

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF SPARTANBURG ) SEVENTH JUDICIAL CIRCUIT

Kenneth and Angela Hensley, on behalf ) Civil Action No. 2013-CP-42-01569  
of their minor child BLH, and All Others )  
Similarly Situated, )  
Plaintiffs, )

vs. )

South Carolina Department of Social )  
Services )

Defendant. )

**ORDER DENYING DEFENDANT’S  
MOTION TO DECERTIFY THE CLASS  
AND ORDERING PLAINTIFF TO  
PROVIDE NOTICE TO ALL CLASS  
MEMBERS**

This matter before the Court was Defendant’s Motion to Decertify the Class filed on May 31, 2024. Oral arguments in this matter were held on June 5, 2024. Attorneys T. Ryan Langley and James Fletcher Thompson appeared for the Plaintiffs, and Attorney Andrew Lindemann appeared for Defendant South Carolina Department of Social Services (“Defendant). The Court, after considering the submitted motions, memorandum, pleadings, exhibits, and oral arguments, denies Defendant’s Motion to Decertify the Class. The Court also exercises its authority under Rule 23 to Order that Plaintiff’s provide notice to the Class by the means outlined herein; including to those Class members under the age of 4 at the time of adoption.

The Court incorporates the previous Orders in this matter into this Order by reference herein and the Form 4 Order by Judge J. Mark Hayes, II filed July 9, 2024.

**THE LAW**

Rule 23 of the South Carolina Rules of Civil Procedure grants this Court broad discretion to protect the class and to provide notice to class members. Specifically, Rules

23(d)(1) and (2) of the South Carolina Rules of Civil Procedure require the trial court to maintain continual control over class action proceedings, including the method of class notification. Salmonsens v. CGD, Inc., 377 S.C. 442, 455–56, 661 S.E.2d 81, 89 (2008). Further, the interests of justice and due process require the same. See Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment (explaining notice requirement was designed “to give the [class] members . . . an opportunity to secure exclusion from the class” and indicating such notice was necessary “to fulfill requirements of due process”).

The United States Supreme Court has noted that “[c]lass actions serve an important function in our system of civil justice.” Gulf Oil Co. v. Bernard, 452 U.S. 89, 99, 101 S. Ct. 2193, 2199 (1981). The Court has also recognized that the class action procedure is necessary for private rights of action to be initiated. Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 1174 (1980), reh’g denied, 446 U.S. 947, 100 S. Ct. 2177 (1980). As stated in Deposit Guar. Nat’l Bank, class actions serve an important function in our system of civil justice, because they permit plaintiffs to vindicate the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the costs. Id at 338, 1174.

## ANALYSIS

### **I. Denial of Defendant’s Motion to Decertify the Class**

Based on the record presently before this Court, the prior Judge’s ruling to certify the class was correct and the motion to decertify is denied. The previous circuit judge certified that class and then addressed the class certification again on the Defendants’ motion to reconsider. While a motion to decertify a class can be made at any time, no new evidence was offered by the moving party that was not available or offered to the previous circuit judge who certified

the class. While the rule that one circuit judge cannot overrule another circuit judge may not apply to decertification motions, without additional new evidence unavailable to the prior judge or some articulable change that justifies revisiting the certification issues, this Court, to some degree, will not begin its review of the prior judge's decision as meritless. Otherwise, a party opposing class certification could simply file and refile and file again, decertification motions, thereby frustrating the class members right to reasonable due process. This case is about a contractual payment that was reduced in the amount of \$20 per month by DSS to families who were adopting--- through DSS--- a special needs child. DSS was contractually obligated to make the monthly payments to the adopted family for the adopted child's needs. As this Court understands a "special needs" child is one who has a medical condition, physical condition, mental condition, or combination of thereof, that causes the child to have needs beyond those typical needs that may be considered customary for a child.

This Court takes judicial notice that a special needs child has financial and other needs that are more significant than non-special needs children and that adoption of special needs children presents more challenges to DSS to find a pool of prospective adopting parents. These payments were negotiated between the adopting parents and DSS at the time the contract was executed and included a sum deemed necessary to meet the child's needs. The overall nature of the claim being an institutional/agency decision to reduce the contractually obligated payment in the amount of \$20 per month per family for the care of special needs children meets the objective behind class action litigation.

This Court disagrees with DSS assertion that to recover damages in this action a child or family would need to prove with particularity how the reduction in the subsidy amount by \$20 a month would have individually affected the child in a negative manner. This case does not involve the Tort Claims Act or Qualified Immunity under Section 1983. The damages

calculation is contractual. There is no requirement under the law that third-party beneficiaries show that the contractually owed amount, if paid, would have been used for the third-party beneficiary's benefit. It is enough to show that there was a breach in the contract and the damages in the loss of consideration identified in the contract flowed from the breach.

