both admitted that they are unaware of any

fraudulent conduct by PBA. (R. p. 678, lines 22-25 through p. 679, lines 1-6; R. p. 807, lines 10-15.) PBA is entitled to explore the voluntary payment defense for each class member.

PBA is also entitled to assert the defenses of comparative negligence (for the negligence claims) and failure to mitigate (for the contract claims). In one case, a district court in South Carolina held “the affirmative defenses of comparative negligence . . . and failure to mitigate” were individualized and would require the court “to inquire into each class member’s case to determine whether these affirmative defenses are valid.” *Robert Elliott Trucking, Inc. v. Caterpillar, Inc.*, 2012 WL 2918700, *8 (D.S.C. Mar. 21, 2012); *see also Spelman*, 2012 WL 13047524, *3 (agreeing that “potential defenses, such as . . . estoppel, and comparative negligence” were individualized and precluded class certification).

2. The Trial Court Erred in Ruling That Plaintiffs Satisfied Typicality.

To satisfy the typicality requirement, Plaintiffs must prove that their “interest in prosecuting [their] own case . . . simultaneously tend[s] to advance the interest of the absent class members.” *Dieter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006) (holding that named plaintiffs in proposed antitrust class action were not typical of other purported class members because proving absent class members’ claims would require “new and different proof” than evidence required to prove named plaintiffs’ claims). The “essence of the typicality requirement is captured by the notion that ‘as goes the claim of the named plaintiff, so go the claims of the class.’” *Dieter*, 436 F.3d at 466 (quotations omitted). Accordingly, the typicality analysis must “begin with a review of the elements of [the] plaintiff[’s] prima facie case and the facts on which the plaintiff would necessarily rely to prove it,” whereupon the court must “then determine the extent to which those facts would also prove the claims of the absent class members.” *Id.*

Here, proof of either Plaintiff's claims would not prove the other Plaintiff's claims, let alone those of over 2,000 other putative class members. For example, if Plaintiff Stanley somehow could prove PBA breached a contract with him (and he most assuredly cannot, given that he admitted under oath that PBA has never breached any contract with him (R. p. 698, lines 1-10)), that would not prove PBA breached a contract with any other putative class member.

Furthermore, Plaintiffs do not establish typicality because they are seeking a remedy – shutting down PBA – that, they admit, no one else has requested or desired. (R. p. 816, lines 16-19.) There is simply no basis for such a remedy, nor is there any reasonable basis to conclude that these two Plaintiffs, who admit they received the very benefits they bargained for under the Plan, are typical of the over 2,000 PBA members they purport to represent. The trial court failed to rigorously analyze the typicality requirement and erroneously concluded that these Plaintiffs, neither of whom have been personally damaged by any acts or omissions of PBA (beyond the speculative derivative “harm” they believe they sustained from the Slager events, which did not involve either of them), are appropriate and typical representatives of the proposed class.

Plaintiffs must do more than simply allege typicality. *See Waller*, 300 S.C. at 467-68, 388 S.E.2d at 801 (stating plaintiff bears the burden of proving she has established each of the prerequisites of a class). Yet, Plaintiffs have made only a conclusory argument that PBA harmed each putative class member because PBA supposedly acted as an unlicensed insurer, issuing unauthorized “policies” through the collection of the \$23.50 monthly membership dues for participation in the Plan. (R. pp. 46-47, ¶¶ 11, 16.) Neither Plaintiff can offer any examples of how he personally, or any member of the class, has been similarly injured (or injured at all), whether or not caused by the alleged lack of licensure. They instead simply aver the amount paid in membership dues constitutes an injury entitling themselves and class members to refunds and

rescission of their Plan membership contracts. (R. p. 47, ¶ 16.) This argument presents a fundamental flaw in the trial court's order. Under Plaintiffs' theory, and particularly in light of their demand for rescission, adjudication of this claim will require the trial court to individually assess each plaintiff's damage in relation to dues paid versus the cost of benefits received. *See First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 299 S.C. 491, 496, 386 S.E.2d 245, 248 (1989) ("Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore [the party] to the position occupied prior to the making of the contract."). As the Court held in *Gardner*, "[r]equiring such individualized examination negates the benefits of a class action suit." 153 S.C. at 22, 577 S.E.2d at 201.

In essence, Plaintiffs' claims are simply a thinly veiled attempt to terminate memberships and disgorge PBA of membership fees voluntarily paid because Plaintiffs disagree with PBA's decision to not provide legal representation to Slager, a matter that has been long been settled in other courts. These claims are not typical of the class, but rather represent the efforts of two individuals to obtain monetary and injunctive relief at the significant expense (and to the severe detriment) of former and current PBA members. There has been no evidence presented that any other PBA members desire rescission of their memberships and cancellation of benefits (particularly those currently being provided counsel by the PBA) or that any former PBA members desire their membership dues to be refunded – less the cost of benefits received. Accordingly, Plaintiffs failed to establish their claims are typical of the class.

3. Plaintiffs Did Not Satisfy the Adequacy Requirement.

a. Because They Do Not Fall Within Their Own Class Definition, Plaintiffs Are Inadequate Representatives.

