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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2024-001598
Case No. 2013-CP-42-1569

Kenneth and Angela Hensley, on behalf of their minor child BLH, and All
Others Similarly Situated,..... Respondents,

v.

South Carolina Department of Social Services,..... Appellant.

RECORD ON APPEAL

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Spartanburg
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013-CP-42-01569

BLH et al.

South Carolina Department of Social Services

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : See Below

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Ryan Langley

James Thompson

ATTORNEY(S) FOR THE PLAINTIFF(S)

Andrew Lindemann

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

Thank you for your recent arguments and presentations on the issue (as I will stated it) what is the minimum age for defining the class.

As I received the issue as being most significant because of potential privacy concerns of class members and their families when a class member's status as an adopted person is potentially unknown to the class member. Thus, receiving the Notice of Class Action may invade the potential privacy concerns of the certain individuals who were previously unaware of their adopted status. My phraseology is in large part after digesting the Supreme Court's opinion in this case.

An issue was raised during the hearing as to the evidence offered by plaintiff to establish the designated age as being three (3) years of age. After reviewing the information and applying the rules from State v. Council, 335 S.C. 1 (1999), State v. Jones, 273 S.C. 723 (1979) and SCRE 702, this Court finds the plaintiff's expert is qualified to give her opinions, her testimony will assist the this Court in its role as fact finder, her methodology is reliable, the information is relevant and is not prejudicial. Thus, the information is admissible. The Court has also taken into account and given the appropriate weight it deserves to the information offered by the defendant in deciding the issue before this Court.

This Court's decision is that the minimum age for receiving class notice is age 4. From the information provided, there is some support that the age could be as young as 18 months to two years. There is also some support that the age could be 5 and could reach to age 6. Plaintiff's expert embraces and

supports age 3. Notwithstanding, the cumulative consumption of all of the information when applied to the issue presented leads to this Court's opinion that the age should be designated as age 4.

Given the above, based on the arguments and information presented to this Court, if plaintiff is successful with its theories, there would potential be individuals who were harmed by the defendant's conduct but who being excluded from the claims members because of privacy concerns that resulted in the present decision that the class age will begin at 4. Question, for individuals who are being excluded because of the age designation, can these potential members be reached by a notice method that does not invade the privacy concerns? Alternatively, if plaintiff is successful on the merits, can a separate fund be established which mirrors the amount these individual would have received but for the designation of the age 4 for class membership? (I have seen such a fund established in class actions when the wrong can be identified and measured but the injured individual cannot be identified as part of the class. These questions are asked based on this Court's obligation under SCRC Rule 23

Thank you all for your attention and cooperation.



Spartanburg Common Pleas

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

Case Number: 2013CP4201569

Type: Order/Form 4

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

Electronically signed on 2024-03-01 15:22:44 page 5 of 5

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Spartanburg
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013-CP-42-01569

BLH et al.

South Carolina Department of Social Services

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : See Below

INFORMATION FOR THE JUDGMENT INDEX

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Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Ryan Langley

James Thompson

ATTORNEY(S) FOR THE PLAINTIFF(S)

Andrew Lindemann

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

Thank you for your arguments and briefings in regards to the above referenced matter.

Considering the arguments and briefing DSS's motion for summary judgment cannot be granted. The Fourth Circuit case is instructive but is not read, as a matter of law, of preventing the plaintiff from going forward with its case a plead. Traditionally, a denial of summary judgment does not require a formal order. However, a portion of the present summary judgment ruling also involves the granting of the plaintiff motion for summary judgment as to the issue of exhaustion of administrative remedies. The plaintiff's motion on the administrative remedy issue is granted. Therefore, plaintiff's attorney is asked to prepare a formal order granting its motion. In the formal order a discussion of this Court's denial of other aspects of DSS's motion for summary judgment. In the section that includes the granting of plaintiff's motion include the standard of review for a summary judgement. The evidence before this Court—the agreement—was relied upon by this Court. The plain and ordinary meaning of the words was used. In so doing, it is clear that DSS's decision concerning the \$20 monthly payment was not an individualize decision based on the specific needs of the adopting family or the special needs of the child. The decision was an overall agency decision. Therefore, an individual recipient (denied recipient) of the \$20 monthly amount clearly would have conclude the futility of appearing the decision---on appeal they would have to challenge the overall agency's decision instead of an individualize review of the specific needs of the child. At the summary judgment stage, facts and inferences are seen in a light most favorable to the non-

moving party. Thus, the defendant's motion could not be granted on this issue. Moreover, once a party has established their right to summary judgment, the opposing party must come forth with facts to counter the moving party's right to summary judgment. Here, DSS's position is that, as matter of law, the plaintiff had to exhaust their administrative remedies in order to recover the \$20 monthly amount. While DSS's argument presents a logical explanation of the administrative review process in South Carolina, under the facts presented as part of this summary judgment, this Court finds that the plaintiff have established the issue of futility. The plaintiff's argument concerning the word "may" is not determinative to the granting of this motion but rather instructive. To the degree the decision concerning the administrative remedies being exhausted before filing a civil action is discretionary with this Court, my decision is that the facts presented do not require the exhaustion of those remedies. As an observation, the overall nature of the claim being an institutional/agency decision over a \$20 monthly non-payment for the care of special needs children appears to meet the objectives behind class action litigation.

Considering the arguments and briefings, plaintiff's counsel is asked to prepare a formal order denying the motion to Decertify the Class. Note in the order that this was a motion to decertify the Class. 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 articulatable 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.

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 properly denied. The prior judge certified that class and then address the class certification again on the defendants motion to reconsider. This case is about a contractual \$20 monthly payment that was not paid by DSS to families who were adopting--- through DSS--- a special needs child. The \$20 monthly payments were to be paid through DSS for the child's benefit based 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. The American With Disabilities Act may have a better definition for these children. The parties are welcomed to challenge this Court on the following conclusion, but this Court take judicial notice that the needs of special needs child are finacally more significant that non-special needs children AND that adoption of special needs children presents more challenges to the DSS to find a pool of prospective adopting parents.

Considering the challenges to certification articulated by DSS as part of its motion to decertify, please discuss in the proposed order that "individualize" characteristic of the class members do not warrant decertification. This Court disagrees, as asserted by DSS, that to recover damages a child or family would need to prove with particularity how the denial of \$20 a month would have individually affected them affected them in a negative manner. This case does not involve the Tort Claims Act or Qualified Immunity under Section 1983. The damages calculation is contractual. DSS asserts that the

plaintiffs must show something individualize that was lost such as a dance lesson, a happy meal from MacDonald's, etc., to recover. Given the broadly accepted physical, medical and/or mental needs of these children, this Court disagrees that they must carry an individualize burden, and the resulting scrutiny, of explaining how \$20 a month has adversely damaged them. The claim before this Court is contractual and limited to \$20 a month. If an individualize review is conducted, a court, more likely than not, will not be presented a lack of a dance lesson or happy meal but rather the lack of a caterer or hearing aid battery. Counsel for plaintiff may discuss the nature of the intended payment was already designated for the need of the child. You may also discuss that any issue that involved exhaustion of administrative remedies—which this Court does view as preventing class certification (see above discussion)—or the date of termination of the agreement are not issues that require decertification. If these are issues which arise in the future of this litigation they may readily be address through a claims process, again, if they arise at all.

Also, prepare an order that approves the class being expanded to include those potential members 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 by definition of the class member 4 or older at the time of adoption who may receive notice. In the order, include the proposed method of notice offer to the Court that will protect the interest to those under 4 at the time of adoption. Specially reference is made to the proposal offered during the hearing of publication in newspapers discussed at the recent hearing.

A copy of this email will be incorporated into a form 4 for filing. To the extent formal orders have been requested, the formal orders will be the final orders concerning my decisions.

Again, thank you all for your briefing and arguments.



Spartanburg Common Pleas

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

Case Number: 2013CP4201569

Type: Order/Form 4

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

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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.	)	<u>ORDER GRANTING PLAINTIFFS'</u>
	)	<u>MOTION FOR PARTIAL SUMMARY</u>
	)	<u>JUDGMENT AND DENYING</u>
South Carolina Department of Social	)	<u>DEFENDANT'S MOTION FOR</u>
Services	)	<u>SUMMARY JUDGMENT</u>
	)	
Defendant.	)	
	)	

The matter before the Court was Defendant South Carolina Department of Social Services' ("Defendant" or "DSS") Motion for Summary Judgment (filed April 1, 2024) and Plaintiffs, Kenneth and Angela Hensley, on behalf of their minor child BLH, and All Others Similarly Situated, ("Plaintiffs" or "BLH") Motion for Summary Judgment (filed April 15, 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. The Court, after considering the submitted motions, memorandum, pleadings, exhibits, and oral arguments hereby denies Defendant's Motion for Summary Judgment and grants Plaintiff's Motion for Partial Summary Judgment as to the issue of exhaustion of administrative remedies.

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.

FACTS

In June 2002, the then-State Director of DSS issued across-the-board cuts in the adoption subsidies that DSS had contracted to pay some 4,100 families, including BLH's adoptive parents. In 2004, the DSS rescinded a similar cut in subsidies for children in foster care yet has *never restored* the cut in benefits for adoptees whose adoptive parents had earlier accepted all the legal responsibilities of parenthood. BLH, in this lawsuit, alleges a *single count* against DSS for a breach of contract. The evidence before the Court was the contractual agreement between the parties. The Court relied on this document and the plain and ordinary meaning of the words was used.

I. Summary Judgment Standard

Rule 56(c) of the *South Carolina Rules of Civil Procedure* states a motion for summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). *Catawba Indian Nation v. State*, 407 S.C. 526, 535–36, 756 S.E.2d 900, 905–06 (2014).

The parties stipulated the relevant facts and agreed that this Court's decision on the exhaustion of administrative remedies issue is appropriate for summary judgment. “Whether administrative remedies must be exhausted is a matter within the [circuit court]'s sound discretion and [its] decision will not be disturbed on appeal absent an abuse thereof.” See *Holman v. S.C. Education Lottery Commission*. 441 S.C. 18, 29, 891 S.E.2d 701 (2023) (citing *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994).

“An abuse of discretion occurs where the [circuit court] was controlled by an error of law or where [the circuit court's] order is based on factual conclusions that are without evidentiary support.” *Stanton v. Town of Pawleys Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (quoting *Coleman v. Dunlap*, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992)).

ANALYSIS

II. This Court Denies Defendant’s Motion for Summary Judgment

Defendant DSS moved for summary judgment on the grounds of failure to exhaust administrative remedies and on the grounds that the Fourth Circuit case *Hensley v. Hensley v. Koller*, 722 F.3d 177, 183 (4th Cir. 2013) bars this state Court action by collateral estoppel. The Court finds that the Fourth Circuit case is instructive, but does not, as a matter of law, bar the Plaintiff from going forward with its case as plead. For the reasons outlined below, the Defendant’s Motion for Summary Judgment on the failure to exhaust administrative remedies is also not supported by the law. Accordingly, Defendant’s Motion for Summary Judgment is denied.

III. The Court Grants Plaintiff’s Motion for Summary Judgment on the Issue of Exhaustion of Administrative Remedies

a) Permissive and not Mandatory Language

For the reasons stated below, the Plaintiffs’ motion for summary judgment as to the issue of exhaustion of administrative remedies is granted; the Plaintiffs have established that seeking an administrative remedy would have been a futile act.

The contract (adoption subsidy agreement) provides notice to the adoptive parents of their appeal rights as follows: “Adopted parents **may** appeal DSS’ decision to reduce, change, or terminate any adoption subsidy in accordance with the rules and procedures of the state’s fair hearing and appeal process. Information **may** be requested from DSS.” (emphasis added).

The Plaintiffs contend that the bolded language in the adoption subsidy agreement does not require that the adoptive parents pursue this administrative remedy.

Similarly, the Plaintiffs contend that the statute regarding redress for subsidy reductions is not mandatory. Rather, like the adoption subsidy agreement, the Plaintiffs assert that it offers a mechanism for redress, but does not purport to be an exclusive or compulsory mechanism.¹ Plaintiffs cite *Edge v. State Farm Insurance Company*, 345 S.C. 136, 139-40, 546 S.E.2d 647, (2021) to support their position that there is no requirement to pursue administrative remedies when both the contractual and statutory language is discretionary, and not mandatory.² The Court agrees with this contention.

The Court finds it can make this decision without reaching Plaintiffs' argument that the exhaustion of administrative remedies is permissive solely based on the word "may," which appears in the contract. This court concludes this argument is not determinative in the granting of this motion but is rather only instructive. Instead, to the degree this decision is discretionary

¹ **SECTION 63-9-1790.** Review of decisions.

A decision concerning supplemental benefits by the department which the adoptive parents consider adverse to the child is reviewable according to department regulations.

The DSS regulations on this subject are equally permissive, and not mandatory:

1. The family **has a right** to appeal any decision made by the department on supplemental benefits, both before and after finalization of the adoption, according to the Department's approved appeal process.
2. The family will be informed of its right to a judicial review in accordance with the Administrative Procedures Act. (See S. C. Reg. Section 114-4380(G)) (emphasis added).

² "The words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation. *Byerly v. Connor*, 307 S.C. 441, 415 S.E.2d 796 (1992). Pursuant to the plain and ordinary meaning of the regulation, an aggrieved party may appeal to the Commissioner; however, nothing prevents the aggrieved party from bypassing an administrative hearing before the Commissioner and bringing an action in the circuit court as *Edge* did in this matter. By using the word "may" instead of "shall," the regulation allows, but does not require, an aggrieved party to appeal to the Commissioner. See *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995) (use of word "may" signifies permission and generally means the action spoken of is optional or discretionary); *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980) (same)."

Edge v. State Farm Insurance Company, 345 S.C. 136, 139-40, 546 S.E.2d 647, (2021) (footnotes omitted)

the Court holds that the facts presented do not require the exhaustion of those administrative remedies because the plaintiff has established the issue of futility.

b) Futility

The stipulated facts are as follows: On June 20, 2022, adoptive parents received a letter from Elizabeth G. Patterson, then state Director of the Department of Social Services. Ms. Patterson announced a unilateral and across-the-board reduction in the monthly subsidy rate of \$20 per child. This is an undisputed fact.

The letter from Ms. Patterson stated that the department “has made every effort to avoid taking any action that affects critical services to children and families. However, it is now necessary to take additional measures in order to stay within the department budget.” Ms. Patterson continued: “Please be assured that this action has not been taken without much thought and consternation. I would not be asking families to make this financial sacrifice if I did not feel it was necessary in order to continue to provide essential, protective service and assistance to as many children as possible.” In short, the letter from Director Patterson announced that this was a necessary action, and a decision made at the highest level of the agency.

It is clear to this court that the DSS decision concerning the \$20 monthly payment was not an individualized decision based on the specific needs of the adopting family or the special needs of the child. Instead, the decision was an overall financially driven agency decision. Therefore, any individual recipient of the subsidy who had been deprived of the \$20 monthly amount would have reasonably concluded the futility of appealing this decision. This court concludes that where the highest placed person within an organization has announced a decision, and that decision is an across-the-board decision and is not unique or fact specific to

the denied recipient, a reasonable person would consider an appeal to be vain or futile.³ See *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct.App. 2010) (recognizing an exception to the requirement of exhaustion of administrative remedies when a party demonstrates that pursuit of administrative remedies would be a “vain or futile” act).

Once a party has established their right to summary judgment, the opposing party must come forth with facts to counter the moving party’s right to summary judgment. Here, DSS has provided no facts to sufficiently counter the Plaintiff’s position. Accordingly, the Court finds as a matter of law, there was no reasonable requirement for the Plaintiff to exhaust the administrative remedies in order to recover the \$20 monthly amount. Under the facts presented, this Court finds that the Plaintiff has established this issue of futility and, therefore, is entitled to summary judgment as to the exhaustion of administrative remedies issue.

As a result, this Court denies the Defendant's Motion for Summary Judgment and grants the Plaintiff’s Motion for Partial Summary Judgment ordering that Plaintiffs were not required to exhaust their administrative remedies prior to instituting this action because any such attempt would have been futile.

AND IT IS SO ORDERED.

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

August _____ 2024.

³ Similarly, the Supreme Court of South Carolina has found that it would be futile to require a parent to exhaust administrative remedies when a school board of trustees has already acted adversely to the parent. In *Storm M.H., v. Charleston County Board of Trustees*, 400 S.C. 478, 735 S.E.2d 492 (2012), a parent from Berkeley County sought to enroll her child in a magnet school in Charleston County. When the Board of Trustees decided that only Charleston County residents were eligible for enrollment, the parent did not pursue available administrative remedies, but instead filed an action in the circuit court. The Supreme Court held that “we find it would have been futile for Parent to exhaust her administrative remedies as the Board’s decision was certainly to be unfavorable.” *Id.* at 487. There, like here, when the highest placed and most powerful person or entity has already spoken, it is futile for a parent to assume the outcome of an administrative procedure would be different.



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

Electronically signed on 2024-08-28 16:42:11 page 7 of 7

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.	)	<u>ORDER DENYING DEFENDANT'S</u>
	)	<u>MOTION TO DECERTIFY THE CLASS</u>
	)	<u>AND ORDERING PLAINTIFF TO</u>
South Carolina Department of Social	)	<u>PROVIDE NOTICE TO ALL CLASS</u>
Services	)	<u>MEMBERS</u>
	)	
Defendant.	)	
	)	

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 of 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. Salmonsens, 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).¹

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.

¹ “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.

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

Electronically signed on 2024-08-28 16:45:21 page 8 of 8

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	CIVIL ACTION NO. 2013-CP-42-1569
	)	
Kenneth and Angela Hensley, on behalf	)	
of their minor child BLH, and all other	)	
similarly situated children,	)	
	)	
Plaintiffs,	)	CONSENT SCHEDULING ORDER
v.	)	
	)	
South Carolina Department of Social	)	
Services,	)	
	)	
Defendant.	)	
	)	

Pursuant to Rule 16 of the South Carolina Rules of Civil Procedure and with the consent of the Parties, the following Scheduling Order is established for this case:

1. The Defendant shall serve a document identifying by full name, address, and telephone number the persons whom they expect to call as experts at trial by March 1, 2024.
2. The Plaintiffs shall provide the Defendant's counsel a proposed draft of the Class Notice by February 1, 2024.
3. The Defendant shall provide the Plaintiffs' counsel any objections to the proposed draft of the Class Notice by February 8, 2024.
4. The proposed draft of the Class Notice shall be provided to the Court for approval by February 12, 2024. If the Parties do not agree on the language of the Class Notice, the Court shall be notified of the substance of any disagreements of the Parties.
5. On February 21, 2024 the Court will determine the final class definition or any other remaining class-related issues.
6. Notice to the Class shall be sent no later than seven (7) days from the date of the Court's order approving the Class Notice and establishing the final class definition. There shall be an "opt out" period which will expire 45 days from the date of the Court's order approving the Class Notice and establishing the final class definition. The precise expiration date of the "opt out" period will be stated with specificity in the Class Notice.
7. The Plaintiffs shall no later than 30 days after the end of the "opt out" period submit a report to the Court, with a copy to the Defendant's counsel, providing a list of all potential class members who opted out or otherwise raised objections to the class action as well a list of all potential class members for whom the Class Notice was returned as undeliverable.

