

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Oct 14 2024**

**S.C. SUPREME COURT**

APPEAL FROM DORCHESTER COUNTY  
Heath P. Taylor, Circuit Court Judge

Appellate Case No. \_\_\_\_\_  
Case No. 2017-CP-18-1125

Calvin Henson, Daniel James Collins, Jason Robinson,  
Russell Taylor, and All Those Similarly Situated, ..... Respondents,

v.

South Carolina Department of Corrections and the  
South Carolina Department of Juvenile Justice, ..... Appellants-Petitioners.

**NOTICE OF APPEAL, OR IN THE ALTERNATIVE,  
PETITION FOR WRIT OF CERTIORARI**

The Appellants-Petitioners South Carolina Department of Corrections (“SCDC”) and the South Carolina Department of Juvenile Justice (“SCDJJ”) hereby appeal the Amended Order Granting Plaintiffs’ Motion to Certify issued by Circuit Court Judge Heath P. Taylor on September 13, 2024.

The Appellants-Petitioners’ counsel received written notice of entry of the Amended Order Granting Plaintiffs’ Motion to Certify filed September 13, 2024, on that same date.

The Appellants-Petitioners submit that the Amended Order Granting Plaintiffs’ Motion to

Certify affects the mode of trial and therefore is immediately appealable. However, in the event that the Court were to disagree and find that the mode of trial is not implicated, the Appellants-Petitioners alternatively present several critical issues for the Court's consideration by way of a petition for writ of certiorari.

## **BACKGROUND**

The Respondents Calvin Henson, Daniel James Collins, and Jason Robinson allege that they were SCDC inmates who were sexually assaulted, and the Respondent Russell Taylor alleges that he was sexually assaulted while in the custody of SCDJJ. The Respondents, individually and as representatives of putative classes, have brought a claim for negligence/gross negligence alleging that SCDC and SCDJJ “fail[ed] properly to implement and enforce their policies and procedures, including but not limited to classification of inmates, monitoring of inmates by employees, allowing gross overcrowding, and by failing to provide appropriate employees and staff at the various locations in Defendants’ facilities which would have prevented the sexual assaults suffered by Plaintiffs.” *See*, Amended Complaint, ¶ 76. The Respondents seek monetary relief for themselves and for all putative class members. The Respondents also seek declaratory and injunctive relief.

## **LEGAL ANALYSIS**

### **I. Direct Appeal**

As indicated, the Appellants-Petitioners submit that the Amended Order Granting Plaintiffs’ Motion to Certify affects the mode of trial and therefore is immediately appealable. South Carolina law is clear that “[o]rders affecting the mode of trial affect a substantial right as defined in section

14-3-330(2) of the South Carolina Code (1976), and must, therefore, be appealed immediately.” *Frampton v. South Carolina Dept. of Transportation*, 406 S.C. 377, 752 S.E.2d 269, 274 (Ct. App. 2013). Additionally, “the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” *Id.* See also, *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978) (holding that an order denying a compulsory reference affects the mode of trial and is immediately appealable); *Foggie v. CSX Transportation, Inc.*, 313 S.C. 98, 431 S.E.2d 587, 591 (1993) (“[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable”).

Importantly, in the leading case of *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), the South Carolina Supreme Court ruled that an order adopting an “opt-in” rather than an “opt-out” notification procedure in a class action affects the mode of trial. The Supreme Court recognized that the “traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case.” 661 S.E.2d at 87. The Supreme Court further explained that “the mode of trial analysis indubitably includes the consideration of the availability of trial” and hence “[t]he question of the denial of an actual trial is intrinsic.” *Id.* The *Salmonsens* Court also reiterated that South Carolina law requires that a litigant seek an immediate appeal on a mode of trial issue or otherwise the right to appeal is deemed waived. *Id.*

