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Jan 21 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2024-001727
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.

PETITION FOR REHEARING

The Appellants South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice petition the South Carolina Court of Appeals for a rehearing of the Court's January 3, 2025 Order dismissing this appeal as not being immediately appealable.

The grounds for the Appellants' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellants' petition for rehearing is based on the Court's January 3, 2025 Order dismissing this appeal; the supporting memorandum filed herewith; the motion to dismiss appeal briefs; Rule 221(a) and Rule 221(c), SCACR; and other rules of court.

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Appellants South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice have petitioned the South Carolina Court of Appeals for a rehearing of the Court's January 3, 2025 Order dismissing this appeal as not being immediately appealable. The Appellants respectfully submit that the following points were overlooked or misapprehended by this Court:

In their Notice of Appeal filed October 14, 2024, the Appellants specifically stated that the Amended Order Granting Plaintiffs' Motion to Certify filed September 13, 2024, "affects the mode of trial and therefore is immediately appealable." *See*, Notice of Appeal, p. 2. In that Notice of Appeal, the Appellants provided an explanation as to how the Amended Order impacts

the mode of trial. As the Appellants cited to this Court, 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). In fact, "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"). Thus, the Appellants will arguably waive their mode of trial-related issues if those are not immediately appealed.

Despite that background and a detailed explanation as to how the Amended Order impacts the mode of trial and the potential detriment to the Appellants were they not to seek an immediate appeal on issues impacting the mode of trial, this Court issued an Order dismissing the appeal which does not address whether or not the Amended Order impacts the mode of trial. Instead of addressing the mode of trial implications, the Court simply states that "we dismiss the appeal as not immediately appealable." (Order at 2). That is followed by a string citation that does not address whether or not the Amended Order impacts the mode of trial as the Appellants have raised.

The string citation includes *Hensley v. South Carolina Dept. of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020), in which the Supreme Court explained that "class certification orders are *ordinarily* not immediately appealable." *Hensley*, 838 S.E.2d at 512. (Emphasis added). This use of the term "ordinarily" should not be overlooked. Indeed, South Carolina jurisprudence is clear that a trial court order on class certification *which affects the mode of trial*

not only is immediately appealable, but must be immediately appealed or the challenge to mode of trial is waived and cannot be asserted after final judgment.

The string citation also includes *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), in which the Supreme Court ruled that an order adopting an "opt-in" rather than an "opt-out" notification procedure in a class action can affect 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 *Salmonsen* 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*.

Despite including *Hensley* and *Salmonsen* in the string citation, the Court overlooks and fails to address the Appellants' arguments as to how the Amended Order impacts the mode of trial in this case. Notably, this Court's Order never states even whether the mode of trial is impacted or not. Instead, it simply dismisses the appeal as "not immediately appealable" because "ordinarily" that is the correct result.

Respectfully, that is not the correct result here. The Appellants continue to believe that the critical issues they raise impact the mode of trial, thereby justifying a direct and immediate appeal at this stage in the litigation. To reiterate, the Appellants have not been advised conclusively by this Court (or the Supreme Court) that the mode of trial is not impacted by their challenge to the class definitions. Thus, the Appellants remain at serious risk of waiving their mode of trial arguments by not taking an immediate appeal and exhausting those appellate rights. The Appellants cannot take those chances in a case of this significance and wide-ranging impact.

As discussed in detail in the Notice of Appeal and in the Appellants' opposition to the Respondents' Motion to Dismiss Appeal, there is a valid and meritorious argument that the mode of trial is impacted by the Amended Order. To recap, in its Amended Order, the trial court identified two classes -- a single class against the Defendant SCDC and a single class against the Defendant SCDJJ. For 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 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.

Notably, as to both classes, the trial court 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. As the Appellants have explained, 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, the trial court did state definitively that these would be "opt-out" classes, which is no surprise – that procedure is required by our Supreme Court in *Salmonsen*. *See*, *Salmonsen*, 661 S.E.2d at 9 ("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"). The Respondents do not deny that the classes, as certified by the trial court, are opt-out classes.

However, because they are opt-out classes and given the lack of "ascertainability" of the classes as defined by the trial court, the mode of trial is impacted by the Amended Order. As the Appellants have explained, it logically follows 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. Thus, the fact that the trial court did not set forth notification procedures does not make this mode of trial argument premature. Regardless of whatever the notification procedures may be, for an opt-out class as required in *Salmonsen*, 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 the notification of the classes even commence.

Importantly, both the Plaintiffs and the Defendants have demanded a jury trial in their operative pleadings. However, the mode of trial is significantly intertwined with and implicated by the class definitions adopted by the trial court. 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. The two-part findings that will need to be made by the factfinder to determine *each* class member 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 the Appellants have explained, that is unprecedented. That determination will need to be made by the jury per the jury trial demand made by all parties. Moreover, before there can be a full hearing on liability – again by the jury – the qualifying class members would need to be notified and given the opportunity to "opt-out" per *Salmonsen*.

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 determine 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 juriable 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.

Of further significance, 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" class as mandated by the Supreme Court in *Salmonsen* and as already established by the Amended Order. Therefore, the appeal should be permitted to proceed as an immediate appeal.

To further support their position, the Appellants have cited to such seminal Supreme Court cases as *Hensley, supra*, and *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), both of which contain useful analysis regarding the pitfalls of classes which require individualized inquiry and decision-making with respect to each putative class member.[1] *Hensley* and *Gardner* are slightly different from the case at bar in that the determination of class membership in those cases did not require individualized inquiry; only a determination of commonality required individualized inquiry. However, those cases explain

[1] This Court's recent decision in *Robinson v. South Carolina Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024), is another example where class certification was found not to be appropriate due to 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.

that individualized inquiry and the need for mini-trials or evidentiary hearings negate the benefits of a class action. *See*, *Gardner*, 577 S.E.2d at 201 ("[r]equiring such individualized examination negates the benefits of a class action suit"). It certainly is much more problematic – and indeed affects the mode of trial – where as here the individualized inquiry is needed on the front-end to determine whether each putative class member even meets the two-prong definition of the class itself.

Clearly, the same level of individualized inquiry as in *Gardner*, 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. 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 and adjudication.

In sum, there has not been a class certified – certainly not in South Carolina – that requires a jury trial to determine if a putative class member even qualifies as a class member so that notification procedures can take place and ultimately each class member can make an opt-out decision. Yet, that is the posture of this class action given the fact-intensive class definitions adopted by the trial court. Those are indeed fail-safe class definitions which clearly impact the mode of trial for the reasons discussed herein.

Based on the foregoing discussion, the Appellants South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice respectfully request that the Court rehear and reconsider the dismissal of this appeal and allow this appeal to proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellants, does hereby certify that service of the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only this the 21st day of January 2025, as follows:

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SC Court of Appeals

Via Email Only
The Honorable Jenny Abbott Kitchings
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Email: ctappfilings@sccourts.org

RE: Calvin Henson, Daniel James Collins, Jason Robinson, Russell Taylor, and All Those Similarly Situated v. South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice
Appellate Case Number: 2024-001727
Civil Action Number: 2017-CP-18-1125
Claim Number: B0927
Our File Number: 106.20706

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as Amended April 24, 2024), please find enclosed for filing the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** with regard to the above referenced matter. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order.

A filing fee is not required as the Appellants are exempt as state agencies. If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

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