8. Discovery shall be completed on March 15, 2024. All discovery requests shall be served in time for the responses thereto to be served by this date. All depositions must be completed by or before this deadline.

9. All dispositive motions and all Daubert motions shall be filed on or before April 1, 2024.

(a) The Response to the dispositive motions shall be filed by April 15, 2024.

(b) Replies in support of dispositive motions shall be filed by April 22, 2024.

(c) A hearing on all dispositive motions will be held following briefing of the motions on or before May 1, 2024.

10. Mediation shall be conducted on or before May 15, 2024.

11. The Court will hold a status conference to discuss and set a date certain for trial of the case to be held on or after June 3, 2024.

12. The Parties shall meet at least 10 days prior to the date set for trial for the purpose of exchanging and marking all exhibits.

13. Motions in limine must be filed no later than 14 days prior to the date set for trial in this matter.

Upon consent of the parties or on motion of any one of them, the Court may modify this Scheduling Order. The parties may modify the pre-trial deadlines by agreement, except they may not modify the trial date without approval by the Court.

J. MARK HAYES
Circuit Court Judge,
Seventh Judicial Circuit



Spartanburg Common Pleas

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

Case Number: 2013CP4201569

Type: Order/Scheduling Order

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4201569

Blh Angela Hensley	Kenneth Hensley	South Carolina Department Of Social Services

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: Defendant's motion for summary judgment is DENIED.
Plaintiff's motion for class certification is GRANTED. Refer to original in case file.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

[Signature]
Circuit Court Judge

2168

Judge Code

Date

4/8/14

For Clerk of Court Office Use Only

This judgment was entered on 8 of April, and a copy mailed first class or placed in the appropriate attorney's box on 8 of April, to attorneys of record or to parties (when appearing pro se) as follows:

Timothy Ryan Langley PO Box 2765 Spartanburg, SC
29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

Joel Steve Hughes 1611 Devonshire Dr. 2Nd Flr Columbia,
SC 29202-8568

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley

Court Reporter

M Hope Blackley - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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CLERK OF COURT
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

COURT OF COMMON PLEAS

BLH [REDACTED] by parents/general guardians
Kenneth and Angela Hensley, AND on behalf of all
others similarly situated

Plaintiff,
vs.

South Carolina Department of Social Services

Defendant.

CA NO. 13-CP-42-1569

ORDER ON PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION, PLAINTIFF'S
MOTION TO COMPEL
AND DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

I. Introduction/Factual and Procedural History

This matter came before me for hearing on April 8, 2014. The Court heard arguments and reviewed written briefs from counsel for both parties on all above-referenced motions and related issues. Based on these briefs and arguments, the Court makes the following findings of fact and conclusions of law:

Defendant entered agreements with approximately 4000 South Carolina families for the provision of Adoption Assistance Subsidies (hereinafter referred to as "AAS") to benefit the adopted children. In 2002, Defendant cut the payment to these adopted children across the board by \$20 per month. At the same time, Defendant cut the payments to foster families. In 2004, Defendant reinstated the payments to the foster families but did not reinstate the payment to the adoption families. Plaintiffs allege the cut of these payments breaches the written agreement they have with Defendant. Initially a similar action was brought as a 42 U.S.C. Section 1983 action.

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CLERK OF COURT
SPARTANBURG COUNTY

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M. HOPE BLACKBERRY

against individual employees of the South Carolina Department of Social Services (hereinafter "SCDSS") in this same state court on September 16, 2011. Counsel for those individual employees, who is the same counsel for the Defendant in the case at bar, removed the case to federal court. The federal district court certified the class under Federal Rule 23 and denied cross motions for summary judgment. Defendant appealed the denial of summary judgment to the U.S. Court of Appeals for the Fourth Circuit. On March 28, 2013 Plaintiff's withdrew their federal contract clause allegations and then filed the current breach of contract action against Defendant SCDSS on April 1, 2013.

The 1983 claims ultimately were decided by the 4th Circuit Court of Appeals on July 3, 2013. The Fourth Circuit Court of Appeals held that there was not a violation of federal law by the individual directors of DSS. The Fourth Circuit opinion made no reference to any preclusive effect of its ruling on the pending state court action based on South Carolina state law. Indeed, the transcript of the hearing from the 4th Circuit reflects that the parties discussed (if not stipulated) that the 4th Circuit Order would have no preclusive effect on the already pending state law contract cause of action brought against SCDSS.

Discovery in the state court action was served by Plaintiff on Defendant on July 26, 2013. Plaintiff's counsel fulfilled its duty to consult with counsel for Defendant but no responses were provided. Plaintiff therefore filed a motion to compel in October of 2013. Plaintiff filed a Motion for Class Certification. On March 10, 2014 Defendant filed its motion for summary judgment. This hearing was set for April 8th. On April 3rd, Defendant emailed discovery responses to Plaintiff. No depositions have been taken due to the delay in Defendant's discovery responses.

II. Analysis and Citation of Authority

II.A. Defendant's Motion for Summary Judgment



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Summary judgment is only appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.¹

In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.² “All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party.”³ “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.”⁴

It is only necessary for the nonmoving party to submit “a mere scintilla of evidence in order to withstand a motion for summary judgment.”⁵ “Summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.”⁶ Finally, because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a “full and fair opportunity to complete discovery.”⁷

Given that Defendant served its discovery responses nine months after they were due and only days prior to the summary judgment hearing, Plaintiff has clearly had no full and fair

¹ Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Rule 56(c), SCRPC.

² Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).

³ Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004).

⁴ Redwend, 354 S.C. 459, 581 S.E.2d 496; Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999).

⁵ Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009) Hill v. York County Sheriff's Dep't, 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993) cert. den. (1994).

⁶ Redwend, 354 S.C. 459, 581 S.E.2d 496; Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001).

⁷ Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 708 S.E.2d 745 (2011).

opportunity to complete discovery. For that reason alone, summary judgment is improper.

Assuming *arguendo*, Defendant's discovery responses had somehow provided Plaintiff a full and fair opportunity to complete discovery, Defendant is not entitled to summary judgment on the issue of collateral estoppel. "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment."⁸

As noted, the case at bar had been filed prior to the oral argument before the 4th Circuit Court of Appeals. At the oral argument before the 4th Circuit the issue of collateral estoppel was raised by counsel for Plaintiff. The same Defense counsel who made the argument for collateral estoppel in this case represented to the 4th Circuit oral argument that he would not seek to bar this action on the basis of collateral estoppel as no basis for collateral estoppel would be present on a dismissal without prejudice.

He said specifically:

58

3 BY MR. LANGLEY:

4 Well, on the grounds of res judicata or
5 collateral estoppel by virtue of some dismissal with
6 prejudice ---

7 BY MR. LINDEMANN:

8 If it's without prejudice, there would be no
9 such argument.

10 BY FEMALE SPEAKER:

11 Right.

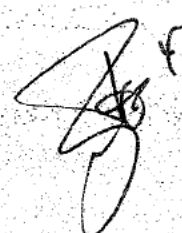
12 BY MR. LINDEMANN:

13 And that wasn't my intent to try to make that
14 argument, I can represent to the Court.

15 BY FEMALE SPEAKER:

16 Okay. Thank you very much.

⁸ *Kunst v. Loree*, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct.App.,2013).



17 BY MR. LINDEMANN:

18 Thank you.⁹

Defendant's motion for summary judgment seeks the same relief its counsel represented to three federal appellate judges was unavailable under these circumstances. The reason counsel admitted previously that there would be no such argument for collateral estoppel is that his client cannot meet its burden of proving that the elements of collateral estoppel are met. Specifically, 4th Circuit dealt with federal law and the issue at bar is whether Defendant breached South Carolina state law breach of contract principles.

Among these principles are the following:

1. The South Carolina General Assembly requires the Department of Social Services to execute a written agreement with adoptive parents whenever it determines that a child is eligible for supplemental benefits. S.C. Code Ann. § 63-9-1770 (A)(formerly § 20-7-1950).
2. When a state agency or commission is statutorily required or authorized to contract, the contract, by necessary implication, carries with it the authority to enforce the contract by an action at law.¹⁰
3. When there are conflicts in a contract's interpretation "a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."¹¹ This is especially so for adhesion contracts.¹²

⁹ Transcript of 4th Circuit Oral Argument.

¹⁰ Chesterfield County v. State Highway Dept. of South Carolina, 181 S.C. 323, 187 S.E. 548, 550-551 (1936). (The Court in Chesterfield noted that a contract would otherwise be one-sided, where the State could enforce it against parties it contracts with by the parties could not enforce the same contract against the State).

¹¹ Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010).

¹² Southern Atlantic Fin. Serv., Inc. v. Middleton, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct.App. 2002) ("It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion.").

4. There exists in every South Carolina contract an implied covenant of good faith and fair dealing.¹³ This covenant requires that neither party will do anything which will injure right of the other to receive benefits of the agreement.¹⁴

The issue decided by the 4th Circuit was solely based on federal law and made no reference to any of the aforementioned South Carolina principles of contract law. Likewise, Defendant's arguments in its brief and at the hearing before this Court focused entirely on federal law. On the contrary, counsel for Plaintiff explained that this litigation was not an attempt to relitigate the question of whether Defendant's employees violated the Adoption Assistance and Child Welfare Act, but rather whether Defendant had violated the South Carolina contract principles outlined above. Accordingly, Defendant cannot meet the burden of showing that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.

II.B. Plaintiff's Motion for Class Certification

Circuit courts enjoy discretion in deciding whether or not to certify a class action under Rule of Civil Procedure 23(d)¹⁵ and the decision is therefore not normally immediately appealable.¹⁶ Rule 23(d) requires the court to determine whether a class action is to be maintained as soon as practical after the commencement of an action.¹⁷ The circuit court need not consider the merits of the action for the purpose of issuing an order under S.C. Rule 23, but the class must comply with the following five prerequisites: (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality

¹³ Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995), reh'g denied, (Dec. 19, 1995).

¹⁴ Shiftlet v. Allstate Ins. Co., 451 F. Supp. 2d 763 (D.S.C. 2006).

¹⁵ Tilley v. Pacesetter Corp., 333 S.C. 33, 42-43, 508 S.E.2d 16, 21 (1998); Waller v. Seabrook Island Property Owners Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990) (Finding that South Carolina Appellate Courts generally defer to the trial court's discretion in granting class certification absent an error of law).

¹⁶ Salmonsens v. CGD, Inc. 377 S.C. 442, 661 S.E.2d 81 (2008).

¹⁷ S.C.R.Civ.P. 23(d).

of claims and defenses of class representatives; (4) adequacy of representation; and (5) amount in controversy.¹⁸ The South Carolina Supreme Court has found in a case analogous to the case at bar that class certification is especially appropriate where the number of potential plaintiffs was large, there was one main issue of law identical for all plaintiffs, all injuries resulted from the same act, and calculation of damages would not be difficult.¹⁹

Though Defendant has argued an affidavit is required from Plaintiff in order to certify the class there is no such requirement in the statute or in any South Carolina case law. Defendant directs the Court to federal authority but it is well-settled that South Carolina's Rule 23 "endorses a more expansive view of class action availability than its federal counterpart."²⁰ For example, contrary to the federal rule South Carolina has no predominance or superiority requirement,²¹ which was intentionally omitted by the drafters.²² Actually, the South Carolina Rule requires only that the "court find" that the above five elements are met.²³ Based on the arguments of counsel at the hearing April 8, 2014, the pleadings of record, and the statutory and case law authority the Court finds the five elements are met for the following reasons.

II.B.1 Numerosity

The class is sufficiently numerous. In light of prevailing precedent, the difficulty inherent in joining as few as forty class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the task of Rule 23(a)(1) on that fact

¹⁸ S.C. R. Civ. P. 23.

¹⁹ Littlefield v. S.C. Forestry Comm'n., 337 S.C. 348, 355, 523 S.E.2d 781, 784 (1999).

²⁰ See Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) (citing Littlefield v. S.C. Forestry Comm'n., 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999)).

²¹ Melton ex rel. Dutton v. Carolina Power & Light Co., 283 F.R.D. 280, 297-298 (D.S.C. 2012) (citing S.C. R. Civ. P. 23).

²² Littlefield, 337 S.C. at 355, 523 S.E.2d at 784.

²³ S.C. R. Civ. P. 23(a).

alone.²⁴ As of June 20, 2002, approximately 4,000 children had adoption assistance agreements in place that were negatively affected by the unilateral cut of benefits. Counsel for Defendant did not dispute this assertion at the hearing and Paragraph 5 of Defendant's Amended Answer concedes that the cut was made across the board. A class of 4,000 is sufficiently numerous.

II.B.2 Commonality

There is commonality of factual and legal issues in this case. Rule 23(a)(2) of the South Carolina Rules of Civil Procedure requires that there be "questions of law or fact common to the class."²⁵ Plaintiffs meet this test when their claims and the claims of absent class members share a determinative issue.²⁶ "Critically, [n]ot every issue in the case must be common to all class members."²⁷ "It is important to note that the subsection does not demand all questions of law and fact to be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status."²⁸

Furthermore, "claims arising out of form contracts are particularly appropriate for class action treatment."²⁹ As the California Supreme Court aptly noted in La Sala v. American Sav. & Loan Ass'n., a case involving standard form trust deeds, "[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication: the contracts are uniform, the same

²⁴ 1 H. Newberg & A. Conte, *Newberg on Class Actions* ¶13.05, 3-25 (3rd Ed. 1992).

²⁵ SCRCP 23(a)(2).

²⁶ Gardner v. South Carolina Dep't of Revenue, 353 S.C. 1, 21-22, 577 S.E.2d 190, 200-01 (2003).

²⁷ Id.

²⁸ McGarr v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) ("Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.")

²⁹ Hoban v. USLIFE Credit Life Ins. Co., 163 F.R.D. 509, 513 (N.D. Ill. 1995).

principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party.”³⁰

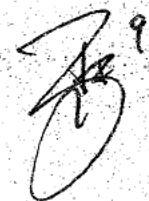
In the case at bar, each named Plaintiff and each putative class member is subject to the same action by Defendants. The two critical common questions of law and fact alleged in the Complaint, as amended, are as follows:

1. whether the cut of benefits to families of adopted children breached the contract or violated the implied duty of good faith and fair dealing;

2. whether the failure to reinstate the benefits to the families of the adopted children after reinstating the benefits to the families of the foster care children breached the contract or violated the implied duty of good faith and fair dealing;

Class actions are intended to achieve economies of time, effort, and expense and to promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness, which will all be accomplished in this instance where Defendants have used common practices with regard to all members of the Class. Specific to this case, a decision on the lawfulness of Defendants’ simultaneous, unilateral cut of benefits allegedly in violation of its contractual obligations to the class members. All putative class members share a united interest in the fair, just, and consistent determination of these questions of law and fact necessary to the adjudication of Defendants’ liability. Thus, this Court can resolve the issue that is central to the validity of each one of the claims in one stroke. Accordingly, the element of commonality is met.

³⁰ La Sala v. American Sav. & Loan Ass’n., 5 Cal. 3d 864, 877, 489 P.2d 1113, 1121 (1971).



Defendants arguments against commonality essentially ask the court to accept the merit of the various defenses Defendant has plead such as implied consent, novation, exhaustion of administrative remedy, and damages; which is generally inappropriate at this stage. Additionally, were the court to accept Defendants arguments as to the implied consent defense then any defendant could avoid class certification of a breach of contract action by pleading a defense of implied consent then arguing this defense required individual analysis. Such an argument fails to comport with the case law on the issue of commonality.

The remaining purported defenses are applicable to the class as a whole except the question of the exact damages each member has suffered. The Court considered Defendant's reliance on Gardner v. South Carolina Department of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003) on the issue of damages. While Gardner does provide that individualized examination negates the benefit of a class action lawsuit, such named differences among proposed class members in that case were addressed regarding a legal issue:

“[T]he factual differences (whether prejudice exists) [among plaintiffs] are the crux of a predominant legal issue. A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case.”³¹

Conversely, members of the Proposed Class in the case at bar each allege the same cause of action, set forth the same ensuing legal issues and each anticipates the same contract defenses. Any

³¹ Id. at 22.

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differences in the variance in damages are of "a typical class action where minor factual differences [damage amounts] exist among the individualized cases of class members."³²

Importantly, there is no requirement under South Carolina law that each class member have suffered the exact same amount of damages. South Carolina courts have repeatedly acknowledged that class certification is appropriate in cases in which the damages were different for each class member.³³ In McGann v Mungo, hundreds of residents and owners of improved residential properties in Cold Stream, a subdivision near Columbia, filed a class action concerning negligent design and construction of streets and drainage systems. The defendants argued that each class member's individualized damages prevented the Court from certifying the case as a class action. In rendering its decision, the South Carolina Court of Appeals attached no significance to the undisputed fact that each class member had different damages:

The mere fact that the Plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action.³⁴

McGann has been cited consistently by the Courts of this state and no less than eleven times by the South Carolina Supreme Court in ruling on class certification cases, which makes sense as its holding is in line with the historical "purpose of a class action [which] is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action."³⁵

³² Id.

³³ Littlefield, 337 S.C. at 355, 523 S.E.2d at 784; Bates v. Tenco Services, Inc., 132 F.R.D. 160, 163 (D.S.C. 1990.) (Any difference in the degree of harm suffered by class members does not diminish the typicality of the proposed representatives' claims).

³⁴ McGann, 340 S.E.2d at 158.

³⁵ O'Quinn v. Beach Associates, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978) (emphasis added).



Furthermore, the question of damages is easily answered given the specifically identifiable nature of this class. By the very nature of this suit, Defendant has documentation of everyone in the class showing precisely the name, age, and benefits each class member would be entitled to if in fact Defendant's actions are determined to violate the law. Given the abundance of common issues, ease of Defendant's access to the information necessary for calculating damages, and general purpose of class actions in consolidating proof of the elements of the cause of action, the element of commonality is met in the case at bar.

II.B.3 Typicality

The legal violations against the Plaintiffs are typical of those against each member of the putative class under Rule (23)(a)(3) of the South Carolina Rules of Civil Procedure. This requirement is satisfied if the representative plaintiffs' claim "arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories."³⁶ When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.³⁷ This is applicable to the case at bar, where Plaintiffs allege that Defendant's unilateral, simultaneous cut of benefits, similarly applied to all Class Members, gives rise to the claims at issue.

Because Plaintiffs allege the written agreements they signed have been breached applies uniformly to all Class Members, Plaintiffs have satisfied the typicality requirement. Like the members of the Class, the Plaintiff through her parents is the third party beneficiary of a contract who had its contractually owed benefits cut. In addition, the claims of Plaintiff and the Class

³⁶ Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628, 637 (D.S.C. 1992), *aff'd*, 6 F. 3d 177 (4th Cir. 1993).

³⁷ Newberg ¶ 3.13 at 3-77.

Members arise under the same legal theories that the written contract has been breached. The harms suffered by the Plaintiff are typical of the harms suffered by all children in the putative class because they arise from the same cut of benefits and are based on the same legal theories. Defendant's brief and arguments at the hearing made no meaningful arguments to the contrary.