In its Amended Order Granting Plaintiffs’ Motion to Certify, the trial court adopted two class definitions, one for each Defendant. For the Defendant SCDC, the class definition is “[a]ll individuals that have been under the custody and care of the South Carolina Department of Corrections (“SCDC”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.” See, Amended Order, p. 14. Similarly, for the Defendant SCDJJ,

the class definition is “[a]ll individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice (“SCDJJ”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.” *See*, Amended Order, p. 14. Thus, the trial court has adopted class definitions that use the language “who were victims of a nonconsensual sexual battery,” which in turn incorporates the statutory definition of “sexual battery” from S.C. Code Ann. § 16-3-651(h). Critically, before being deemed a member of either class, each putative class member will need to prove both (1) that he/she was a victim of a “sexual battery” based on that statutory definition and (2) that the sexual battery was nonconsensual. In effect, in order to determine whether a particular SCDC inmate or SCDJJ juvenile meets the class definition, the trial court will be required to engage in hundreds of mini-trials or evidentiary hearings. These class definitions consequently raise significant mode of trial issues from the outset.

Although the trial court declined to address procedures for notification of the defined classes in its Amended Order Granting Plaintiffs’ Motion to Certify, it is well established in *Salmonsens* that South Carolina law recognizes only one type of class action in a monetary relief case – a class action with “opt-out” procedures. As the Supreme Court held in *Salmonsens*, “an ‘opt-out’ notification procedure is the proper method to be offered to putative class members in the instant case and *future class action cases*.” *Salmonsens*, 661 S.E.2d at 91. (Emphasis added). It goes without saying that in order to comply with opt-out procedures, the members of the class must be identified before notification of the class can be made. Hence, before class notices are prepared and mailed, the trial court will be required to determine which SCDC inmates and which SCDJJ juveniles meet the class definitions. Only once those class members are identified may notification of the classes even commence.

The question thus arises as to how the trial court will make a judicial determination as to the

class membership. To reiterate, for both the SCDC and the SCDJJ classes, using the class definitions as adopted, the trial court will need to determine (1) whether each putative class member was a victim of a “sexual battery” using the statutory definition of “sexual battery” from S.C. Code Ann. § 16-3-651(h), and (2) whether any sexual battery as found was nonconsensual. As indicated, both the Plaintiffs and the Defendants have requested a jury trial. Notably, the Supreme Court has held that there is no constitutional or statutory right to a jury trial for a shareholder’s derivative action in *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978), which is one form of a class action in equity. Yet, the Supreme Court has never ruled definitively whether or not there is a right to a jury trial in a class action brought pursuant to Rule 23, SCRPC, particularly a class action which is an action at law, as is the case at bar, in which monetary relief is sought for each class member. One commentator has discussed the mode of trial for a class action under South Carolina precedent as follows:

As for class actions, no clear precedent was found, but two cases offer weak support for a jury trial right. In *Salmonsens v. CGD, Inc.*, the South Carolina Supreme Court rejected opt-in class actions finding an opt-in provision “effectively denies [putative class members] a trial by jury.” In *The Gates at Williams-Brice Condominium Ass’n v. DDC Construction, Inc.*, the South Carolina Court of Appeals reversed the trial court’s denial of defendants’ motion for a nonjury trial based on a waiver in a master deed but did not hold that class actions are never entitled to a jury trial.

Scarlett, *Jury Trial Disparities Between Class Actions and Shareholder Derivative Actions in State Court*, 72 Okla. L. Rev. 283, 331 (2020).

Assuming that the parties are entitled to a jury trial as they have all demanded in their pleadings, the mode of trial is significantly intertwined with and implicated by the class definitions adopted by the trial court. The two-part findings that will need to be made by the factfinder to determine class membership are also a significant part of the merits of each putative

class member's cause of action, and those findings will need to be determined before class notification even occurs. As indicated, that determination will need to be made by a jury per the jury trial demand made by all parties. Moreover, before there can be a full hearing on liability – again by a jury – the qualifying class members would need to be notified and given the opportunity to opt-out per *Salmonsens*. Thus, in order to provide the jury trial requested by all parties, the jury trial would need to be bifurcated, with the second phase of the trial on liability issues held months later after the “opt-out” period has expired.