Here, I find that Plaintiffs have established a prima facie case, by demonstrating the existence of a contract, its breach, and damages. *Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015) (citing elements for a breach of contract). In this case, the contract at issue states on its face that it is intended for the benefit of the child. Moreover, the child has the right to enforce that contract because the language of the agreement (an adhesion contract drafted by Defendant DSS) was "to aid the adoptive parents in providing proper care for this child."

DSS asserts that the plaintiffs must show something individualized that was lost such as a dance lesson, a happy meal from McDonald's, etc., to establish their damages and right to recover. Given the broadly accepted physical, medical and/or mental needs of these children and the dearth of any applicable law requiring otherwise, this Court finds that the class members in this case have no obligation to carry an individualized burden of explaining how DSS reduction of the contractual amount by \$20 a month has specifically adversely damaged them. The claim before this Court is contractual and limited to \$20 a month per family for the applicable period in the class definition and that is the measure of damage whether it would translate to a McDonald's meal; or much more likely a hearing aid battery or replacement catheter. Items more likely contributing to the child's dignity of care.

DSS also argued that Plaintiff's failure to exhaust administrative remedies and individualized inquiry into the date of termination of the agreement were issues that require decertification. As further outlined in the Court's order granting Plaintiff's motion for summary

judgment, the Court finds DSS arguments lacking and finds no meaningful argument for decertification. If any such administrative remedy or date or termination issues arise in the future of this litigation, they may readily be addressed through a claims administration process.

Accordingly, the Class in this case is defined as all children, less than 19 years of age on the date the filing of the first state court Complaint (September 16, 2011); whose adoptive parents entered into assistance subsidy agreements with the South Carolina Department of Social Services, executed on or before June 20, 2002, and who have had at least five (5) months of lost benefits due to the cut in the assistance agreement after the date the foster care payments were reinstated in 2004.

## **II. The Court Orders that the Class Shall Include Those Under 4 at the Time of Adoption**

Per the definition adopted above, the Court Orders that the Class in this case shall also include children who meet the class definition but were under the age of 4 at the time of adoption. The parties and this Court have gone through an exhaustive process to protect potential privacy rights from being compromised.

A court must consider the number of members of the putative class together with other factors, including the size of the class members' claims. Middleton v. SunStar Acceptance Corp., 2000 WL 33385388 (S.C. Cir. Ct. 2000). The method of determining how class members are to be bound is in the Court's discretion. Salmonsén, 377 S.C. at 455–56.

“Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, SCRCF intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B). By omitting the additional requirements, Rule 23, SCRCF, endorses a more expansive view of class action availability than its federal counterpart.”); McGann v. Mungo, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (Ct. App. 1986)

(relying on federal precedent to interpret new Rule 23 of the South Carolina Rules of Civil Procedure).” Id.

Further, the Court has broad discretion to control the manner, extent, and scope of the notice for purposes of Due Process – to ensure the adequate and fair protection of those not yet identified. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (identifying notice, as well as opt-out rights, as part of required “minimal procedural due process protection” to which each absent class member is entitled); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) (interpreting Rule 23 as requiring “each class member who can be identified through reasonable effort **must**” be provided direct notice).<sup>1</sup>

The Court has considered the arguments of the parties and agrees that notice of this action can be provided by publication to the members under the age of 4 at the time of adoption. If, as DSS argues, some child is not aware of their adoption status then the notice will mean nothing to them. For children who are aware of their adopted status, however, this method protects their right to be involved in this litigation and receive a recovery. It would not meet the ends of justice for all children adopted under the age of 4 to be excluded from a potential recovery based solely on the slight possibility that some such children may not be aware of their adopted status.

Accordingly, in the interests of fairness and judicial efficiency, this Court Orders that Notice be given to all potential class members. Salmonsens, 377 S.C. at 455–56.

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<sup>1</sup> “Notably, in defining a trial courts authority our state rule uses the term “may” whereas the federal rule uses the mandatory term “must.” Even more significant, the federal rule specifically mandates that class members will only be excluded from the class if the member so requests, *i.e.*, an “opt-out” procedure.” Salmonsens v. CGD, Inc., 377 S.C. 442, at 661.

More specifically, this Court Orders that the parties continue to respect privacy concerns of the minors and provide a Public Notice of these proceedings via Newspaper which shall run for a period of three consecutive weeks in newspapers which shall be designated in subsequent order by this court. The Notice shall run consistent with S.C. Code 15-9-740.

Rule 23 is sufficiently flexible to allow courts to direct that notice be provided so that members' rights are preserved whenever possible. Here, this Court finds that it is possible, reasonable and correct to preserve those rights and Notice can and should be provided to the broader class, those under the age of four, in order to afford these victims their right of recovery.

**AND IT IS SO ORDERED.**

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The Honorable Judge J. Mark Hayes, II  
Presiding Judge of Spartanburg County  
Seventh Judicial Circuit

August \_\_\_\_\_ 2024



Spartanburg Common Pleas

**Case Caption:** Blh , plaintiff, et al VS South Carolina Department Of Social Services

**Case Number:** 2013CP4201569

**Type:** Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132