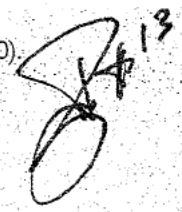
II.B.4 Adequacy and Class Definition

The Plaintiffs will fairly and adequately represent and protect the interest of the members of the putative class under Rule 23(a)(4) of the South Carolina Rules of Civil Procedure. This rule has two elements: (1) that the class representatives and their counsel will competently and vigorously prosecute the action; and (2) that the interests of the class representatives are not adverse to those of the class members.³⁸ Class representatives need not master the intricacies of the case. It must appear to the Court, however, they are willing and able to represent the interests of the class. Plaintiffs in this case are willing to appear for their depositions, will cooperate with counsel, and are not disqualified from service as class representatives for any reason.

The Class the Plaintiffs seek to represent is as follows:

All children, age 19 or younger on the date the filing of the first state court Complaint (September 16, 2011), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and the South Carolina Department of Social Services, executed on or before June 20, 2002 and had at least five (5) months of lost benefits due to the cut in the assistance agreement.

³⁸ Waller v. Seabrook Island Property Owners Ass'n., 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990).



A proper class definition describes the class in objective terms, capable of membership ascertainment without regard to the merits of the proposed class members' claims or the particular relief they seek.³⁹ The Plaintiffs have no interest in the subject matter of the lawsuit that would render them antagonistic to other class members. Accordingly, Plaintiffs truly are representative of the class and the class is defined as outlined above.

With regard to the second prong, the adequacy of Plaintiffs' counsel, like that of the individual plaintiffs, is presumed in the absence of specific proof to the contrary.⁴⁰ Plaintiffs' have engaged experienced and capable attorneys. Accordingly, the adequacy requirements are satisfied in this case.

Defendant's argument against adequacy on the issue of Plaintiff's position as a Third-Party beneficiary is without merit because third party beneficiaries (BLH and the putative class members) have the right to enforce the terms of the contract under South Carolina law.⁴¹

II.B.5 Amount in Controversy

Rule 23(a)(5) of the South Carolina Rules of Civil Procedure requires an amount in controversy for each class member to be at least one hundred (\$100.00) dollars to certify a class in cases where the relief sought is not primarily injunctive relief. In interpreting the phrase "amount in

³⁹ See H. Newberg & A. Conte, *Newberg on Class Actions*, Fourth, § 6.14 (1994).

⁴⁰ *South Carolina National Bank v. Stone*, 139 F.R.D. 325, 330 (D.S.C. 1991).

⁴¹ 30 S.C. Jur. Contracts § 68 (citing *Svenningsen v. Knight*, 286 S.C. 299, 333 S.E.2d 78 (Ct. App. 1985); see also, *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n.*, 384 F.3d 157 (4th Cir. 2004) (finding that under South Carolina law, when contract is made for benefit of third person, that person may enforce contract if contracting parties intended to create direct benefit to such third person)).

controversy,” the South Carolina Supreme Court held “the sum claimed by the plaintiff controls if the claim is apparently made in good faith.”⁴²

In this case, the Plaintiff conceded at the hearing a modification to the requested class narrowing it to only those children who have lost at least 5 months in benefits due to the cut made by Defendants. Because the monthly cut in benefits was twenty (\$20) dollars the amount in controversy is equal to or exceeds \$100 for each member of the Class. These funds were lost to the class members and Defendants argument that perhaps they received the same care anyway is without merit as the loss is tangible, identifiable, and real. Accordingly, the requirements of SCRCR Rule 23(a)(5) are met.

II.B.6 Notice

As to the notice requirements pursuant to S.C. R. Civ. P 23(d), the Court adopts an “opt-out” notice procedure. Given that Defendant regularly corresponds or has previously corresponded with all class members, Defendant shall serve on each class member a Notice of Class Action which shall advise them of the facts of this case and their right to opt out within 30 days if they choose not to participate.

II.C. Plaintiff's Motion to Compel

The Plaintiff agreed to hold this Motion in abeyance pending the Court's ruling on the Motion for Class Certification and Motion for Summary Judgment. Now that the class has been certified for the reasons outlined herein, counsel are directed by the Court to confer regarding the discovery requests that relate to all class members. Plaintiff reserves the right to reinstate its Motion to Compel if these matters are not resolved.

⁴² Gardner v. Newsome Chevrolet-Buick Inc., 304 S.C. 328, 331, 404 S.E.2d 200, 201-02 (1991)(emphasis in original).

IT IS ORDERED that Defendants' Motion for Summary Judgment IS DENIED.

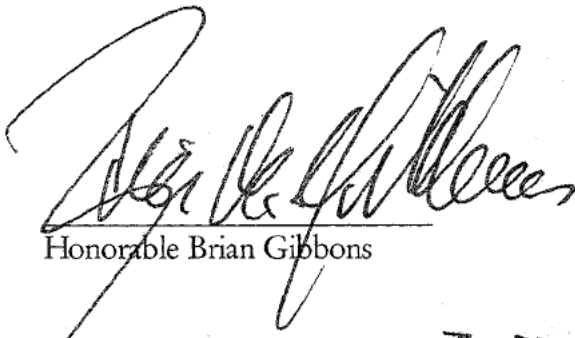
IT IS FURTHER ORDERED that Plaintiff's Motion for Class Certification is GRANTED.

IT IS FURTHER ORDERED that Defendant shall serve on each class member a Notice of Class Action which shall advise them of the facts of this case and their right to opt out within 30 days if they choose not to participate pursuant to Salmonsens v. CGD 377 S.C. 442, 661 S.E. 2d 81 (2008) (holding that in South Carolina all class members shall have the right to opt out of a class action). Defense counsel shall prepare a Notice and email to the court (copying counsel for the Plaintiff) for review within ten (10) days and shall thereafter be mailed to all class members within ten (10) days. The notice shall include instructions for the class members to communicate any decision to opt out by written notice to Plaintiff's counsel: T. Ryan Langley at P.O. Box 2765; Spartanburg, SC 29304.

IT IS FURTHER ORDERED that T. Ryan Langley, Charles J. Hodge, and James Fletcher Thompson are appointed class counsel and shall file any opt outs with the Clerk of Court within ten (10) days of receipt.

IT IS SO ORDERED.

May 21, 2014


Honorable Brian Gibbons

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

COURT OF COMMON PLEAS

BLH [REDACTED] by parents/general guardians
Kenneth and Angela Hensley, AND on behalf of all
others similarly situated

Plaintiff,
vs.

South Carolina Department of Social Services

Defendant.

CA NO. 13-CP-42-1569

ORDER ON PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION, PLAINTIFF'S
MOTION TO COMPEL
AND DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

I. Introduction/Factual and Procedural History

This matter came before me for hearing on April 8, 2014. The Court heard arguments and reviewed written briefs from counsel for both parties on all above-referenced motions and related issues.

Defendant entered agreements with approximately 4000 South Carolina families for the provision of Adoption Assistance Subsidies (hereinafter referred to as "AAS") to benefit the adopted children.¹ In 2002, Defendant cut the payment to these adopted children across the board by \$20 per month.² At the same time, Defendant cut the payments to foster families.³ In 2004, Defendant reinstated the payments to the foster families but did not reinstate the payment to the

¹ Complaint, para. 9. Defendant's Amended Answer does not dispute this allegation. See also, Affidavit of Caldwell, Exhibit G: contract with Plaintiff.

² Affidavit of Judy Caldwell, para. 12; Exhibit H to affidavit of Judy Caldwell.

³ Id.



adoption families. Plaintiffs allege the cut of these payments breaches the written agreement they have with Defendant. Initially a similar action was brought as a 42 U.S.C. Section 1983 action against individual employees of the South Carolina Department of Social Services (hereinafter "SCDSS") in this same state court on September 16, 2011. Counsel for those individual employees, who is the same counsel for the Defendant in the case at bar, removed the case to federal court. The federal district court certified the class under Federal Rule 23 and denied cross motions for summary judgment. Defendant appealed the denial of summary judgment to the U.S. Court of Appeals for the Fourth Circuit. On March 28, 2013 Plaintiff's withdrew their federal contract clause allegations and then filed the current breach of contract action against Defendant SCDSS on April 1, 2013.

The 1983 claims ultimately were decided by the 4th Circuit Court of Appeals on July 3, 2013. The Fourth Circuit Court of Appeals held that there was not a violation of federal law by the individual directors of DSS.⁴ The Fourth Circuit opinion made no reference to any preclusive effect of its ruling on the pending state court action based on South Carolina state law. Indeed, the transcript of the hearing from the 4th Circuit reflects that the parties discussed (if not stipulated) that the 4th Circuit Order would have no preclusive effect on the already pending state law contract cause of action brought against SCDSS.

Discovery in the state court action was served by Plaintiff on Defendant on July 26, 2013. Plaintiff's counsel fulfilled its duty to consult with counsel for Defendant but no responses were provided. Plaintiff therefore filed a motion to compel in October of 2013. Plaintiff filed a Motion for Class Certification. On March 10, 2014 Defendant filed its motion for summary judgment. This hearing was set for April 8th. On April 3rd, Defendant emailed discovery responses to Plaintiff. No

⁴ Order of the 4th Circuit Court of Appeals in Hensley v. Koller, et al.



depositions have been taken due to the delay in Defendant's discovery responses.

II. Analysis and Citation of Authority

II.A. Defendant's Motion for Summary Judgment

Summary judgment is only appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.⁵

In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.⁶ "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party."⁷ "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."⁸

It is only necessary for the nonmoving party to submit "a mere scintilla of evidence in order to withstand a motion for summary judgment."⁹ "Summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues."¹⁰ Finally, because summary judgment is a drastic remedy, it must not be granted until

⁵ Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Rule 56(c), SCRPC.

⁶ Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003).

⁷ Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); South Carolina Elec. & Gas Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004).

⁸ Redwend, 354 S.C. 459, 581 S.E.2d 496; Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 533, 538 S.E.2d 301 (Ct.App.1999).

⁹ Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009) Hill v. York County Sheriff's Dep't, 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993) cert. den. (1994).

¹⁰ Redwend, 354 S.C. 459, 581 S.E.2d 496; Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001).

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the opposing party has had a “full and fair opportunity to complete discovery.”¹¹

Given that Defendant served its discovery responses nine months after they were due and only days prior to the summary judgment hearing, Plaintiff has clearly had no full and fair opportunity to complete discovery. For that reason alone, summary judgment is improper.

Assuming arguendo, Defendant’s discovery responses had somehow provided Plaintiff a full and fair opportunity to complete discovery, Defendant is not entitled to summary judgment on the issue of collateral estoppel. “The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.”¹²

As noted, the case at bar had been filed prior to the oral argument before the 4th Circuit Court of Appeals. At the oral argument before the 4th Circuit the issue of collateral estoppel was raised by counsel for Plaintiff. By way of background, the same Defense counsel who made the argument for collateral estoppel in this case represented to the 4th Circuit oral argument that he would not seek to bar this action on the basis of collateral estoppel as no basis for collateral estoppel would be present on a dismissal without prejudice.

He said specifically:

58

3 BY MR. LANGLEY:

4 Well, on the grounds of res judicata or
5 collateral estoppel by virtue of some dismissal with
6 prejudice —

7 BY MR. LINDEMANN:

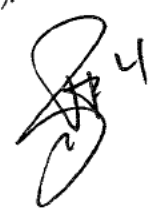
8 If it’s without prejudice, there would be no
9 such argument.

10 BY FEMALE SPEAKER:

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¹¹ Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 708 S.E.2d 745 (2011).

¹² Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct.App.,2013).



11 Right.
12 BY MR. LINDEMANN:
13 And that wasn't my intent to try to make that
14 argument, I can represent to the Court.
15 BY FEMALE SPEAKER:
16 Okay. Thank you very much.
17 BY MR. LINDEMANN:
18 Thank you.¹³

Defendant's motion for summary judgment seeks the same relief its counsel represented to three federal appellate judges was unavailable under these circumstances. The reason counsel admitted previously that there would be no such argument for collateral estoppel is that his client cannot meet its burden of proving that the elements of collateral estoppel are met. Specifically, 4th Circuit dealt with federal law and the issue at bar is whether Defendant breached South Carolina state law breach of contract principles.

Among these principles are the following:

1. The South Carolina General Assembly requires the Department of Social Services to execute a written agreement with adoptive parents whenever it determines that a child is eligible for supplemental benefits. S.C. Code Ann. § 63-9-1770 (A)(formerly § 20-7-1950).
2. When a state agency or commission is statutorily required or authorized to contract, the contract, by necessary implication, carries with it the authority to enforce the contract by an action at law.¹⁴

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¹³ Transcript of 4th Circuit Oral Argument.

¹⁴ Chesterfield County v. State Highway Dept. of South Carolina, 181 S.C. 323, 187 S.E. 548, 550-551 (1936). (The Court in Chesterfield noted that a contract would otherwise be one-sided, where the State could enforce it against parties it contracts with by the parties could not enforce the same contract against the State).

5

3. When there are conflicts in a contract's interpretation "a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."¹⁵ This is especially so for adhesion contracts.¹⁶
4. There exists in every South Carolina contract an implied covenant of good faith and fair dealing.¹⁷ This covenant requires that neither party will do anything which will injure right of the other to receive benefits of the agreement.¹⁸

The issue decided by the 4th Circuit was solely based on federal law and made no reference to any of the aforementioned South Carolina principles of contract law. Likewise, Defendant's arguments in its brief and at the hearing before this Court focused entirely on federal law. On the contrary, counsel for Plaintiff explained that this litigation was not an attempt to relitigate the question of whether Defendant's employees violated the Adoption Assistance and Child Welfare Act, but rather whether Defendant had violated the South Carolina contract principles outlined above. Accordingly, Defendant cannot meet the burden of showing that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.

II.B. Plaintiff's Motion for Class Certification

Circuit courts enjoy discretion in deciding whether or not to certify a class action under Rule of Civil Procedure 23(d)¹⁹ and the decision is therefore not normally immediately appealable.²⁰

¹⁵ Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010).

¹⁶ Southern Atlantic Fin. Serv., Inc. v. Middleton, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct.App. 2002) ("It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion.").

¹⁷ Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995), reh'g denied, (Dec. 19, 1995).

¹⁸ Shiftlet v. Allstate Ins. Co., 451 F. Supp. 2d 763 (D.S.C. 2006).

¹⁹ Tilley v. Pacesetter Corp., 333 S.C. 33, 42-43, 508 S.E.2d 16, 21 (1998); Waller v. Seabrook Island Property Owners Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990) (Finding that South Carolina Appellate Courts generally defer to the trial court's discretion in granting class certification absent an error of law).

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23(d) requires the court to determine whether a class action is to be maintained as soon as practical after the commencement of an action.²¹ The circuit court need not consider the merits of the action for the purpose of issuing an order under S.C. Rule 23, but the class must comply with the following five prerequisites: (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims and defenses of class representatives; (4) adequacy of representation; and (5) amount in controversy.²² The South Carolina Supreme Court has found in a case analogous to the case at bar that class certification is especially appropriate where the number of potential plaintiffs was large, there was one main issue of law identical for all plaintiffs, all injuries resulted from the same act, and calculation of damages would not be difficult.²³

Though Defendant has argued an affidavit is required from Plaintiff in order to certify the class there is no such requirement in the statute or in any South Carolina case law. Defendant directs the Court to federal authority but it is well-settled that South Carolina's Rule 23 "endorses a more expansive view of class action availability than its federal counterpart."²⁴ For example, contrary to the federal rule South Carolina has no predominance or superiority requirement,²⁵ which was intentionally omitted by the drafters.²⁶ Actually, the South Carolina Rule requires only that the "court find" that the above five elements are met.²⁷ Based on the affidavits cited herein and attached hereto, the pleadings of record and the statutory and case law authority, the Court finds the five elements are met for the following reasons.

²⁰ Salmonsens v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008).

²¹ S.C.R. Civ. P. 23(d).

²² S.C. R. Civ. P. 23.

²³ Littlefield v. S.C. Forestry Comm'n., 337 S.C. 348, 355, 523 S.E.2d 781, 784 (1999).

²⁴ See Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) (citing Littlefield v. S.C. Forestry Comm'n., 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999)).

²⁵ Melton ex rel. Dutton v. Carolina Power & Light Co., 283 F.R.D. 280, 297-298 (D.S.C. 2012) (citing S.C. R. Civ. P. 23).

²⁶ Littlefield, 337 S.C. at 355, 523 S.E.2d at 784.

²⁷ S.C. R. Civ. P. 23(a).

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II.B.1 Numerosity

The class is sufficiently numerous. In light of prevailing precedent, the difficulty inherent in joining as few as forty class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the task of Rule 23(a)(1) on that fact alone.²⁸ As of June 20, 2002, approximately 4,000 children had adoption assistance agreements in place that were negatively affected by the unilateral cut of benefits. Counsel for Defendant did not dispute this assertion at the hearing and Paragraph 5 of Defendant's Amended Answer concedes that the cut was made across the board. A class of 4,000 is sufficiently numerous.

II.B.2 Commonality

There is commonality of factual and legal issues in this case. Rule 23(a)(2) of the South Carolina Rules of Civil Procedure requires that there be "questions of law or fact common to the class."²⁹ Plaintiffs meet this test when their claims and the claims of absent class members share a determinative issue.³⁰ "Critically, [n]ot every issue in the case must be common to all class members."³¹ "It is important to note that the subsection does not demand all questions of law and fact to be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status."³²

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²⁸ 1 H. Newberg & A. Conte, Newberg on Class Actions ¶3.05, 3-25 (3rd Ed. 1992).

²⁹ SCRCP 23(a)(2).

³⁰ Gardner v. South Carolina Dep't of Revenue, 353 S.C. 1, 21-22, 577 S.E.2d 190, 200-01 (2003).

³¹ Id.

³² McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) ("Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.").

Furthermore, "claims arising out of form contracts are particularly appropriate for class action treatment."³³ As the California Supreme Court aptly noted in La Sala v. American Sav. & Loan Ass'n., a case involving standard form trust deeds, "[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication: the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party."³⁴

In the case at bar, each named Plaintiff and each putative class member is subject to the same action by Defendants. The two critical common questions of law and fact alleged in the Complaint, as amended, are as follows:

1. whether the cut of benefits to families of adopted children breached the contract or violated the implied duty of good faith and fair dealing;
2. whether the failure to reinstate the benefits to the families of the adopted children after reinstating the benefits to the families of the foster care children breached the contract or violated the implied duty of good faith and fair dealing;

Class actions are intended to achieve economies of time, effort, and expense and to promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness, which will all be accomplished in this instance where Defendants have used common practices with regard to all members of the Class. Specific to this case, a decision on the lawfulness of Defendants' simultaneous, unilateral cut of benefits allegedly in violation of its contractual obligations to the Class members. All putative class members share a united interest in the fair, just, and consistent

³³ Hoban v. USLIFE Credit Life Ins. Co., 163 F.R.D. 509, 513 (N.D. Ill. 1995).

³⁴ La Sala v. American Sav. & Loan Ass'n., 5 Cal. 3d 864, 877, 489 P.2d 1113, 1121 (1971).