To further complicate the process, the same jury will be required to decide whether each SCDC inmate and SCDJJ juvenile meets the class definitions and then later determines liability and, if necessary, damages. As federal courts have recognized, “[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have jurable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial) and not reexamined by another finder of fact.” *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 3003 (7th Cir. 1995) (collecting cases). The same would be true under state law. That extended process will create a tremendous burden and hardship of time and inconvenience on that jury (as well as the court), and more significantly, it will also not be reasonably feasible for the jury to hear the evidence relevant to determining whether each putative class member qualifies as a class member and then months later be called upon to determine liability and, if necessary, damages, both of which determinations will rely on or at least be extensions of the fact-finding performed in the “class definition” phase of the trial held months earlier.

In effect, as the foregoing discussion reflects, the class definitions adopted by the trial court create what are commonly referred to as “fail-safe” classes. A fail-safe class is one that “is defined so that whether a person qualifies as a member [of the class] depends on whether the

person has a valid claim.” *EQT Production Co. v. Adair*, 764 F.3d 347, 360, n.9 (4th Cir. 2014), citing *Messner v. Northshore University Health Systems*, 669 F.3d 802, 825 (7th Cir. 2012). Fail-safe classes are considered improper for two principal reasons. First, in a fail-safe class, “a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.” *Messner*, 669 F.3d at 825. Second, fail-safe classes do not comply with Rule 23. As discussed in more detail below, Rule 23 requires that members of a proposed class be readily identifiable, which is a principle called “ascertainability.” See, *EQT*, 764 F.3d at 358 (“Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable”). Under this so-called “ascertainability” requirement, “[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria.” *Id.* In other words, a class action should not proceed “if class members are impossible to identify without extensive and individualized fact-finding or mini-trials.” *Id.* Therefore, because a fail-safe class requires a court to engage in individualized fact-finding or mini-trials to identify the members of the class, fail-safe class definitions violate these principles.

In sum, if those fail-safe class definitions are allowed to proceed, there will be a significant impact on issues related to mode of trial – issues which are unavoidable in order to comply with the requirements of an “opt-out” notification process as mandated by the Supreme Court in *Salmonsens*. Therefore, the appeal should be permitted to proceed as a direct appeal.

In addition, in examining these class definitions and the resulting mode of trial issues, the trial court failed to consider or at least address instructive case law from the South Carolina Supreme Court. For instance, the trial court failed to consider the Supreme Court’s latest decision in *Hensley v. South Carolina Dept. of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020), in which the Supreme Court explains that “there must be a proper balance between

common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote.” 838 S.E.2d at 514. The Supreme Court further speaks of the need for the court “to balance the efficiency to be gained from one trial on common issues versus the difficulty to be suffered by having to conduct individual trials or hearings on issues that are not common.” *Id.* The Supreme Court also cited a well-respected treatise on South Carolina civil procedure for the following:

The commonality requirement [of Rule 23(a), SCRCPP] is a condition of class action status, but the existence of common questions alone is not sufficient .... *[T]he class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation.* Under Fed. R. Civ. P. 23(b)(3), this is reflected in the requirement that the common questions predominate over individual issues. Although not specifically required by this Rule, it is inherent in the general conditions for class actions. The Court should first determine the existence of common questions, and then whether they are sufficient[ly] central to justify the class action.

*Id.*, citing Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 199 (1st ed. 1985). (Emphasis added).

As indicated, the reason *Hensley* is so critical here is that, based on the class definitions adopted by the trial court, it will be required to conduct mini-trials or evidentiary hearings *just to determine who qualifies as a class member* and that must occur before the “opt-out” notification procedure can begin. That is not typical of proper class actions where the class membership may be determined by objective criteria which do not require individualized fact-finding. That alone demonstrates why these cases are not appropriate for class certification.<sup>1</sup>

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<sup>1</sup> Of note, one of the foremost experts on class actions, Professor Newberg cautions that “[i]n a money-damages class action, common issues must predominate over individual ones so as make a class trial ‘manageable,’ thereby rendering it a superior form of adjudication. If a case is likely to devolve into thousands of individual mini-trials concerning each class member’s damages, that process may threaten the efficiency gains of class treatment and render a class