Quoting the United States Supreme Court, this Court has observed that "due process" of course requires that the named plaintiff *at all times adequately represent* the interests of the absent

class members.” *Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 664, 591 S.E.2d 611, 621 (2004) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)) (emphasis added by *Hospitality Mgmt.*). “Significantly, a class representative ‘must be part of the class and possess the same interest and suffer the same injury as the class members.’” *Id.*, 591 S.E.2d at 622 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997)).

Here, neither Plaintiff is a “part of the class,” which the trial court defined as: “All residents of South Carolina who participated in the Defendant’s Legal Defense Benefit Plan by paying member dues to the Defendant in exchange for benefits of said Plan from August 4, 2013 to August 4, 2016.” (R. p. 15.) Significantly, the trial court qualified that definition with certain exclusions: “Excluded from the class are Defendant’s *current and former executive and local board members* or executive level officers, employees, and persons that timely and properly exclude themselves from the class.” (*Id.*) Plaintiffs’ sworn testimony unequivocally reveals that each was, at one time, a local board member or otherwise a leader in a local PBA chapter. (R. p. 788, lines 11-13 (Reiter); R. p. 641, lines 16-22 (Stanley).) As former “executive and local board members,” Plaintiffs fall squarely within their own exclusion. Accordingly, they are “not part of the class” as required by the *Hospitality Mgmt.* and United States Supreme Court cases. For this reason, they are inadequate representatives. *See, e.g., Weinberger v. Retain Retail Co.*, 498 F.2d 552, 556 (4th Cir. 1974) (certification properly denied where named plaintiff was “not a member of the class he seeks to represent”).

b. Alternatively, Plaintiffs Are Inadequate Because Their Interests Are Antagonistic to the Putative Class Members.

Additionally, to determine adequacy the Court must assess “whether the named plaintiff has interests that are antagonistic or adverse to those of the rest of the class.” *Waller*, 300 S.C. at 468, 388 S.E.2d at 801. “If so, that plaintiff will not be considered an adequate representative of

the class.” *Id.* A disqualifying antagonistic interest can include “when the named representative has a claim which conflicts with the economic interests of the class.” *Id.* In his deposition, Reiter testified he and Stanley supposedly had “stepped up at the helm” because they wanted to see PBA “shut down,” despite being unaware of any other members who shared that desire (R. p. 816, lines 10-25 through p. 817, lines 1-7)) and notwithstanding his own testimony that “[t]he legal defense is a valuable service” (R. p. 818, line 13). The stated goal of this case, then, is to judicially force the closure of PBA, the rescission of memberships, and disgorgement of membership dues voluntarily paid – a remedy they stand alone in seeking because they cannot name any other PBA members who desire such a drastic and unwarranted result. (R. p. 816, lines 16-19.) Such interests are antagonistic to the proposed class.

Dismantling PBA, as Plaintiffs desire, indisputably would deprive all members of the benefit of the prepaid legal defense Plan and require them to immediately make alternative arrangements for legal representation for circumstances currently covered by the Plan.⁵ As such, Plaintiffs’ goal clearly is against the economic interests of the putative class members, due to the high cost of replacing the legal defense benefit and other Plan benefits (such as accidental death benefits) through individual, private resources. The other benefits provided by PBA, such as lobbying efforts and accidental death benefits, for which these class members have voluntarily paid monthly dues, would also cease – all without any evidence that any person other than two Plaintiffs (one of whom is not even a member of PBA and would be wholly unaffected by such a result) and their lawyers desire such a draconian result. Plaintiffs have not identified any persons whose interests they are, in fact, fairly and adequately protecting. *Cf. Robert Elliott Trucking,*

⁵ It is undisputed that PBA is currently providing legal counsel to dozens of South Carolina PBA members. (R. p. 601, ¶ 4.)

2012 WL 2918700, *7 (denying certification where “Plaintiff has not established that any other member of the putative class has experienced the same problem with Defendant’s engine”).

In *Waller*, this Court considered a proposed class action wherein appellants sought to represent members of Seabrook Island Property Association. 300 S.C. at 466, 388 S.E.2d at 800. The Court explained that “[t]he fact that a proposed class representative is a property owner in a large or highly populated development does not, in and of itself, qualify him to bring a class action on behalf of the remaining property owners.” *Id.* at 468, 388 S.E.2d at 801. The appellants, who were marsh front property owners, sought to invalidate a “special assessment to pay for beach renourishment ... [for] the primary benefit of ... beach lot owners.” *Id.* The Court held the allegations revealed “interests which are adverse and antagonistic to beachfront property owners. Beachfront property owners who would directly benefit from the assessment would most certainly find this action repugnant to their interests. Consequently, appellants would be inadequate representatives of the putative class of *all* property owners.” *Id.* at 469, 388 S.E.2d at 801-02 (emphasis added). Similarly, in this case, Plaintiffs seek to invalidate PBA memberships as provided by a nonprofit organization for the primary benefit of its members. PBA members who directly benefit from memberships most certainly would find this action repugnant to their interests. Thus, *Waller* precludes certification.

Plaintiffs’ efforts are antagonistic to the interests of PBA members who wish to remain members and retain their benefits. Their claims are antagonistic to the economic interests of those members of the class who cannot afford to retain private counsel in the absence of their PBA Plan benefits. This Court should, therefore, reverse the trial court’s class certification.

CONCLUSION

PBA respectfully requests that this Court reverse the Court of Appeals’ order dismissing PBA’s appeal of the Class Certification Order.

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Respectfully submitted,

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