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determination of these questions of law and fact necessary to the adjudication of Defendants' liability. Thus, this Court can resolve the issue that is central to the validity of each one of the claims in one stroke. Accordingly, the element of commonality is met.

Defendants arguments against commonality essentially ask the court to accept the merit of the various defenses Defendant has plead such as implied consent, novation, exhaustion of administrative remedy, and damages; which is generally inappropriate at this stage. Additionally, were the court to accept Defendants arguments as to the implied consent defense then any defendant could avoid class certification of a breach of contract action by pleading a defense of implied consent then arguing this defense required individual analysis. Such an argument fails to comport with the case law on the issue of commonality.

The remaining purported defenses are applicable to the class as a whole except the question of the exact damages each member has suffered. The Court considered Defendant's reliance on Gardner v. South Carolina Department of Revenue. 353 S.C. 1, 577 S.E.2d 190 (2003) on the issue of damages. While Gardner does provide that individualized examination negates the benefit of a class action lawsuit, such named differences among proposed class members in that case were addressed regarding a legal issue:

"[T]he factual differences (whether prejudice exists) [among plaintiffs] are the crux of a predominant legal issue. A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominant issues in the case."³⁵

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³⁵ Id. at 22.

Conversely, members of the Proposed Class in the case at bar each allege the same cause of action, set forth the same ensuing legal issues and each anticipates the same contract defenses. Any differences in the variance in damages are of "a typical class action where minor factual differences [damage amounts] exist among the individualized cases of class members."³⁶

Importantly, there is no requirement under South Carolina law that each class member have suffered the exact same amount of damages. South Carolina courts have repeatedly acknowledged that class certification is appropriate in cases in which the damages were different for each class member.³⁷ In McGann v Mungo, hundreds of residents and owners of improved residential properties in Cold Stream, a subdivision near Columbia, filed a class action concerning negligent design and construction of streets and drainage systems. The defendants argued that each class member's individualized damages prevented the Court from certifying the case as a class action. In rendering its decision, the South Carolina Court of Appeals attached no significance to the undisputed fact that each class member had different damages:

The mere fact that the Plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action.³⁸

McGann has been cited consistently by the Courts of this state and no less than eleven times by the South Carolina Supreme Court in ruling on class certification cases, which makes sense as it

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³⁶ Id.

³⁷ Littlefield, 337 S.C. at 355, 523 S.E.2d at 784; Bates v. Tenco Services, Inc., 132 F.R.D. 160, 163 (D.S.C. 1990.) (Any difference in the degree of harm suffered by class members does not diminish the typicality of the proposed representatives' claims).

³⁸ McGann, 340 S.E.2d at 158.

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holding is in line with the historical “purpose of a class action [which] is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action.”³⁹

Furthermore, the question of damages is easily answered given the specifically identifiable nature of this class. By the very nature of this suit, Defendant has documentation of everyone in the class showing precisely the name, age, and benefits each class member would be entitled to if in fact Defendant’s actions are determined to violate the law. Given the abundance of common issues, ease of Defendant’s access to the information necessary for calculating damages, and general purpose of class actions in consolidating proof of the elements of the cause of action, the element of commonality is met in the case at bar.

II.B.3 Typicality

The legal violations against the Plaintiffs are typical of those against each member of the putative class under Rule (23)(a)(3) of the South Carolina Rules of Civil Procedure. This requirement is satisfied if the representative plaintiffs’ claim “arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories.”⁴⁰ When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.⁴¹ This is applicable to the case at bar where Plaintiffs allege that Defendant’s unilateral, simultaneous cut of benefits, similarly applied to all Class Members, gives rise to the claims at issue.

³⁹ *O’Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978) (emphasis added).

⁴⁰ *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628, 637 (D.S.C. 1992), *aff’d*, 6 F.3d 177 (4th Cir. 1993).

⁴¹ *Newberg* ¶ 3.13 at 3-77.



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Because Plaintiffs allege the written agreements they signed have been breached applies uniformly to all Class Members, Plaintiffs have satisfied the typicality requirement. Like the members of the Class, the Plaintiff through her parents is the third party beneficiary of a contract who had its contractually owed benefits cut. In addition, the claims of Plaintiff and the Class Members arise under the same legal theories that the written contract has been breached. The harms suffered by the Plaintiff are typical of the harms suffered by all children in the putative class because they arise from the same cut of benefits and are based on the same legal theories. Defendant's brief and arguments at the hearing made no meaningful arguments to the contrary.

II.B.4 Adequacy and Class Definition

The Plaintiffs will fairly and adequately represent and protect the interest of the members of the putative class under Rule 23(a)(4) of the South Carolina Rules of Civil Procedure. This rule has two elements: (1) that the class representatives and their counsel will competently and vigorously prosecute the action; and (2) that the interests of the class representatives are not adverse to those of the class members.⁴² Class representatives need not master the intricacies of the case. It must appear to the Court, however, they are willing and able to represent the interests of the class. Plaintiffs in this case are willing to appear for their depositions, will cooperate with counsel, and are not disqualified from service as class representatives for any reason.

The Class the Plaintiffs seek to represent is as follows:

All children, age 19 or younger on the date the filing of the first state court Complaint (September 16, 2011), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and

⁴² Waller v. Seabrook Island Property Owners Ass'n., 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990).

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the South Carolina Department of Social Services, executed on or before June 20, 2002 and had at least five (5) months of lost benefits due to the cut in the assistance agreement beginning on the date of the foster care reinstatement in 2004

A proper class definition describes the class in objective terms, capable of membership ascertainment without regard to the merits of the proposed class members' claims or the particular relief they seek.⁴³ The Plaintiffs have no interest in the subject matter of the lawsuit that would render them antagonistic to other class members. Accordingly, Plaintiffs truly are representative of the class and the class is defined as outlined above.

With regard to the second prong, the adequacy of Plaintiffs' counsel, like that of the individual plaintiffs, is presumed in the absence of specific proof to the contrary.⁴⁴ Plaintiffs' have engaged experienced and capable attorneys. Accordingly, the adequacy requirements are satisfied in this case.

Defendant's argument against adequacy on the issue of Plaintiff's position as a Third-Party beneficiary is without merit because third party beneficiaries (BLH and the putative class members) have the right to enforce the terms of the contract under South Carolina law.⁴⁵

II.B.5 Amount in Controversy

Rule 23(a)(5) of the South Carolina Rules of Civil Procedure requires an amount in controversy for each class member to be at least one hundred (\$100.00) dollars to certify a class in

⁴³ See H. Newberg & A. Conte, *Newberg on Class Actions*, Fourth, § 6.14 (1994).

⁴⁴ *South Carolina National Bank v. Stone*, 139 F.R.D. 325, 330 (D.S.C. 1991).

⁴⁵ 30 S.C. Jur. Contracts § 68 (citing *Svenningsen v. Knight*, 286 S.C. 299, 333 S.E.2d 78 (Ct. App. 1985); see also, *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157 (4th Cir. 2004) (finding that under South Carolina law, when contract is made for benefit of third person, that person may enforce contract if contracting parties intended to create direct benefit to such third person)).

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cases where the relief sought is not primarily injunctive relief. In interpreting the phrase “amount in controversy,” the South Carolina Supreme Court held “the sum claimed by the plaintiff controls if the claim is apparently made in good faith.”⁴⁶

In this case, the Plaintiff conceded at the hearing a modification to the requested class narrowing it to only those children who have lost at least 5 months in benefits due to the cut made by Defendants. Because the monthly cut in benefits was twenty (\$20) dollars the amount in controversy is equal to or exceeds \$100 for each member of the Class. These funds were lost to the class members and Defendants argument that perhaps they received the same care anyway is without merit as the loss is tangible, identifiable, and real. Accordingly, the requirements of SCRCR Rule 23(a)(5) are met.

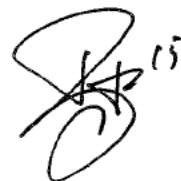
II.B.6 Notice

As to the notice requirements pursuant to S.C. R. Civ. P 23(d), the Court adopts an “opt-out” notice procedure. Given that Defendant regularly corresponds or has previously corresponded with all class members, Defendant shall serve on each class member a Notice of Class Action which shall advise them of the facts of this case and their right to opt out within 30 days if they choose not to participate.

II.C. Plaintiff's Motion to Compel

The Plaintiff agreed to hold this Motion in abeyance pending the Court's ruling on the Motion for Class Certification and Motion for Summary Judgment. Now that the class has been certified for the reasons outlined herein, counsel are directed by the Court to confer regarding the discovery requests that relate to all class members. Plaintiff reserves the right to reinstate its Motion

⁴⁶ Gardner v. Newsome Chevrolet-Buick Inc., 304 S.C. 328, 331, 404 S.E.2d 200, 201-02 (1991)(emphasis in original).



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to Compel if these matters are not resolved.

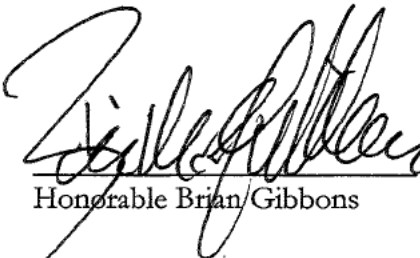
IT IS ORDERED that Defendants' Motion for Summary Judgment IS DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Class Certification is GRANTED.

IT IS FURTHER ORDERED that Defendant shall serve on each class member a Notice of Class Action which shall advise them of the facts of this case and their right to opt out within 30 days if they choose not to participate pursuant to Salmonsens v. CGD 377 S.C. 442, 661 S.E. 2d 81 (2008) (holding that in South Carolina all class members shall have the right to opt out of a class action). Defense counsel shall prepare a Notice and email to the court (copying counsel for the Plaintiff) for review within ten (10) days and shall thereafter be mailed to all class members within ten (10) days. The notice shall include instructions for the class members to communicate any decision to opt out by written notice to Plaintiff's counsel: T. Ryan Langley at P.O. Box 2765; Spartanburg, SC 29304.

IT IS FURTHER ORDERED that T. Ryan Langley, Charles J. Hodge, and James Fletcher Thompson are appointed class counsel and shall file any opt outs with the Clerk of Court within ten (10) days of receipt.

IT IS SO ORDERED.


Honorable Brian Gibbons

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

BLH [REDACTED] by parents/general)
guardians Kenneth and Angela Hensley,)
and on behalf of all others)
similarly situated,)

Civil Action No. 2013-CP-42-1569

Plaintiff,)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTIONS
FOR RECONSIDERATION**

v.)

South Carolina Department)
of Social Services,)

Defendant.)
_____)

This matter is before the Court on the Motions to Alter or Amend Order and/or Motions for Reconsideration filed August 5, 2014 and September 30, 2014, by the Defendant South Carolina Department of Social Services ("DSS"). With these motions, the Defendant DSS seeks reconsideration with respect to the Amended Order on Plaintiff's Motion for Class Certification, Plaintiff's Motion to Compel and Defendant's Motion for Summary Judgment, as filed September 16, 2014 (hereafter referred to as the "September 16, 2014 Order").

A hearing was held on February 27, 2015, in Chester County. The hearing was held outside of the Seventh Circuit with the consent of the parties. The Plaintiff was represented at the hearing by T. Ryan Langley and James F. Thompson. The Defendant was represented by Andrew F. Lindemann and Joel S. Hughes. After a review of the pleadings, prior orders, written submissions by the parties, and the oral arguments of counsel, the Court grants the Defendant's

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motions in part and denies them in part, as well as further discusses the rationale for the orders issued.

The following fundamental facts have been stipulated or agreed to by the parties through the pleadings and/or the course of the hearings on April 8th and February 27th:

- Defense counsel admitted that there is “no doubt there is a common issue of fact” that the class members signed a contract with Defendant;
- Defense counsel admitted that there is “no doubt there was \$20 across the board deduction in the adoption subsidy payments”;
- Defense counsel admitted that “whats implicated in this case is multiple millions of dollars . . . so this is not a minor case.”
- The 4th Circuit noted and the parties do not dispute that in 2004 Defendant reinstated the full payments to the foster families but did not reinstate the full payment to the adoption assistance families.

Plaintiffs allege the continued cut of the foster care payments after 2004 breaches the written agreement they have with Defendant. Defendant denies liability and has plead various defenses.

SUMMARY JUDGEMENT ISSUE

The portion of the September 16, 2014 Order addressing the Defendant's Motion for Summary Judgment is hereby vacated. In *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014), the Court of Appeals counseled that "it is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment" and that findings of fact and conclusions of law that are made do not establish the law of the case, are not binding on the parties, and are not binding on the next judge to hear the same issues when renewed in a

subsequent motion or at trial. 756 S.E.2d at 162-163. Therefore, in denying the Defendant's Motion for Summary Judgment, the Court will only be issuing a Form 4 Order that denies that motion. Any findings of fact and conclusions of law as set forth in the September 16, 2014 Order and pertaining solely to the Motion for Summary Judgment are vacated.

CLASS CERTIFICATION ISSUE

The Circuit court has wide discretion in deciding whether or not to certify a class action under Rule of Civil Procedure 23(d). Rule 23(d) requires the court to determine whether a class action is to be maintained as soon as practical after the commencement of an action. The circuit court need not consider the merits of the action for the purpose of issuing an order under S.C. Rule 23, but the class must comply with the following five prerequisites: (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims and defenses of class representatives; (4) adequacy of representation; and (5) amount in controversy.

Based on the stipulations of counsel at the hearings, the affidavits produced to the Court, the pleadings of record, and the statutory and case law authority, the Court finds the five elements are met.

Defendant has argued that the affidavits of DSS employees Caldwell and Hanak-Coulter were not proper for consideration because they were not served with the motion for class certification. S.C.R.Civ.P 6(d) allows the Court discretion to permit service of affidavits at any time. However, presuming *arguendo* the rule required service of the affidavits with the motion, there was no prejudice to Defendant for the following reasons:

- 1) the affidavits submitted were in the Defendants possession for years prior to the motion for class certification;



2) the affidavits submitted were procured by Defendants, from agents of Defendants acting within the course and scope of their employment and thus are admissions of a party opponent;

3) Defendants have had notice that the Plaintiffs intended to rely on the affidavits since September 16, 2014 (164 days prior to the last hearing on this issue) and have failed to file any affidavits in opposition; and

4) Defendants have had a full and meaningful opportunity to argue about the contents of the affidavits, which Defendant conceded at the hearing included only basic facts over which there was no disagreement.

Further, the affidavits include basic documents important in this case that the Court takes notice of from the court record, including: the contract with Plaintiff (see Exhibit G to the affidavit), the 2002 letter that went to all families with foster and adopted children (see paragraph 12 of the affidavit and Exhibit H to the affidavit), as well as a supplement to the contract that states: "based on negotiations with Mr. and Mrs. Hensley, adoption subsidies are authorized as follows: Supplemental Benefits \$675 per month." (see Exhibit F to the affidavit).

The Hanak-Coulter affidavit has been in the possession of Defendants for a while as it was filed in the federal litigation. Paragraph 9 of the affidavit admits that the foster care rates were reinstated to the pre-existing levels in 2004. This affidavit supports the argument by Plaintiff and the Class that there was no justification for any sustained decrease in the adoption subsidy following the foster care reinstatement in 2004.

These documents support Plaintiff's argument for class certification and the specific justification for each of the five elements is as follows:

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Numerosity

The class is sufficiently numerous. Counsel for Defendant admitted at the February 27th hearing that this is “a case that’s quite significant” involving “multiple millions of dollars” because “even though we’re talking about \$20 a month, we’re talking about \$20 a month over multiple months with multiple different potential class members.” Further, Paragraph 5 of Defendant’s Amended Answer concedes that the cut was made across the board. The class is sufficiently numerous.

Commonality

There is commonality of factual and legal issues in this case. Rule 23(a)(2) of the South Carolina Rules of Civil Procedure requires that there be “questions of law or fact common to the class.” Plaintiffs meet this test when their claims and the claims of absent class members share a determinative issue. “Not every issue in the case must be common to all class members.” “It is important to note that the subsection does not demand all questions of law and fact to be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status.”

In the case at bar, each named Plaintiff and each putative class member is subject to the same action by Defendants. The two critical common questions of law and fact alleged in the Complaint, as amended, are as follows:

1. whether the cut of benefits to adopted children breached the contract and/or violated the implied duty of good faith and fair dealing;

2. whether the failure to reinstate the benefits to adopted children after reinstating the benefits to the families of the foster care children breached the contract and/or violated the implied duty of good faith and fair dealing;

Defendant's counsel stipulated at the hearings that there is "no doubt there is a common issue of fact that each of these parties signed a contract" and "no doubt there was \$20 across the board deduction in the adoption subsidy payments." These are the determinative issues.

The question of damages is easily answered given the specifically identifiable nature of this class. By the very nature of this suit, Defendant has documentation of everyone in the class showing precisely the name, age, and benefits each class member would be entitled to if in fact Defendant's actions are determined to violate the law. Given the abundance of common issues, ease of Defendant's access to the information necessary for calculating damages, and general purpose of class actions in consolidating proof of the elements of the cause of action, the element of commonality is met in the case at bar.

Typicality

The alleged legal violations against the Plaintiffs are typical of those against each member of the putative class under Rule (23)(a)(3) of the South Carolina Rules of Civil Procedure. Plaintiffs allege that Defendant's unilateral, simultaneous cut of benefits, similarly applied to all Class Members, gives rise to the claims at issue. Because Plaintiffs allege the written agreements they signed have been breached applies uniformly to all Class Members, Plaintiffs have satisfied the typicality requirement. Like the members of the Class, the Plaintiff through her parents is the third party beneficiary of a contract who had its contractually owed benefits cut. In addition, the claims of Plaintiff and the Class Members arise under the same legal theories that the written contract has been breached. The harms suffered by the Plaintiff are

typical of the harms suffered by all children in the putative class because they arise from the same cut of benefits and are based on the same legal theories. Defendant's brief and arguments at the hearing made no meaningful arguments to the contrary.

Adequacy and Class Definition

The Plaintiffs will fairly and adequately represent and protect the interest of the members of the putative class under Rule 23(a)(4) of the South Carolina Rules of Civil Procedure. This rule has two elements: (1) that the class representatives and their counsel will competently and vigorously prosecute the action; and (2) that the interests of the class representatives are not adverse to those of the class members. Class representatives need not master the intricacies of the case. It must appear to the Court, however, they are willing and able to represent the interests of the class. Plaintiffs in this case are willing to appear for their depositions, will cooperate with counsel, and are not disqualified from service as class representatives for any reason.

The Class the Plaintiffs seek to represent is as follows:

All children, age 19 or younger on the date the filing of the first state court Complaint (September 16, 2011), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and the South Carolina Department of Social Services, executed on or before June 20, 2002 and had at least five (5) months of lost benefits due to the cut in the assistance agreement beginning on the date of the foster care reinstatement in 2004.

A proper class definition describes the class in objective terms, capable of membership ascertainment without regard to the merits of the proposed class members' claims or the particular relief they seek. The Plaintiffs have no interest in the subject matter of the lawsuit

that would render them antagonistic to other class members. Accordingly, Plaintiffs truly are representative of the class and the class is defined as outlined above.