Similarly, the trial court gave no consideration to the importance and impact of *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). While the trial court mentions *Gardner*, it never distinguishes *Gardner* nor explains why it is not controlling. In *Gardner*, the Supreme Court explained that "[t]o establish commonality, a party must show that there are questions of law or fact common to the class. In practical terms this means the party must articulate the existence of *significant* common, legal, or factual issues that bind the proposed class together." 577 S.E.2d at 200. (Emphasis added). Importantly, "[c]ommonality is met only where the class shares a *determinative* issue." 577 S.E.2d at 200-201. (Emphasis added). Relying on federal jurisprudence, the Supreme Court in *Gardner* explained that "questions that are in no way dispositive and which simply propel the action into a posture where judicial scrutiny is necessary for just adjudication are insufficient to establish commonality." 577 S.E.2d at 201. Most importantly, the Supreme Court held that "a representative plaintiff cannot establish commonality if the court must investigate each plaintiff's individual claim." *Id.*<sup>2</sup>

The *Gardner* case is instructive in addressing not only the commonality prong, but in the present case, it is instructive on the propriety and utility of the class definitions as well. In *Gardner*, a proposed plaintiff class of taxpayers sued the Department of Revenue and numerous

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action unhelpful." 4 *Newberg on Class Actions* § 12:6 (5th ed.). See also, *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734, 738 (1978), as cited in *Gardner*, 577 S.E.2d at 201 ("[t]he very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action").

<sup>2</sup> The trial court also gave no consideration to the recent decision of the Court of Appeals in *Robinson v. South Carolina Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024). In that case, the Court of Appeals reversed all orders on appeal, including the Circuit Court's orders certifying a class action. The Court of Appeals specifically ruled that "the circuit court erred by finding Claimants were not required to exhaust their administrative remedies." 902 S.E.2d at 50. *Robinson* demonstrates that class certification is not appropriate based upon the need to separately adjudicate the exhaustion of administrative remedies defense which required individualized inquiry and decision-making with respect to each putative class member.

governmental entities who attempted to use the Setoff Debt Collection Act to recover monies owed by taxpayers from their tax refunds. The Supreme Court reversed the certification of a plaintiff class for a lack of commonality. The Supreme Court found that, in addition to showing that the notice required by statute was deficient, a showing of prejudice was also required and that an individualized examination of each class member's claim was necessary before a class member could prevail. The Supreme Court explained that "[a] representative class cannot exist where the court must investigate each plaintiff's prejudice claim ... Requiring such individualized examination negates the benefits of a class action suit." *Gardner*, 577 S.E.2d at 201.

That same level of individualized inquiry, if not a much greater level of such inquiry, is necessary in the present case – particularly just to identify the putative class members. Similar to the individualized issue of prejudice in *Gardner*, the present action turns on the individualized issue of consent, among others.<sup>3</sup> As discussed at length, the putative class members in the case at bar cannot even qualify as a class member until they can show they are a victim of a “nonconsensual sexual battery.” By its very nature, consent – like prejudice – requires individualized inquiry.

In sum, the Appellants-Petitioners submit that the order on appeal impacts the mode of trial, as was the case in *Salmonsens*, and a direct appeal should be permitted to proceed.

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<sup>3</sup> In addition to requiring individualized inquiry just to determine if a putative class member meets the class definition, as discussed above, a determination on the merits of each Plaintiff's and putative class member's liability claims will require a jury to determine the facts and circumstances of each claim of a “nonconsensual sexual battery,” as well as the conduct of the Defendants and particularly whether the Defendants' conduct rises to the level of gross negligence. *See*, S.C. Code Ann. § 15-78-60(25) (governmental entities are entitled to sovereign immunity for acts of simple or ordinary negligence). Moreover, for each Defendant, there will be issues of notice to that Defendant and likely issues implicating comparative negligence, in addition to immunity defenses under S.C. Code Ann. § 15-78-60. Moreover, the liability determination for each Plaintiff and each putative class member will also require a determination of a statute of limitations defense given the brought temporal scope of the class definitions.

## B. Petition for Writ of Certiorari

If this Court concludes that there is no mode of trial issue similar to what was presented in *Salmonsens*, and as a result, a direct appeal is not available, the Appellants-Petitioners alternatively submit that these issues are of such significant public interest and importance that they warrant the issuance of a writ of certiorari. The Supreme Court may hear an interlocutory issue in its original jurisdiction when “the public interest is involved, or if special grounds of emergency or other good reasons exist.” Rule 245, SCACR. *See also*, S.C. Const. art. V, § 5 (setting forth that “[t]he Supreme Court shall have power “to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs”). In *Lafitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009), the Supreme Court recognized that “a writ of certiorari may be issued when exceptional circumstances exist.” 674 S.E.2d at 160. The Court further explained that a writ of certiorari may be issued in “the interests of judicial economy” to address a “novel issue of significant public interest.” 674 S.E.2d at 160-61.

As already addressed above, the description of the two classes using the class definitions adopted by the trial court does not allow for the class members to be identified by objective criteria and indeed would require mini-trials or evidentiary hearings to determine just the class membership. As indicated, each potential class member will need to prove that he/she was a victim of a “sexual battery” and moreover that the sexual battery was nonconsensual before being deemed a member of the class. Neither the trial court nor the parties identified any existing South Carolina case addressing the current scenario where the inclusion of a person in the class requires individualized inquiry. Hence, this scenario is a novel one, for which immediate guidance from the Supreme Court by way of a writ of certiorari is merited. Likewise,

there is no existing appellate authority addressing the propriety of a “fail-safe” class under South Carolina law.

Where there is an absence of governing law on a rule of civil procedure, the Supreme Court directs that courts seek guidance from case law interpreting and applying the equivalent federal rule. In *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991), the Supreme Court states: “Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.” 404 S.E.2d at 201.

The federal courts direct that “[a]s a preliminary matter, the court should consider the definition of the class when determining the appropriateness of class certification.” *Cuming v. South Carolina Lottery Commission*, 2008 WL 906705, \*1 (D.S.C. 2008). In *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014), the Fourth Circuit recognized that “Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable.” 764 F.3d at 358. The Fourth Circuit has explained that “[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria.” *Id.* Importantly, “if class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.” *Id.* As the federal district court has further explained, “[t]he proposed class definition must not depend on subjective criteria or the merits of the case or require an extensive factual inquiry to determine who is a class member.” *Cuming*, 2008 WL 906705, \*1. “Where the practical issue of identifying class members is overly problematic, the court should consider that the administrative burdens of certification may outweigh the efficiencies expected in a class action.” *Id.*

To reiterate, from a practical standpoint, if the identity of the putative class members cannot be identified without the trial court holding separate mini-trials or individualized evidentiary hearings, then it is impossible to effectuate the “opt-out” notification procedure. Obviously, the class representatives cannot give notice to persons whom they cannot identify. This demonstrates why this issue needs to be addressed at the class notification stage and not after final judgment.

For these reasons, the Appellants-Petitioners request that the Court grant a writ of certiorari to address the following issues which are novel and of significant public importance:

- (1) Does South Carolina law recognize an “ascertainability requirement” under Rule 23, SCRCF?
- (2) Does South Carolina law allow for a class definition that requires the trial court to conduct mini-trials or evidentiary hearings to determine class membership, and if so, are the mini-trials or evidentiary hearings conducted with a jury as the fact finder?
- (3) Are the class definitions as adopted by the trial court proper under South Carolina law and do they allow for the manageability and efficiencies required of a class action?

### **CONCLUSION**

The Appellants-Petitioners South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice respectfully request that this Court accept this appeal as a proper direct appeal. In that case, the Appellants-Petitioners leave it to the Court’s discretion whether to transfer the appeal to the Court of Appeals or to retain jurisdiction under Rule 204, SCACR. Alternatively, if the Court finds that the direct appeal does not impact the mode of trial and the Amended Order Granting Plaintiffs’ Motion to Certify is accordingly not immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2), the Court is nonetheless requested to issue

a writ of certiorari in its original jurisdiction to address the critical issues of public importance raised herein.

Respectfully submitted,

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