With regard to the second prong, the adequacy of Plaintiffs' counsel, like that of the individual plaintiffs, is presumed in the absence of specific proof to the contrary. Plaintiffs' have engaged experienced and capable attorneys. Accordingly, the adequacy requirements are satisfied in this case.

Defendant's argument against adequacy on the issue of Plaintiff's position as a Third-Party beneficiary is without merit because third party beneficiaries (BLH and the putative class members) have the right to enforce the terms of the contract under South Carolina law.

Amount of Controversy

Rule 23(a)(5) of the South Carolina Rules of Civil Procedure requires an amount in controversy for each class member to be at least one hundred (\$100.00) dollars to certify a class in cases where the relief sought is not primarily injunctive relief. Plaintiff concedes that the class is narrowed to those who have lost at least five months of benefits. Accordingly, the requirements of SCRPC Rule 23(a)(5) are met.

Notice

As to the notice requirements pursuant to S.C. R. Civ. P 23(d), the Court adopts an "opt-out" notice procedure. Rule 23(d)(2) states: "In the conduct of actions to which this rule applies, the court may make appropriate orders: ... The court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." The South Carolina Supreme Court has repeatedly stated: "South Carolina Rule of Civil Procedure 23(d)(2) gives the circuit court the broad power to 'impose such terms as shall

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fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended.””

Initially, it was alleged that the Defendant refused to provide the names and contact information for any potential class members. Accordingly, the Court exercised its broad discretion to protect the members of the Class by requiring Defendant to provide notice.

At the February 27th hearing, however, Defendant agreed to provide the necessary class-member contact information to Plaintiff within 90 days. As such, the Court grants Defendant's motions to reconsider this portion of the September 16, 2014 order.

As a result, the Court orders that the "Notice of Class Action" shall be approved by the Court Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit and the expense and resources required to notify the class members shall be borne by the Plaintiff. The Defendant DSS will not be required to provide any notification to the class members or bear any expense therefor.

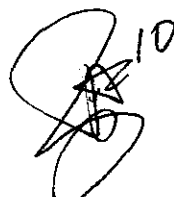
However, the Defendant shall be required to provide the Plaintiff class counsel within ninety (90) days of the filing date of this Order the names and available addresses of any potential class members. The Court fully recognizes that information related to adoptions and adoption proceedings is confidential under South Carolina law. Specifically, S.C. Code Ann. § 63-9-780(C) provides: "All files and records pertaining to the adoption proceedings in the State Department of Social Services, or in any authorized agency ... are confidential and must be withheld from inspection except upon court order for good cause shown." S.C. Code Ann. § 63-9-780(C). The Court specifically finds that good cause has been shown, and the Defendant is hereby ordered to produce as ordered the names and available addresses of any potential class members to the Plaintiff class counsel. The Court further orders, however, that the information

produced by the Defendant in response to this Order is and shall remain confidential. The information shall be redacted from any public filings with the Court, and to the extent that a name of a class member is identified in a public filing, the initials shall be substituted for the name. Furthermore, the Plaintiff and class counsel are hereby directed that the information produced by the Defendant in response to this Order may only be used for purposes of conducting this litigation and may not be disseminated to any third parties except by further order of this Court.

Pursuant to Rule 23(d), SCRPC, the Court hereby adopts an "opt-out" procedure. The Court hereby orders the Plaintiff class counsel to prepare and serve a Notice of Class Action advising class members of the facts of this case and their right to opt out within thirty (30) days if they choose not to participate. The Plaintiff class counsel shall submit the draft notice to the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit and opposing counsel for approval within thirty (30) days of receiving the class member contact information from the Defendant. The Notice of Class Action shall include instructions for the class members to communicate any decision to opt out by mailing written notice to the Plaintiff class counsel at the following address: Post Office Box 2765, Spartanburg, South Carolina 29304. All correspondence to the class shall be conspicuously marked "Confidential."

IT IS, THEREFORE ORDERED that Defendant's Motions for Reconsideration are granted in part and denied in part as set forth herein.

IT IS FURTHER ORDERED that the Defendant shall provide the Plaintiff class counsel within ninety (90) days of the filing date of this Order the names and available addresses of any potential class members. The Plaintiff class counsel shall then prepare a Notice of Class Action which shall advise the potential class members of the facts of this case and their right to opt out

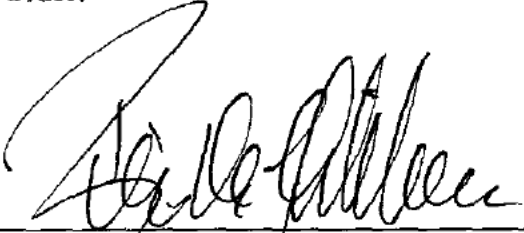
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within thirty (30) days if they choose not to participate in the class action. The Plaintiff class counsel shall submit the draft notice to the Court and opposing counsel for approval within thirty (30) days of receiving the class member contact information from the Defendant. The Notice of Class Action shall thereafter be mailed to all potential class members within ten (10) days of Court approval.

IT IS FURTHER ORDERED that the Plaintiff class counsel shall file any opt-outs with the Spartanburg County Clerk of Court within ten (10) days of receipt. The opt-outs, which will necessarily identify the potential class members, shall be maintained as confidential by the Clerk of Court and shall be filed only under seal.

IT IS FURTHER ORDERED that the parties and the Clerk of Court shall abide by all confidentiality requirements as set forth in this Order.

AND IT IS SO ORDERED.


BRIAN M. GIBBONS
Presiding Judge, Seventh Judicial Circuit

Chester, South Carolina

April 13, 2015

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M. HOPE ELAQUELEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

BLH [REDACTED] by parents/general guardians
Kenneth and Angela Hensley, AND on behalf of all
others similarly situated

Plaintiff,
vs.

South Carolina Department of Social Services

Defendants.

7TH JUDICIAL CIRCUIT

CA NO. 13-CP-42-1509

COMPLAINT
(CLASS ACTION)

Plaintiff, BLH [REDACTED] by parents/general guardians Kenneth and Angela Hensley individually and on behalf of all others similarly situated hereby files this Complaint and alleges the following based upon information, belief, and the investigation of counsel:

INTRODUCTION

1. This class action is brought by Plaintiffs (hereinafter "Class Representatives") individually and on behalf of all recipients of Adoption Assistance Subsidies (hereinafter referred to as "AAS") who had their benefits unilaterally cut by Defendant without their consent (hereinafter "Class Members" or "putative class members"). AAS are provided to help thousands of abused and neglected children, all of them currently or formerly in the custody of the South Carolina foster care system, which have highly specialized medical, mental health or other special needs. The law provides subsidies for these children because due to their special needs, they would likely not otherwise have a chance for a permanent family through adoption. These subsidies are continued by contract for children who are adopted out of foster care from the State of South Carolina to the child's adoptive parents for the benefit of the child.
2. The contract between the State of South Carolina Department of Social Services ("SCDSS")

and the Class Representatives and putative class members provided for a monthly adoption subsidy.

3. On or about June, 2002, in an ill-conceived, and illegal effort to cut benefits to the state's most needy, Defendants unilaterally cut twenty dollars (\$20.00) per month from the adoption assistance subsidy provided to BLH. Defendants also cut twenty dollars (\$20.00) per month from the South Carolina Foster Care Subsidies ("FCS"), but this cut was reversed in 2004 and the twenty dollars (\$20.00) per month was restored to the South Carolina Foster Care Subsidies.
4. The unilateral cut of the adoption benefits Defendants' contractually agreed to violates Plaintiff's contractual rights and has proximately caused Class Representatives and putative class members substantial damages.

PARTIES

5. Class Representatives Kenneth and Angela Hensley appear as guardians and adoptive parents on behalf of BLH [REDACTED] pursuant to Fed. R. Civ. P. 17(c) and are citizens and residents of Spartanburg, South Carolina. Kenneth and Angela Hensley are sufficiently familiar with the facts of BLH's situation to fairly and adequately represent the child's best interest in this litigation.
6. Defendant South Carolina Department of Social Services, ("SCDSS") is a state agency that entered into the contractual agreements outlined herein and is required to comply with state and federal laws. SCDSS has been on notice of these specific allegations since at least October 2011.

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CLASS ACTION ALLEGATIONS

7. This action is properly maintained as a class action pursuant to S.C. R. Civ. P. 23.

8. The class is defined as: "All children, age 19 or younger on the date of the Motion for Class Certification (January 6, 2012), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and the South Carolina Department of Social Services, executed on or before June 20, 2002."
9. This class has previously been certified as compliant with the requirements of Fed.R.Civ. P. 23 and applicable common law by federal judge G. Ross Anderson in CA NO. 7:11-cv-02827. That case involves a related, but distinct cause of action under 42 U.S.C. Section 1983. Judge Anderson agreed with the following in certifying the class:

A The class is sufficiently numerous. As of June 20, 2002, approximately 4,100 children had adoption assistance agreements in place that were negatively affected by the unilateral cut of benefits. Therefore, the class as a whole is comprised of at least 4,100 current and former adopted children and joinder of all putative class members is impracticable. The disposition of the claims asserted herein through this class action will be more efficient and will benefit the parties and the Court.

B The questions of law and fact raised by the Class Representatives are common to and typical of those of the putative class members. Each named Class Representative and each putative class member is subject to Defendants' action concerning adoption assistance subsidy contracts and Defendants' unlawful pattern and practice of unilaterally cutting benefits in violation of the contract obligations it had to Class Representatives. The damages calculation is also common to each of the Class Representatives. The facts of the case at bar present a textbook example of the commonality element: a uniform, across-the-board cut of benefits, in the exact same amount, at the exact same time, in violation of the same contractual rights.

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- C All Class Representatives and putative class members share a united interest in the fair, just, and consistent determination of the questions of law and fact necessary to the adjudication of Defendant's liability, which predominate over questions affecting only individual members. The key question being: whether the unilateral cut of adoption assistance benefits violates Class Representatives and putative class members rights under the adhesion contract entered into by Defendant and members of the class ;
- D Common questions of fact include: whether Defendant nullified the primary terms of pre-existing, long-term adoption assistance agreements between SCDSS and parents that adopted former wards of South Carolina's foster care system and third-party beneficiaries to that contract.
- E The legal violations against the Class Representatives are typical of those against each member of the putative class. The harms suffered by the Class Representatives are typical of the harms suffered by all children in the putative class.
- F The Class Representatives will fairly and adequately represent and protect the interest of the members of the putative class. The Class Representatives adequately and truly represent the interests of the absent class members. Class Representatives and all members of the class they seek to represent have been damaged by reason of the Defendants' conduct. The interests of Class Representatives are coextensive with the interests of the proposed class members, with common rights of recovery based on the same essential cut of benefits by Defendants. Class Representatives are intended third-party beneficiaries of the adoption assistance benefits conferred under the Adoption Assistance Act. Class Representatives have retained counsel, who are competent in complex class action litigation. Class Representatives have no interest

adverse to those of any putative class members, with respect to the key common issues.

- G In this case, the prosecution of separate actions by or against individual members of the class would create the risk of: 1) inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class; and/or 2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.
- H The questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.
- I Class action treatment is a superior method for the fair and efficient adjudication of this controversy, in that, among other things, there is no interest by members of the class in individually controlling the prosecution of separate actions and the expense of prosecuting individual claims is prohibitive. It is desirable to concentrate the litigation of the claims made herein in a single proceeding, in order to provide claimants with a forum in which to seek redress. Whatever difficulties may exist in the management of the class action will be greatly outweighed by the class action procedure, including but not limited to, providing claimants with a method for the redress of claims that may not otherwise warrant individual litigation. The questions of law or fact common to the members of the proposed class predominate over any questions affecting only individual proposed class members.

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10. Accordingly, class certification was found proper under Fed. R. Civ. P. 23 and should be found by this Court to be proper under S.C. Rule of Civ. Pro. 23.

GENERAL ALLEGATIONS

11. Each and every allegation of the Complaint is incorporated as if fully set forth herein.
12. Prior to and up until the effective date of the unilateral cut of benefits by Defendants, the State of South Carolina provided adoption assistance benefits to special needs children pursuant to the provisions of South Carolina and federal law.
13. The state-authored, standard form Adoption Assistance Agreement customarily and routinely entered into between SCDSS and adoptive parents, as parties and signators, provides for the continuation of benefits until: (1) the 18th birthday of the adopted child, or (2) termination of the parents' rights to the child, or (3) the parent is no longer financially responsible for the child, or (4) the child is no longer in the legal custody of the parents, or (5) the child has moved out of the home or (6) the child or both adoptive parents have died.
14. In contravention of this essential contractual understanding, Defendant unilaterally cut the benefits to Class Representatives and putative class members by twenty dollars per month.
15. The unilateral cut of benefits by Defendants interferes with and frustrates the clear and reasonable expectation of Class Representatives and putative class members when they acted to adopt a special needs foster child and entered into an adoption assistance agreement that government-paid subsidies would continue until the adoptive child attains the age of majority. This continuous benefits stream forms the very essence of the adoption assistance agreement from the perspective of both contracting parties – the parents, who accept legal responsibility for a special needs child, and the state, which secures permanency for the foster child in a stable family setting and frees itself of legal custody.

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16. The impairment of existing contractual rights caused by the unilateral cut of benefits by Defendant serves no legitimate governmental purpose, and certainly is not in the best interests of the state's most needy – its vulnerable, special needs children adopted from foster care. Instead, the unilateral cut of benefits by Defendant completely interferes with and undermines the essential contractual promises and valuable consideration exchanged by the state and putative class members that was contractually agreed to in order to secure adoptive parents for special needs children. This retroactive nullification of the state's covenants and commitments constitutes a substantial impairment of pre-existing contractual rights.
17. Even assuming there was some justification for the cut in 2002 based on the cut to the Foster Care Subsidy (which Plaintiffs' deny); this justification was removed in 2004 when the Foster Care Subsidy was reversed. Accordingly, at the very least Plaintiffs are entitled to recovery of benefits dating back to 2004.

FIRST CAUSE OF ACTION
(BREACH OF CONTRACT)

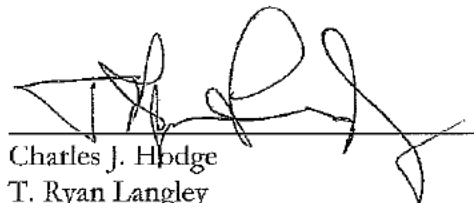
18. Each and every allegation of the Complaint is incorporated as if fully set forth herein.
19. As a result of the unilateral cut of benefits by Defendant, the essential rights and obligations in the long-term, pre-existing contract with Class Representatives and putative class members have been and will continue to be substantially impaired without serving any legitimate governmental purpose. This retroactive nullification of the state's covenants and commitments constitutes a substantial impairment of pre-existing contractual rights and further deprives Class Representatives and putative class members of rights, privileges, and immunities secured by the adhesion contract drafted by Defendant.
20. Defendant's actions and inactions in violation of the contract have caused Class Representatives and putative class member's substantial damages.

PRAYER FOR RELIEF

WHEREFORE, the putative class member children respectfully request that this Court:

- a. Assert jurisdiction over this action;
- b. Apply the class certification adopted in federal case number 7:11-cv-02827.
- c. Award Class Representatives and putative class members damages in the amount of past due adoption assistance benefits and prospective adoption assistance benefits;
- c. Award Class Representatives and putative class members their reasonable attorneys fees and costs; AND
- d. Grant such other and further equitable relief as the Court deems just, necessary and proper to protect the special needs children from further harm by the State of South Carolina.

Respectfully Submitted by HODGE & LANGLEY LAW FIRM, P.C. and JAMES FLETCHER THOMPSON, LLC



Charles J. Hodge
T. Ryan Langley
229 Magnolia St.
Spartanburg, SC 29302
p. 864-585-3873

JAMES FLETCHER THOMPSON, LLC
James Fletcher Thompson
302 E Saint John St
Spartanburg, SC 29302-1545
p. (864) 573-5533

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M. HODGE BLACKLEY

DATED: April 1, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

BLH [REDACTED] by parents/general)
guardians Kenneth and Angela Hensley,)
AND on behalf of all others similarly)
situated,)

Civil Action No. 13-CP-42-1569

Plaintiff,)

AMENDED ANSWER

v.)

South Carolina Department of Social)
Services,)

Defendant.)
_____)

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The Defendant South Carolina Department of Social Services (SCDSS) hereby answers the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. The Complaint fails to state facts sufficient to state a cause of action. The Defendants reserves its right to file a motion pursuant to Rule 12(b)(6), SCRCP.

FOR A SECOND DEFENSE

2. The Defendant denies each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted, qualified, or explained.

3. That as to paragraph 1, the Defendant would allege that such allegations set forth legal conclusions which require no response on the part of the Defendant. In so far as such allegations attempt to establish liability on the part of the Defendant, the Defendant would deny same and demand strict proof thereof.

4. That as to paragraph 2, the Defendant denies these allegations as stated. The Defendant admits only that it has contracted with a number of adoptive parents, including Kenneth and Angela Hensley, to provide monthly adoption subsidies.

5. That as to paragraph 3, the Defendant admits only that on June 20, 2002, the then acting Director for the Department of Social Services (DSS) sent a letter to foster and adoptive parents notifying said parents of a decrease to the monthly adoption assistance subsidy by twenty dollars (\$20.00). All other allegations in this paragraph are denied as stated.

6. That as to paragraph 4, the Defendant denies these allegations and demand strict proof thereof.

7. That as to paragraph 5, the Defendant, upon information and belief, admits only that Kenneth and Angela Hensley are citizens and residents of Spartanburg, South Carolina. The Defendant denies the remaining allegations as stated.

8. That as to paragraph 6, the Defendant admits only that the Department of Social Services is a state agency and thereby an arm of the State of South Carolina. The Defendant asserts the remaining allegations set forth legal conclusions which require no response on the part of the Defendant. In so far as such allegations attempt to establish liability on the part of the Defendant, the Defendant would deny same and demand strict proof thereof.

9. That as to paragraph 7, 8, 9, and 10, the Defendant specifically denies that a class action has been certified in this matter, that class certification is appropriate, and that Plaintiff, BLH, or Kenneth and Angela Hensley, are appropriate representatives for any alleged putative class in this matter. Further answering, the Defendant asserts that the federal suit referenced by Plaintiff has no precedential value at this point, as it is currently on appeal in the Fourth Circuit Court of Appeals on grounds that would be entirely dispositive of the claim and the separate and

distinct cause of action in this instant matter was abandoned by Plaintiff in the referenced federal action. The Defendant further asserts such allegations set forth legal conclusions which require no response on the part of this Defendant. In so far as such allegations attempt to establish liability on the part of this Defendant, this Defendant would deny same and demand strict proof thereof. The Defendant further reserves the right to contest any attempt by Plaintiff to certify this matter as a class action.

10. That as to paragraph 11, the Defendant reiterates and realleges each and every paragraph and affirmative defense as if set forth herein verbatim.

11. That as to paragraph 12, the Defendant admits only that the SCDSS provided and provides adoption assistance benefits to adoptive parents of special needs children. All other allegations are denied as stated.

12. That as to paragraph 13, the Defendant denies these allegations as stated. Further answering, the Defendant would crave reference to the Adoption Assistance Agreement as the best evidence of the terms and conditions therein.

13. That as to paragraphs 14, 15, 16 and 17, the Defendant denies these allegations as stated and demand strict proof thereof.

14. That as to paragraph 18, the Defendant reiterates and realleges each and every paragraph and affirmative defense as if set forth herein verbatim.

15. That as to paragraphs 19 and 20, the Defendant denies these allegations as stated and demand strict proof thereof.

16. That as to the Defendants Prayer for Relief, the Defendant denies the Plaintiff is entitled to the relief requested, or any other relief, from the Defendant. The Defendant further denies that class certification is appropriate in this matter.

FOR A THIRD DEFENSE

17. The Defendant alleges, upon information and belief, the Plaintiff has failed to exhaust the administrative remedies available to them.

FOR A FOURTH DEFENSE

18. The Plaintiff's Complaint fails to state a justiciable claim.

FOR A FIFTH DEFENSE

19. The Defendant asserts the Plaintiff's claim is barred, in whole or in part, by the applicable statute of limitations.

FOR A SIXTH DEFENSE

20. The Defendant asserts the Plaintiff's claim is barred by the doctrine of laches.

FOR A SEVENTH DEFENSE

21. The Defendants crave reference to South Carolina Code § 63-9-1770 and to South Carolina of Regulations §114-4380 as a complete bar to any claim for breach of contract in this matter.

FOR AN EIGHTH DEFENSE

22. The Defendant asserts the Plaintiff's claim is barred by the defense of accord and satisfaction.

FOR A NINTH DEFENSE

23. The Defendant asserts the Plaintiff, a minor, lacks capacity to enter into any contractual arrangement, and as such, the Plaintiff lacks standing in this Court to pursue recovery for any alleged breach.

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FOR A TENTH DEFENSE

24. The Defendant asserts the Plaintiff lacks standing in this Court to pursue recovery on behalf of any unnamed plaintiff, including but not limited to, any other special needs child or children.

FOR AN ELEVENTH DEFENSE

25. The Defendant asserts waiver as a complete bar to the Plaintiff's claim.

FOR A TWELFTH DEFENSE

26. The Defendant asserts estoppel as a complete bar to the Plaintiff's claim.

FOR A THIRTEENTH DEFENSE

27. The Defendant asserts the Plaintiff BLH lacks standing in this Court to pursue recovery on behalf of Kenneth and Angela Hensley.

FOR A FOURTEENTH DEFENSE

28. The Defendant asserts the Plaintiff's claim is barred, in whole or in part, by the doctrine of collateral estoppel.

FOR A FIFTEENTH DEFENSE

29. The Defendant asserts the Plaintiff's claim is barred, in whole or in part, by the defense of illegality.

FOR A SIXTEENTH DEFENSE

30. The Defendant asserts the Plaintiff's claim is barred by the lack of valid consideration.

FOR A SEVENTEENTH DEFENSE

31. The Defendant asserts the Plaintiff's claim is barred as a result of the modification of the Adoption Assistance Agreement.

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FOR AN EIGHTEENTH DEFENSE

32. The Defendant asserts the Plaintiff's claim is barred by the defense of contract novation by operation of law and/or by assent of the parties.

FOR A NINETEENTH DEFENSE

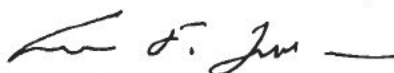
33. The Defendant asserts acquiescence as a complete bar to the Plaintiff's claim.

FOR A TWENTIETH DEFENSE

34. The Defendant asserts that, to the extent Kenneth and Angela Hensley are attempting to assert any claims on their own behalf, the Defendant would reiterate and reassert every defense as if fully set forth herein.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendant prays that the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

DAVIDSON & LINDEMANN, P.A.



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*Counsel for Defendant South Carolina
Department of Social Services*

Columbia, South Carolina

July 8, 2013

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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

BLH by parents/general guardians)
Kenneth and Angela Hensley, and on)
behalf of all others similarly situated,)

Civil Action No. 2013-CP-42-1569

Plaintiff,

v.

South Carolina Department
of Social Services,

Defendant.

**NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT
OF DEFENDANT SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES**

TO: CHARLES J. HODGE, T. RYAN LANGLEY, AND JAMES F. THOMPSON,
COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant South Carolina Department of Social Services (“DSS”) will move before the Honorable J. Mark Hayes, II of the Seventh Judicial Circuit at the Spartanburg County Courthouse, Spartanburg, South Carolina, at such time and place as may be set by the Court, for an Order, pursuant to Rule 56, SCRCF, granting summary judgment to the Defendant DSS and dismissing the Plaintiff’s Complaint with prejudice, including all claim by the Plaintiff and the other class members.

The Defendant’s motion is based upon the following grounds, as more specifically stated and analyzed in the supporting memorandum of law filed herewith:

1. The Plaintiff’s breach of contract cause of action is barred by the doctrine of collateral estoppel resulting from the final order and judgment entered in the action captioned *Hensley v. Koller*, Civil Action Number 7:11-02827-GRA, and the decision of the Fourth Circuit

Court of Appeals in *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013), which are dispositive of the issues raised in this litigation. In particular, the "parental concurrence" provision of the Adoption Subsidy Agreement, which the Plaintiff contends was breached by the Defendant, is required by and must be construed in conformity with the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670, *et seq.* (AACWA). The AACWA requires a state to "enter into adoption assistance agreements ... with the adoptive parents of children with special needs." 42 U.S.C. § 673(a)(1)(A). The requirement of "parental concurrence" for a readjustment of the adoption assistance payments is provided in 42 U.S.C. § 673(a)(3). Based on the decision of the Fourth Circuit Court of Appeals, "§ 673(a)(3) establishes a right to parental concurrence in subsidy readjustment determinations *except* when the subsidy must be reduced due to reductions in foster care maintenance payments." *Hensley v. Koller*, 722 F.3d 177, 183 (4th Cir. 2013). (Emphasis in original). The Fourth Circuit further ruled:

It is undisputed that DSS reduced the foster care maintenance payments by twenty dollars at the same time DSS reduced the adoption assistance subsidy by the same amount. The Hensleys do not contend that at any time prior to the 2002 reduction, the adoption assistance subsidy they received for BLH was less than BLH's \$675 foster care maintenance payment.

It was only in 2002, when South Carolina decreased by twenty dollars *all* foster care maintenance payments, that the State also decreased BLH's adoption assistance subsidy by twenty dollars. The State's failure to do so would have violated federal law. For, under § 673(a)(3), a failure to reduce BLH's adoption assistance payment would have resulted in a payment "exceed[ing] the foster care maintenance payment" she would have received had she remained in foster care.

Id. The Plaintiff is collaterally estopped from re-litigating this issue or taking a position inconsistent with the Fourth Circuit's ruling. The requirement of "parental concurrence" in the Adoption Subsidy Agreement, which the Plaintiff contends was breached, is inapplicable to the

2002 decrease of \$20 per month because federal law required the subsidy to be reduced so that it did not violate federal law and exceed the foster care maintenance rate. The Adoption Subsidy Agreement, including the "parental concurrence" provision, must be interpreted consistently with 42 U.S.C. § 673(a)(3) and so that it is consistent with federal law. The Adoption Subsidy Agreement, or any provisions thereof, may not be read or construed as violating the provisions of the AACWA that govern adoption assistance agreements. As a result, the 2002 decrease of \$20 per month was in compliance with the AACWA, as determined by the Fourth Circuit, and was not in breach of the Adoption Subsidy Agreement entered with the Hensleys.

2. Additionally, the Plaintiff argues that the Defendant breached the "parental concurrence" provision of the Adoption Subsidy Agreement when the Defendant increased foster care maintenance payments in 2004 without also increasing the adoption assistance subsidy. On this issue, the Plaintiff is likewise collaterally estopped from taking a position contrary to the rulings of the Fourth Circuit Court of Appeals in *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). On this issue, the Fourth Circuit has already ruled that "the 2004 increase did not 'readjust' the amount of the adoption assistance subsidies; accordingly, the Directors' 2004 action did not trigger -- let alone violate -- the parental concurrence requirement." *Hensley v. Koller*, 722 F.3d 177, 183 (4th Cir. 2013). Therefore, there was no breach of the Adoption Subsidy Agreement when the adoption assistance subsidy was not increased in 2004.

3. The Adoption Assistance Agreement incorporates applicable federal and state laws as provisions of the contract, including the provisions of the AACWA that govern adoption assistance agreements. The Adoption Assistance Agreement may not be construed as violating the provisions of the AACWA, including the cap or limit on the amount of the adoption assistance payment payable under the AACWA. Therefore, any provision of the Adoption Assistance

Agreement that violates applicable state and federal laws is illegal or otherwise unenforceable and cannot be enforced by way of the Plaintiff's breach of contract claim. The Plaintiff's breach of contract claim is barred as a result of the modification of the Adoption Assistance Agreement by operation of law and by the defense of contract novation by operation of law.

4. The Plaintiff BLH is not a contracting party. The contracting parties as stated in the Adoption Assistance Agreement are the adoptive parents, Kenneth and Angela Hensley, and the Defendant DSS. Therefore, the Plaintiff BLH and the other class members lack standing to pursue recovery on behalf of their adoptive parents. Only the contracting parties have standing to sue for breach of contract and to recover any adoption subsidies that the Plaintiff claims were illegally reduced or changed. The Plaintiff BLH and the other class members are relying on a third-party beneficiary theory in order to pursue a contractual remedy. The Plaintiff BLH and the other class members, however, do not qualify as third-party beneficiaries. In addition, even if the Court finds that the Plaintiff BLH and the other class members may pursue a third-party beneficiary theory, the correct measure of damages is not the \$20 per month in reduced adoption subsidies. Instead, each adoptive child will be required to show how he or she was harmed by the reduction in the subsidy payment, if at all.

5. The Plaintiff BLH and her adoptive parents failed to exhaust their administrative remedies as available under South Carolina statutory law and the regulations promulgated by DSS prior to filing this action.

The Defendant DSS's motion is based upon the pleadings filed in this case; a copy of the Adoption Assistance Agreement (attached); the decision of the Fourth Circuit Court of Appeals in *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013) (attached); the Order and Judgment entered in *Hensley v. Koller*, Civil Action Number 7:11-02827-GRA (attached); Plaintiff's Responses to

First Set of Interrogatories, dated September 8, 2020 (attached); the rules of court; the supporting memorandum filed herewith; and such other matters as may be presented to the Court at or prior to the time of the hearing.

LINDEMANN LAW FIRM, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
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Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

*Counsel for Defendant South Carolina
Department of Social Services*

April 1, 2024

11/18/01 NCSTD

Page 1 of 3 pages



**SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES
ADOPTION SUBSIDY AGREEMENT**

The following agreement has been entered into by and between the South Carolina Department of Social Services, Post Office Box 1520, Columbia, South Carolina 29202-1520, 803/734-6095, hereafter called the "DSS" and

Angela L. Hensley // [REDACTED] // Kenneth R. Hensley // [REDACTED]
 (Adoptive Mother) (Social Security No.) (Adoptive Father) (Social Security No.)
 [REDACTED] Spartanburg, SC 29303, Spartanburg // [REDACTED]
 (Mailing Address) (County) (Telephone #)

hereafter called the "adoptive parent(s)," for the purpose of facilitating the legal adoption of [REDACTED]
 (Child's First Name)
 [REDACTED] born on [REDACTED], and to aid the adoptive parent(s) in providing proper care for this child.
 (Social Security No.) (Date)

The date of the initial adoption placement agreement for [REDACTED] is 03-22-99, the date of the
 (Child's First Name) (Date)
 initial adoption subsidy agreement is 03-22-99, and the date the adoption was legalized is [REDACTED].
 (Date) (Date)

This document is the: (Check one)

☒ **Initial Agreement:** The adoptive parent(s) agree that [REDACTED] they intend to adopt [REDACTED]
 (Child's First Name)

and [REDACTED] have signed this document prior to legalization of the adoption for the purpose of receiving financial assistance or ☐ the child had a pre-existing medical or rehabilitative need and this agreement is being signed after legalization.

☐ **Renewal Agreement:** This is a renewal of the adoption subsidy agreement for [REDACTED]
 (Child's First Name)

Date of Next Renewal is: N/A, provided the child is financially dependent upon
 (Date)

his/her parent(s), has not reached his/her 21st birthday, and remains in school full-time if he/she is 18 years old or older.

PROVISIONS OF AGREEMENT

I. Assistance

A. Nonrecurring Adoption Expenses:

Attorney Fee \$ _____ Court Costs \$ _____ Other \$ _____ Unknown at this time ☒ X

B. Monthly Cash Payment: Yes ☒ X No ☐ N/A Date payments initiated 03-22-99 4-1-99
 (Date) BA

Current Funding Source: ☐ IV-E Adoption Assistance ☒ State Funded Supplemental Benefits
 Amount \$ 675.00

The amount of this monthly cash payment is based on the needs of the child and the circumstances of the adoptive parent(s) and has been determined by mutual agreement between the adoptive parent(s) and DSS.

The amount of the payment does not exceed the foster care maintenance payment for [REDACTED]
 (Child's First Name)

if he/she were in a foster family home in the state of South Carolina. Other cash income received by the family on behalf of [REDACTED] is \$ N/A from [REDACTED]
 (Child's First Name) (Amount) (Source)

This income is considered in determining the monthly cash payment. Adjustments in monthly cash payments may be made with the concurrence of the adoptive parent(s) based upon changes in the needs of

[REDACTED], changes in circumstances of the adoptive family, or changes in the maximum
 (Child's First Name)

allowable subsidy payment. Documentation of changes in the child's needs or family's circumstances may be required.

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Page 2 of 3 Pages

C. Special Service thru Supplemental Benefits:

N/A is eligible to receive N/A for the following
 (Child's First Name) (Amount)
 special service: N/A

D. Medical Benefits: [REDACTED] is eligible for medical benefits, as provided under Title
 (Child's First Name)

XIX of the Social Security Act (Medicaid), in accordance with the procedures of the state in which the child resides.

1. Eligibility is based on:

N/A IV-E Adoption Assistance for N/A
 (Child's First Name)

X State Funded Supplemental Benefits for [REDACTED], a child with medical or
 (Child's First Name)

rehabilitative needs who could not have been placed without medical benefits.

2. Other medical payments through Supplemental Benefits will be provided by DSS for the following specific condition: asthma, allergies, emotional/behavioral problems, if not provided by Title XIX, family health insurance or other resources. Amount \$ 2,000 per year, as long as funds are available.
3. Prior approval is required for all purchases of equipment over \$500.00 and all inpatient or residential psychiatric treatment to be paid for through state funded Supplemental Benefits.

4. Resources for meeting cost of medical care: Medical insurance company _____
 Policy # _____ Champus # _____ Medicaid # [REDACTED]

E. Social Services:

1. N/A is eligible for IV-E Adoption Assistance and, therefore, social services as
 (Child's First Name)
 provided under Title XX of the Social Security Act in accordance with the procedures of the state of South Carolina.
2. To access Title XX services in South Carolina, the family must apply with the Department of Social Services.
3. Children who are eligible for IV-E Adoption Assistance are eligible to receive Medicaid and Title XX social services regardless of the state in which the adoptive family lives. The family agrees to contact DSS prior to moving to a new state for instructions on accessing services in that state.

II. Notification of Change

- A. The adoptive parent(s) shall immediately notify DSS, in writing, if he/she/they are no longer legally responsible for the child or are no longer financially supporting the child.
- B. The adoptive parent(s) shall notify DSS, in writing, when there is a change in other income received by the family on behalf of the child.
- C. DSS shall notify the adoptive parent(s) in writing of changes in adoption subsidy payments resulting from increases or decreases in allowable rates.
- D. The adoptive parent(s) will contact DSS before moving out of state to implement the Interstate Compact on Adoption and Medical Assistance. The interstate interest of [REDACTED] is protected through the Compact.
 (Child's First Name) [REDACTED]

III. Renewal Agreement

- A. This agreement is renewed annually by the adoptive parent(s) and DSS.
- B. DSS shall notify the adoptive parent(s), in writing, 45 days before the need for renewal and shall supply the adoptive parent(s) with the appropriate forms.
- C. A second notice will be sent by certified mail 20 days before renewal. If the renewal request has not been received from the adoptive parent(s) within five (5) working days after the renewal date, the agreement will be terminated. A written termination notice will be sent.

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1/8/01 NCSTD

IV. Termination

Termination will occur in any of the following circumstances:

- A. Upon the conclusion of the terms of this agreement.
- B. Upon the adoptive parent(s)' written request.
- C. IV-E Adoption Assistance payments will terminate when the child reaches the age of 18. Supplemental Benefits may be provided at the discretion of DSS until the child is 21 years of age if the child is still in school.

N/A is/will be over 18 years of age before the next renewal date of the
(Child's First Name)

agreement.

N/A is attending N/A
(Child's First Name) (School)

N/A
(Location)

and plans to finish school on N/A
(Date)

Attach documentation of school enrollment such as grade sheets or a letter from the school. Verification is required to continue receiving Supplemental Benefits past the child's 18th birthday.

- D. Upon the child's death.
- E. Upon the death of the parent(s) of the child (one in a single parent family and both in a two-parent family).
- F. Upon cessation of the adoptive parent(s)' legal responsibility for the child.
- G. Upon determination that the child is no longer receiving financial support from the adoptive parent(s).
- H. Upon parent(s)' failure to complete the renewal process for adoption subsidy.

V. Appeal

Adoptive parent(s) may appeal DSS's decision to reduce, change or terminate any adoption subsidy in accordance with rules and procedures of the state's fair hearing and appeal process. Information may be requested from DSS.

Angela Hensley
Adoptive Mother's Signature

3-22-99
Date

Kenneth Hensley
Adoptive Father's Signature

3-22-99
Date

Eddie M. Pagan
Authorized Agency Representative's Signature

3-25-99
Date

XXXXXXXXXXXX Supervisor
Title

Signed copy of the Adoption Subsidy Agreement given/sent to adoptive parent(s) on 3-30-99
(Date)

8851-A-3

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

BLH by parents/general guardians)
Kenneth and Angela Hensley, and on) Civil Action No. 2013-CP-42-1569
behalf of all others similarly situated,)

Plaintiff,)
) PLAINTIFF'S RESPONSES TO
) FIRST SET OF INTERROGATORIES

v.)

South Carolina Department of Social)
Services,)

Defendant.)
_____)

TO: JOEL HUGHES AND ANDREW LINDEMANN, COUNSEL FOR DEFENDANTS

1. Give the names and addresses of persons known to the Plaintiff or her counsel to be witnesses concerning the facts of the case and indicate whether written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

RESPONSE: Plaintiffs BLH and Kenneth and Angela Hensley will testify. They are not in possession of any statements. Plaintiffs anticipate that one or more representatives of Defendant will testify. Plaintiffs are in possession of the affidavits filed in this action or in the 1983 federal action but no other statements.

2. For each person known to the Plaintiff or her counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE: See answer to Interrogatory No. 1.

3. Set forth a list of photographs, videotapes, audiotapes, plats, sketches, diagrams or other prepared documents in possession of the Plaintiff or her counsel that relate to the claims or any defense in this case.

RESPONSE: Plaintiffs object to this request to the extent it seeks information or documents protected by the work product doctrine and/or attorney client privilege. Responding further, Plaintiffs are in possession of the contract for adoption subsidy payments, the letter cutting those payments, and DSS policy manuals. See documents produced by Defendants in Answers to Interrogatories and Requests for Production, specifically Judy Caldwell affidavit and exhibits.

4. Identify in complete detail each person whom the Plaintiff has retained and/or intends to call as an expert witness at the trial, stating as to each such person:

- (a) Name, occupation, title, business address, area of specialization, if any, and professional relationship to Plaintiff; and
- (b) The way such person became familiar with the facts of this case.

RESPONSE: Plaintiff has not retained an expert witness to date but reserves the right to do so and supplement this response accordingly.

5. As to each person the Plaintiff has retained and/or intends to call as an expert witness at the trial, state in full detail:

- (a) The subject matter or area in which such person is to testify;
- (b) The substance of the facts and opinions in which such person is to testify; and
- (c) A summary of the grounds or basis for each opinion and fact.

RESPONSE: See response to Interrogatory No. 4.

6. Set forth an *itemized* statement of all damages claimed to have been sustained by the Plaintiff as are result of the allegations in her Complaint. Provide an explanation of the methodology used to calculate the damages and identify by name and address the person(s) who performed the calculation of damages.

RESPONSE: Plaintiff's damages are \$2420 plus the number of months in 2004 where the Plaintiff went without the \$20 benefit (the Plaintiff is unsure of the date in 2004 when the Defendant reinstated the \$20 payment to foster parents; neither the Judy Caldwell affidavit nor the Jessica Hanak-Coulter Affidavit provide this date). This was computed by taking the contractually-guaranteed benefits improperly cut by Defendants in the amount of \$20 per month and multiplying that by the number of months Plaintiff went without the benefit from 2004 until termination of benefits when she turned 18 years old.

7. State whether the Plaintiff BLH used any social networking sites (e.g., Facebook, MySpace or Twitter) from 2010 through present, and if so, identify the sites used. Please be on notice that the sites identified should be preserved and not deleted or closed.

RESPONSE: Plaintiff objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

8. Please set forth the Plaintiff BLH's educational background in detail, including GPA, school activities, clubs, sporting teams, and any honors or achievements, academic or otherwise, from her schools.

RESPONSE: Plaintiff objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

9. Please set forth a complete employment history for the Plaintiff BLH, including the name and address of employers, job titles, job descriptions, dates of employment, a statement of the compensation and benefits received, and an explanation of the reasons for the termination or ending of employment.

RESPONSE: Plaintiff objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

10. Please identify by name and address any psychiatrists, psychologists, counselors, and other mental health care providers who have provided any care, treatment, or counseling to the Plaintiff BLH from 2013 to present.

RESPONSE: Plaintiff objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. To divulge specific information regarding their adult daughter's medical, psychiatric and mental health information would likely be a violation of BHL's privacy rights pursuant to HIPAA. BHL's parents acknowledge that their daughter has had a lengthy history of psychiatric, psychological and mental health challenges.

11. Please identify any mental health diagnoses given to the Plaintiff BLH from 2013 to present.

RESPONSE: Same as 10

12. Please identify any medical, mental health, or other factual basis demonstrating that the Plaintiff BLH is incapacitated, disabled, or otherwise unable to manage her own property or affairs appropriately at the present time.

RESPONSE: same as 10 and 11

13. At what age was Plaintiff BLH told she was adopted? What factors went into that decision?

RESPONSE: There is no specified date when BLH was told she was adopted. This fact was openly discussed and celebrated throughout her childhood.

14. Since the monetary adjustment in 2002, what steps did Plaintiff BLH's parents take to appeal the decision?

RESPONSE: The contract at issue states in the permissive that a party "may appeal" DSS's decision to reduce the adoption subsidy. The Plaintiff BLH's parents did not elect to appeal to DSS because they were unsure of the process and believed that legal representation would be more expensive than the hoped for result.

15. Since the monetary adjustment in 2002, did Plaintiff BLH's parents continue to accept the adjusted amount?

RESPONSE: No. Plaintiff BLH's parents brought this action on her behalf initially in 2011.

16. Why did Plaintiff BLH wait until 2011 to challenge the monetary adjustment in made in 2002?

RESPONSE: Plaintiff was a minor until 2015 and had no obligation to bring this action until one year after turning 18. The action was timely filed in 2011. Prior to that, Plaintiff was not aware of her ability to contest an action taken against her by the government of the state of South Carolina (DSS) and believed that the legal representation necessary would be more expensive than the hoped for result.

Sept 8, 2020



James Fletcher Thompson,
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Attorneys for Plaintiff

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

BLH by parents/general guardians	)	
Kenneth and Angela Hensley, and on	)	Civil Action No. 2013-CP-42-1569
behalf of all others similarly situated,	)	

Plaintiff,	)	CERTIFICATE OF SERVICE

v.	)	

South Carolina Department of Social	)	
Services,	)	

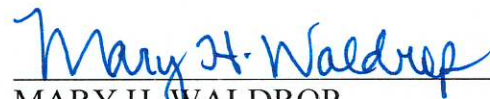
Defendant.	)	

The undersigned hereby certifies that she is a legal assistant in the law office of Thompson Dove Law Group, LLC, and is a person of such age and discretion as to be competent to serve papers.

On September 8, 2020, I emailed one copy of the *Plaintiff's Responses to First Set of Interrogatories and Plaintiff's Responses to First Set of Requests for Production*, to:

Joel Hughes, Esq.
Joel@ldh-law.com

Andrew Lindemann, Esq.
Andrew@ldh-law.com



MARY H. WALDROP
 Legal Assistant for
 Thompson Dove Law Group, LLC

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Profiles, Inc. v. Bank of America Corp.](#), D.Md., April 13, 2020

722 F.3d 177

United States Court of Appeals, Fourth Circuit.

Kenneth HENSLEY, as adoptive parents of BLH; Angela Hensley, as adoptive parents of BLH; BLH, by parents-general guardians Kenneth and Angela Hensley, Plaintiffs–Appellees,

v.

Lillian KOLLER, individually and in her official capacity as State Director for the South Carolina Department of Social Services; Elizabeth Patterson, individually as Former Director of the South Carolina Department of Social Services; Kim Aydlette, individually as Former Director of the South Carolina Department of Social Services; Kathleen Hayes, individually as Former Director of the South Carolina Department of Social Services, Defendants–Appellants, and

South Carolina Department of Social Services, Defendant.

No. 12–2147

Argued: May 16, 2013.

Decided: July 3, 2013.

Synopsis

Background: Minor, by and through her adopted parents, brought § 1983 class action in state court challenging South Carolina’s reduction of monthly adoption assistance benefits. Director for South Carolina Department of Social Services removed action to federal court. The United States District Court for the District of South Carolina, [G. Ross Anderson, Jr.](#), Senior District Judge, [2012 WL 3581175](#), certified class and denied parties’ cross-motions for summary judgment. Director appealed.

Holdings: The Court of Appeals, [Diana Gribbon Motz](#), Circuit Judge, held that:

[1] minor had federal right to individualized adoption assistance payment determinations, and

[2] decrease in adoption assistance payments under South Carolina law did not violate federal right to individualized adoption assistance payment determinations.

Reversed and remanded.

West Headnotes (8)

[1] [Federal Courts](#) [Immunity](#) [Federal Courts](#) [Summary judgment](#)

The Court of Appeals reviews de novo a district court’s denial of summary judgment on qualified immunity; in doing so, to the extent that the district court has not fully set forth the facts on which its decision is based, the Court of Appeals assumes the facts that may reasonably be inferred from the record when viewed in the light most favorable to the plaintiff.

[2 Cases that cite this headnote](#)

[2] [Civil Rights](#) [Government Agencies and Officers](#)

Qualified immunity shields government officials performing discretionary functions from suits for civil damages under § 1983. [42 U.S.C.A. § 1983](#).

[1 Case that cites this headnote](#)

[3] [Civil Rights](#) [Government Agencies and Officers](#)

Civil Rights ➡ Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

The qualified immunity inquiry asks (1) whether an official violated a federal right, and (2) whether that right was clearly established at the time the official acted. 42 U.S.C.A. § 1983.

- [4] **Civil Rights** ➡ Government Agencies and Officers
Civil Rights ➡ Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

When determining whether qualified immunity exists, a court may address the second question, whether a right is clearly established, without ruling on the first, existence of the right. 42 U.S.C.A. § 1983.

1 Case that cites this headnote

- [5] **Civil Rights** ➡ Other particular rights

Unless Congress speaks with a clear voice, and manifests an unambiguous intent to create individually enforceable rights, federal funding provisions provide no basis for private enforcement by § 1983. 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

- [6] **Civil Rights** ➡ Rights Protected

Even if a statute meets the three-factor test establishing a privately enforceable right under § 1983, a plaintiff cannot recover unless it can properly plead a violation of that statutory right. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

- [7] **Adoption** ➡ Public stipends and subsidies; adoption assistance benefits

Provision of Adoption Assistance and Child Welfare Act requiring that amount each adopted family received in adoption assistance payments “shall be determined through agreement between the adoptive parents and the State ..., which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents ..., depending upon changes in such circumstances” created a federal right to individualized adoption assistance payment determinations, enforceable through § 1983, for purposes of class action brought by minor, by and through her adopted parents, whose adoption assistance payments were uniformly reduced by state of South Carolina. Adoption Assistance and Child Welfare Act of 1980, § 101(a), 42 U.S.C.A. § 673(a)(3); 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

- [8] **Adoption** ➡ Public stipends and subsidies; adoption assistance benefits

Decrease in adoption assistance payments under South Carolina law did not violate federal right to individualized adoption assistance payment determinations, and thus Director for South Carolina Department of Social Services was entitled to qualified immunity from minor’s challenge to South Carolina’s reduction of monthly adoption assistance benefits; Adoption Assistance and Child Welfare Act prohibited adoption assistance subsidies that exceeded foster care maintenance payments, and department reduced foster care maintenance payments by \$20 at same time it reduced adoption assistance subsidy by same amount. Adoption Assistance and Child Welfare Act of 1980, § 101(a), 42 U.S.C.A. § 673(a)(3); 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

Attorneys and Law Firms

*179 ARGUED: [Andrew Lindemann](#), Davidson & Lindemann, P.A., Columbia, South Carolina, for Appellants. [Timothy Ryan Langley](#), Hodge & Langley Law Firm, P.C., Spartanburg, South Carolina, for Appellees. ON BRIEF: [William H. Davidson, II](#), [Joel S. Hughes](#), Davidson & Lindemann, P.A., Columbia, South Carolina, for Appellants. [Charles J. Hodge](#), Hodge & Langley Law Firm, P.C., Spartanburg, South Carolina; [James Fletcher Thompson](#), James Fletcher Thompson, LLC, Spartanburg, South Carolina, for Appellees.

Before [MOTZ](#), [DAVIS](#), and [WYNN](#), Circuit Judges.

Reversed and remanded by published opinion. Judge [MOTZ](#) wrote the opinion, in which Judge [DAVIS](#) and Judge [WYNN](#) joined.

Opinion

[DIANA GRIBBON MOTZ](#), Circuit Judge:

A minor, by and through her adopted parents, brought this class action challenging South Carolina’s reduction of monthly adoption assistance benefits. She claims the reduction violates the Adoption Assistance and Child Welfare Act, and seeks declaratory and injunctive relief, as well as money damages. The district court certified the class and denied the parties’ cross-motions for summary judgment. For the reasons that follow, we reverse and remand.

I.

The South Carolina Department of Social Services (“DSS”) provides adoption assistance subsidies and foster care maintenance payments pursuant to federal funding authorized by the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670 *et seq.* (2006) (“the Act”). To receive funding under the Act, a state must develop a

plan for a subsidy and maintenance program and must obtain approval of that plan by the United States Secretary of Health and Human Services. *See id.* § 671(a).

The Act sets forth specific requirements governing foster care maintenance payments, *id.* § 672, and adoption assistance payments, *id.* § 673. With respect to the latter, a state with an approved plan “shall enter into adoption assistance agreements ... with the adoptive parents of children *180 with special needs.” *Id.* § 673(a)(1)(A). The Act further provides:

The amount of the [adoption assistance] payments ... shall be determined through agreement between the adoptive parents and the State ..., which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents ..., depending upon changes in such circumstances. However, in no case may the amount of the adoption assistance payment ... exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home.

Id. § 673(a)(3). The adoption subsidy agreement between DSS and adoptive parents, referenced in § 673, establishes the payment rate for an adoptive child.

II.

In April 1997, BLH, a minor child, was placed in temporary foster care with Angela and Kenneth Hensley. Beginning in 1998, DSS approved monthly foster care maintenance payments of \$675 to Mr. and Mrs. Hensley for the care of BLH. These payments included a “Difficulty of Care Rate” upward adjustment because DSS found BLH to be a special needs child. In early 1999, Mr. and Mrs. Hensley applied for a court order declaring them BLH’s adoptive parents.

In preparing their application, Mr. and Mrs. Hensley sought to convert the foster care maintenance payment into an adoption assistance subsidy. On March 22, 1999, DSS and Mr. and Mrs. Hensley entered into an Adoption Subsidy Agreement under which DSS agreed to furnish the Hensleys with monthly adoption assistance payments of \$675. Two months later, a state court issued an order declaring Mr. and Mrs. Hensley the adoptive parents of BLH. Mr. and Mrs. Hensley continued to receive the \$675 adoption subsidy monthly for three years.

But in June 2002, then-DSS Director Elizabeth G. Patterson announced that as a result of “South Carolina’s budget crisis,” DSS would reduce by twenty dollars all monthly foster care maintenance payments and adoption assistance subsidies, beginning that July. Pursuant to this across-the-board reduction, BLH’s subsidy decreased to \$655. In 2004, DSS rescinded the twenty dollar reduction to foster care maintenance payments, but DSS has never rescinded the 2002 reduction to adoption assistance subsidies; thus, for BLH, the latter remains \$655.

In September 2011, BLH, by and through Mr. and Mrs. Hensley (collectively, “the Hensleys”), filed in state court a class action under 42 U.S.C. § 1983 against Lillian Koller, individually and in her official capacity as director of DSS. Koller removed the action to federal court. The Hensleys amended their complaint three times, removed the South Carolina Department of Social Services as a party, and added Patterson, Kim Aydlette, and Kathleen Hayes, individually as former directors of DSS (collectively, with Koller, “the Directors”).

The Directors then moved for summary judgment. The Hensleys opposed the motion and filed a combined cross-motion for summary judgment and motion for class certification. After the district court heard argument, it granted the Hensleys’ motion for class certification and denied the cross-motions for summary judgment. The Directors timely noted this appeal.

III.

^[1] We have jurisdiction over this interlocutory appeal because the Directors’ *181 assertion of qualified immunity from suit presents purely legal questions. See *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). We review de novo a district court’s denial of qualified immunity. *Johnson v. Caudill*, 475 F.3d 645, 650 (4th Cir.2007). In doing so, “[t]o the extent that the district court has not fully set forth the facts on which its decision is based, we assume the facts that may reasonably be inferred from the record when viewed in the light most favorable to the plaintiff.” See *Waterman v. Batton*, 393 F.3d 471, 473 (4th Cir.2005) (citing *Winfield v. Bass*, 106 F.3d 525, 533–35 (4th Cir.1997) (en banc)).

^[2] ^[3] ^[4] Qualified immunity shields government officials performing discretionary functions from suits for civil damages under § 1983. *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir.2006). The qualified immunity inquiry asks (1) whether an official

violated a federal right, and (2) whether that right was clearly established at the time the official acted. See *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). A court may address the second question—whether a right is clearly established—without ruling on the first—existence of the right. *Pearson v. Callahan*, 555 U.S. 223, 232, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). But “there are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the ‘clearly established’ prong.” *Id.* at 236, 129 S.Ct. 808.

This is such a case. The Hensleys seek injunctive and declaratory relief in addition to money damages. A determination that a right is not clearly established only shields a state official from money damages. See *Akers v. Caperton*, 998 F.2d 220, 226–28 (4th Cir.1993) (holding clearly established law protected state officials only from liability for money damages, and so remanding case for consideration of claim for equitable relief). Thus, if we resolved the case on the ground that no clearly established law permits an award of damages against the state officials, the case would necessarily return to the district court for a determination of the availability of injunctive and declaratory relief. Here, the “conservation of judicial resources,” *Pearson*, 555 U.S. at 236, 129 S.Ct. 808, weighs strongly in favor of resolving the question of whether the Directors violated the Hensleys’ federal rights.

For this reason, we begin (and end) with the first step of *Saucier*’s two-step inquiry—determination of whether § 673(a)(3) creates a privately enforceable right to parental concurrence, which the Directors have violated.

IV.

^[5] ^[6] “[U]nless Congress speak[s] with a clear voice, and manifests an unambiguous intent to create individually enforceable rights, federal funding provisions provide no basis for private enforcement by § 1983.” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (internal quotation marks omitted). In *Blessing v. Freestone*, the Supreme Court announced a three-factor test to determine whether a particular statutory provision gives rise to a federal right privately enforceable under 42 U.S.C. § 1983:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must

demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision *182 giving rise to the asserted right must be couched in mandatory, rather than precatory, terms. 520 U.S. 329, 340–41, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) (internal quotation marks and citations omitted). Of course, even if a statute meets the *Blessing* three-factor test establishing a privately enforceable right, a plaintiff cannot recover unless it can properly plead a violation of that statutory right. In this case we hold that the statute, § 673(a)(3), does set forth a privately enforceable right, but that the Hensleys have failed to plead any violation of that right by the Directors.

A.

Following the *Blessing* three-factor test, we initially consider whether the Hensleys have pled a violation of a federal right.

^[7] As to the first *Blessing* question, whether § 673(a)(3) “confer[s] rights on a particular class of persons,” *Gonzaga*, 536 U.S. at 285, 122 S.Ct. 2268 (internal quotation marks omitted), we agree with the only other circuit to address that question that § 673(a)(3) does “evin[c] a clear intent to create a federal right,” see *ASW v. Oregon*, 424 F.3d 970, 975–76 (9th Cir.2005). For the Act provides that the adoption assistance payments:

shall be determined through agreement between the adoptive parents and the State ..., which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents ..., depending upon changes in such circumstances.

42 U.S.C. § 673(a)(3) (emphasis added).¹

In considering the second *Blessing* factor, we determine whether the asserted right is “so ‘vague and amorphous’ that its enforcement would strain judicial competence.” 520 U.S. at 340–41, 117 S.Ct. 1353. The Directors argue that the term “concurrence” is too “vague[] and amorphous[]” to create an enforceable right. We disagree. “In interpreting the plain language of a statute, we give the terms their ordinary, contemporary, common meaning.” *Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 435 (4th Cir.2012) (internal quotation marks omitted). Black’s Law Dictionary defines “concurrence” as

“[a]greement; assent.” Black’s Law Dictionary (9th ed.2009). Thus, § 673(a)(3) clearly provides that a state may not readjust an adoption assistance payment amount without an adoptive parent’s “concurrence,” i.e., agreement or assent.

Turning to *Blessing*’s final factor, we examine whether the statute “unambiguously impose[s] a binding obligation on the State[].” 520 U.S. at 341, 117 S.Ct. 1353. To do so we must resolve whether “the provision giving rise to the asserted right” is “couched in mandatory, rather than precatory, terms.” *Id.* In this case, the operative “provision,” § 673(a)(3), requires states to enter into agreements with adoptive parents to determine adoption assistance payments. It further requires that such agreed determinations “take into consideration the circumstances of the adopting parents and the needs of the child being adopted.” *Id.* See *183 *ASW*, 424 F.3d at 976 (“[T]here is no ambiguity as to what [states must] do under § 673(a)(3) as a condition of receiving federal funding under [the Act].”). And if a state wants to readjust the agreed-to payments, it must have “the concurrence of the adopting parents” to do so, with the limited exception we address below. 42 U.S.C. § 673(a)(3).

For these reasons, we conclude that, pursuant to the *Blessing* test, § 673(a)(3) does give rise to a limited privately enforceable federal right cognizable under 42 U.S.C. § 1983.

B.

^[8] But only *violations* of such enforceable rights can provide a basis for recovery. See *Saucier*, 533 U.S. at 200, 121 S.Ct. 2151 (“[T]he first inquiry must be whether a ... right would have been *violated* on the facts alleged....” (emphasis added)). Thus, we must also determine whether the Hensleys have alleged facts establishing that the Directors violated the Hensleys’ rights under § 673(a)(3) when the Directors reduced adoption assistance subsidies.

The statute’s limited exception speaks to this very question. Section 673(a)(3) provides:

in no case may the amount of the adoption assistance payment ... exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home.

42 U.S.C. § 673(a)(3). The most logical reading of this language is that the statute prohibits adoption assistance subsidies that exceed foster care maintenance payments.²

As a result, § 673(a)(3) establishes a right to parental concurrence in subsidy readjustment determinations *except* when the subsidy must be reduced due to reductions in foster care maintenance payments.

It is undisputed that DSS reduced the foster care maintenance payments by twenty dollars at the same time DSS reduced the adoption assistance subsidy by the same amount. The Hensleys do not contend that at any time prior to the 2002 reduction, the adoption assistance subsidy they received for BLH was less than BLH's \$675 foster care maintenance payment.

It was only in 2002, when South Carolina decreased by twenty dollars *all* foster care maintenance payments, that the State also decreased BLH's adoption assistance subsidy by twenty dollars. The State's failure to do so would have violated federal law. For, under § 673(a)(3), a failure to reduce BLH's adoption assistance payment would have resulted in a payment "exceed[ing] the foster care maintenance payment" she would have received had

she remained in foster care. For these reasons, the Hensleys cannot establish that the Directors violated the Hensleys' rights under the Act and therefore the Directors are entitled to qualified immunity.³

***184 V.**

For the reasons stated, we reverse the judgment of the district court and remand the case for entry of a judgment consistent with this opinion.

REVERSED and REMANDED

All Citations

722 F.3d 177

Footnotes

- 1 The Directors contend that the Act cannot be challenged by BLH, or Mr. and Mrs. Hensley in their capacity "as adoptive parents of BLH," because it contemplates only an agreement between the state and the adoptive parents. This argument fails. The Act provides that its stated purpose is to "enabl[e] each State to provide ... adoption assistance *for children with special needs*." 42 U.S.C. § 670 (emphasis added). This language clearly reveals Congressional "inten[t] to confer individual rights upon" this "class of beneficiaries." See *Gonzaga*, 536 U.S. at 285, 122 S.Ct. 2268.
- 2 The policy manual issued by the United States Department of Health & Human Services, which administers the federal funding authorized by the Act, supports this reading of § 673(a)(3). See Admin. for Children & Families, U.S. Dep't of Health & Human Servs., *Child Welfare Policy Manual* § 8.2D.4 (2012).
- 3 The Hensleys also argue that the Directors violated their parental concurrence rights when DSS later increased foster care maintenance payments without also increasing the adoption assistance subsidy. However, the 2004 increase did not "readjust" the amount of the adoption assistance subsidies; accordingly, the Directors' 2004 action did not trigger—let alone violate—the parental concurrence requirement.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Kenneth Hensley, as adoptive parents of)
BLH; Angela Hensley, as adoptive parents)
of BLH; BLH, by parents-general guardians)
Kenneth and Angela Hensley,)

Plaintiffs,)

v.)

Lillian Koller, individually and in her)
official capacity as State Director for the)
South Carolina Department of Social)
Services; Elizabeth Patterson, individually)
as Former Director of the South Carolina)
Department of Social Services; Kim)
Aydlette, individually as Former Director)
of the South Carolina Department of Social)
Services; Kathleen Hayes, individually as)
Former Director of the South Carolina)
Department of Social Services,)

Defendants.)

C/A No.: 7:11-cv-02827-GRA

ORDER
(Written Opinion)

This matter is before the Court on remand from the United States Court of Appeals for the Fourth Circuit. On July 3, 2013, the Fourth Circuit reversed this Court's certification of a class in this case and denial of the parties' cross-motions for summary judgment. See *Hensley v. Koller*, 722 F.3d 177, 184 (4th Cir. 2013). The Fourth Circuit concluded that "the Directors are entitled to qualified immunity" and remanded "the case for entry of a judgment consistent with this opinion." *Id.* at 183-84.

IT IS THEREFORE ORDERED that judgment is entered in favor of Defendants.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "G. Ross Anderson, Jr.", written over a horizontal line.

G. Ross Anderson, Jr.
Senior United States District Judge

October 11, 2013
Anderson, South Carolina

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Kenneth Hensley, et al

Plaintiff

v.

Lillian Koller, et al

Defendant

Civil Action No. 7:11-2827-GRA

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars (\$___), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

☒ other: judgment is entered in favor of Defendants Lillian Koller, Elizabeth Patterson, Kim Aydlette, Kathleen Hayes.

This action was *(check one)*:

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

☒ decided by the Honorable G. Ross Anderson, Jr.

Date: October 15, 2013

CLERK OF COURT



Signature of Clerk or Deputy Clerk

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
BLH by parents/general guardians	)	
Kenneth and Angela Hensley, and on	)	Civil Action No. 2013-CP-42-1569
behalf of all others similarly situated,	)	
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR SUMMARY JUDGMENT
	)	OF DEFENDANT SOUTH CAROLINA
South Carolina Department	)	DEPARTMENT OF SOCIAL SERVICES
of Social Services,	)	
	)	
Defendant.	)	
	)	

BACKGROUND

The Plaintiff BLH brings this action by and through her adoptive parents, Kenneth and Angela Hensley, as a class action alleging a third-party beneficiary breach of contract cause of action against the Defendant South Carolina Department of Social Services ("DSS").¹ The Plaintiff BLH contends that DSS breached an Adoption Subsidy Agreement entered March 22, 1999, when DSS implemented an across-the-board decrease of \$20 to any foster care board rate or adoption subsidy payments in June 2002. The Adoption Subsidy Agreement was entered between DSS and BLH's adoptive parents, but BLH seeks to recover as a third-party beneficiary.

By way of procedural history, in September 2011, a prior action was filed in state court which was assigned Civil Action Number 2011-CP-42-3992. That action was then removed to

¹ When this action was filed on April 1, 2013, the Plaintiff BLH was a minor. BLH has since reached majority, and at this point, the action should be prosecuted by BLH. Kenneth and Angela Hensley should be dismissed as party-Plaintiffs.

the United States District Court based upon federal question jurisdiction under 28 U.S.C. § 1331. The party-plaintiffs in that action initially were Kenneth and Angela Hensley who brought what was alleged to be a breach of contract cause of action under 42 U.S.C. § 1983. The Plaintiff BLH was later substituted for her parents as the party-plaintiff in an attempt to avoid a statute of limitations defense. The defendants in the prior action were four former DSS Directors including Elizabeth Patterson, Kim Aydlette, Kathleen Hayes, and Lillian Koller (hereafter referred to as "DSS Directors").

After several pleading amendments, the Plaintiff BLH pursued two federal causes of action: (1) a claim for alleged violation of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA") and (2) a claim for a violation of the Contracts Clause of the United States Constitution. The Plaintiff BLH alleged a prayer for declaratory, injunctive, and monetary relief. BLH sought monetary relief in the nature of "past due adoption assistance benefits and prospective adoption assistance benefits."

The parties filed cross-motions for summary judgment which were heard by Senior District Judge G. Ross Anderson, Jr. On August 17, 2012, Judge Anderson issued an order granting BLH's motion for class certification and denying the cross-motions for summary judgment. The DSS Directors filed an immediate appeal to the Fourth Circuit Court of Appeals, which exercised appellate jurisdiction. By a published decision issued on July 3, 2013, the Fourth Circuit unanimously reversed Judge Anderson's order and remanded for entry of judgment on all federal claims. *See, Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). Thereafter, Judge Anderson entered judgment in favor of the DSS Directors by order filed October 11, 2013.

On April 1, 2013, while the appeal was pending in the Fourth Circuit, the Plaintiff BLH filed the present action in the Court of Common Pleas for Spartanburg County. This action,

which is asserted against DSS only, alleges a state law breach of contract cause of action based upon a third-party beneficiary theory.

The Defendant DSS moves for summary judgment on the grounds stated in the motion and as discussed below.

UNDISPUTED STATEMENT OF FACTS

The following facts are stated verbatim from the Fourth Circuit's decision:

1. In April 1997, BLH, a minor child, was placed in temporary foster care with Angela and Kenneth Hensley. Beginning in 1998, DSS approved monthly foster care maintenance payments of \$675 to Mr. and Mrs. Hensley for the care of BLH. These payments included a "Difficulty of Care Rate" upward adjustment because DSS found BLH to be a special needs child. In early 1999, Mr. and Mrs. Hensley applied for a court order declaring them BLH's adoptive parents.

2. In preparing their application, Mr. and Mrs. Hensley sought to convert the foster care maintenance payment into an adoption assistance subsidy. On March 22, 1999, DSS and Mr. and Mrs. Hensley entered into an Adoption Subsidy Agreement under which DSS agreed to furnish the Hensleys with monthly adoption assistance payments of \$675. Two months later, a state court issued an order declaring Mr. and Mrs. Hensley the adoptive parents of BLH. Mr. and Mrs. Hensley continued to receive the \$675 adoption subsidy monthly for three years.

3. But in June 2002, then-DSS Director Elizabeth G. Patterson announced that as a result of "South Carolina's budget crisis," DSS would reduce by twenty dollars all monthly foster care maintenance payments and adoption assistance subsidies, beginning that July. Pursuant to this across-the-board reduction, BLH's subsidy decreased to \$655. In 2004, DSS rescinded the

twenty-dollar reduction to foster care maintenance payments, but DSS has never rescinded the 2002 reduction to adoption assistance subsidies; thus, for BLH, the latter remains \$655.

See, Hensley v. Koller, 722 F.3d 177, 180 (4th Cir. 2013).

LEGAL ANALYSIS

I. Merits of Breach of Contract Claim

The Defendant DSS is entitled to summary judgment as to the merits of the Plaintiff's breach of contract cause of action because DSS was authorized by the controlling federal and state law to reduce the monthly adoption subsidy payment due to the BLH's adoptive parents and was under no obligation by law to later increase that subsidy amount. As to be discussed below, the controlling issues of fact and law have previously been adjudicated in the federal court litigation in DSS's favor in the final order and judgment entered in the action captioned *Hensley v. Koller*, Civil Action Number 7:11-02827-GRA, and the decision of the Fourth Circuit Court of Appeals in *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). Those rulings in the federal action are dispositive of the issues and the breach of contract claim alleged in this litigation.

Under South Carolina law, "[c]ollateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. South Carolina Dept. of Transportation*, 385 S.C. 550, 684 S.E.2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* As the South Carolina Supreme Court has explained, "[p]rinciples of finality, certainty, and the proper administration of justice suggest that a

decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation." *Shelton v. Oscar Meyer Foods Corp.*, 325 S.C. 248, 481 S.E.2d 706, 708 (1997). Each of the three elements for collateral estoppel is satisfied.

Recently, in *Taylor v. Richland County Sheriff's Department*, Op. No. 2024-UP-030 (S.C. Ct. App. 2024), the South Carolina Court of Appeals reversed the trial court's decision not to give rulings in a companion federal action preclusive effect under the collateral estoppel doctrine in subsequent state court litigation. In reversing, the Court of Appeals ruled that the extensive findings of fact and legal rulings by the federal district court are subject to collateral estoppel and ultimately barred the plaintiff's state court claim for gross negligence. The Court of Appeals cited with favor such cases as *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 789 (4th Cir. 1998), in which the Fourth Circuit determined that a state law negligence claim was barred by the rulings on companion federal claims.

The same is true in the case at bar. The Plaintiff and the class members should be precluded from re-litigating dispositive issues already litigated in the earlier federal court litigation. Nonetheless, even if this Court were not to apply collateral estoppel, the determination of the issues to be discussed below were correctly determined in the federal court litigation and should be applied in this state court litigation.

The Plaintiff BLH alleges that the \$20 reduction in monthly benefits in 2002 constitutes a breach of contract. The Adoption Subsidy Agreement, however, includes the following language: "Adjustments in monthly cash payments may be made with the concurrence of the adoptive parent(s) based upon changes in the needs of [BLH], changes in circumstances of the adoptive family, or *changes in the maximum allowable subsidy payment.*" (Emphasis added). This language is required by and must be construed in conformity with the federal enabling legislation titled the

Adoption Assistance and Child Welfare Act of 1980 (AACWA). The AACWA requires a state to "enter into adoption assistance agreements ... with the adoptive parents of children with special needs." 42 U.S.C. § 673(a)(1)(A). Section 673(a)(3) of the AACWA provides as follows:

The amount of the payments to be made in any case under clauses (i) and (ii) of paragraph (1)(B) shall be determined through agreement between the adoptive parents and the State or local agency administering the program under this section, which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents (which may be specified in the adoption assistance agreement), depending upon changes in such circumstances. However, *in no case may the amount of the adoption assistance payment made under clause (ii) of paragraph (1)(B) exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home.*

42 U.S.C. § 673(a)(3). (Emphasis added).

While the Plaintiff BLH contends that DSS breached its contract with her adoptive parents by reducing the monthly subsidy by \$20 beginning in June 2002, DSS was required to do so in order to comply with Section 673(a)(3), which the Fourth Circuit has correctly construed as "prohibit[ing] adoption assistance subsidies that exceed foster care maintenance payments."

Hensley v. Koller, 722 F.3d 177, 183 (4th Cir. 2013). The Fourth Circuit further ruled:

It is undisputed that DSS reduced the foster care maintenance payments by twenty dollars at the same time DSS reduced the adoption assistance subsidy by the same amount. The Hensleys do not contend that at any time prior to the 2002 reduction, the adoption assistance subsidy they received for BLH was less than BLH's \$675 foster care maintenance payment.

It was only in 2002, when South Carolina decreased by twenty dollars *all* foster care maintenance payments, that the State also decreased BLH's adoption assistance subsidy by twenty dollars. The State's failure to do so would have violated federal law. For,

under § 673(a)(3), a failure to reduce BLH's adoption assistance payment would have resulted in a payment "exceed[ing] the foster care maintenance payment" she would have received had she remained in foster care.

Id. Thus, as the Fourth Circuit has ruled, DSS was prohibited by federal law from allowing the adoption subsidy to exceed the foster care maintenance rate. The Plaintiff is collaterally estopped from re-litigating this issue or taking a position inconsistent with the Fourth Circuit's ruling which is a final judgment. The foster care board rate on July 1, 2002 decreased from \$675.00 to \$655.00 per month. Therefore, the AACWA mandated that the subsidy paid to the Hensleys on July 1, 2002, as well as future payments, be decreased by at least \$20 to \$655.00 per month. That is also mandated by state statutory law. Section 20-7-1950 (now codified at Section 63-9-1770) provides: "The amount of time-limited, long-term supplemental benefits may not exceed that which currently would be allowable for the child under foster family care." *See*, S.C. Code Ann. § 20-7-1950 (Supp. 2002). That is also mandated by South Carolina Code of Regulations § 114-4380(E)(7), which states that "Supplemental Benefits may not exceed that which is reasonable for treatment services or allowable for a child under foster family care." *See*, S.C. Reg. § 114-4380(E)(7). Consequently, there was no breach of contract. The Adoption Subsidy Agreement, consistent with its terms, allows for an adjustment to comply with "changes in the maximum allowable subsidy payment."

The Plaintiff BLH also argues that DSS breached the Adoption Subsidy Agreement by making the \$20 adjustment without "parental concurrence." That issue has also been conclusively resolved by the Fourth Circuit. The requirement of "parental concurrence" for a readjustment of the adoption assistance payments is provided in 42 U.S.C. § 673(a)(3). The Fourth Circuit determined that "§ 673(a)(3) establishes a right to parental concurrence in subsidy readjustment determinations *except* when the subsidy must be reduced due to reductions in foster

care maintenance payments." *Hensley*, 722 F.3d at 183. (Emphasis in original). Thus, the requirement of "parental concurrence" in the Adoption Subsidy Agreement is inapplicable to the 2002 reduction of \$20 per month because federal law required the subsidy to be reduced so that it did not violate federal law and exceed the foster care maintenance rate. The Adoption Subsidy Agreement, including the "parental concurrence" provision, must be interpreted consistently with 42 U.S.C. § 673(a)(3) and so that it is consistent with federal law. The Adoption Subsidy Agreement, or any provisions thereof, may not be read or construed as violating the provisions of the AACWA that govern adoption assistance agreements. As a result, the 2002 reduction of \$20 per month was in compliance with the AACWA, as determined by the Fourth Circuit, and was not in breach of the Adoption Subsidy Agreement entered with the Hensleys.

Additionally, the Plaintiff BLH argues that DSS breached the Adoption Subsidy Agreement when DSS increased foster care maintenance payments in 2004 without also increasing the adoption assistance subsidy. On this issue, the Plaintiff is likewise collaterally estopped from taking a position contrary to the rulings of the Fourth Circuit Court of Appeals in *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). On this issue, the Fourth Circuit has already ruled that "the 2004 increase did not 'readjust' the amount of the adoption assistance subsidies; accordingly, the Directors' 2004 action did not trigger -- let alone violate -- the parental concurrence requirement." *Hensley v. Koller*, 722 F.3d 177, 183 (4th Cir. 2013). Therefore, because there was no requirement for DSS to "readjust" the amount of the adoption subsidy, as already determined by the Fourth Circuit, there was no breach of the Adoption Subsidy Agreement when the adoption assistance subsidy was not increased in 2004.

The Plaintiff BLH's position is also unsupported by any case law or other authority, and in fact, her argument is contrary to the express language of Section 673(a)(3). A clear reading of

Section 673(a)(3) demonstrates that there is no requirement for the adoption subsidy rate to equal the foster care maintenance rate. Those rates are not required to be the same. Instead, Section 673(a)(3) clearly establishes a cap or ceiling for the adoption subsidies – they may "in no case" exceed the foster care rate. Thus, when the foster care rate is reduced below the adoption subsidy rate, the adoption rate must also be reduced. However, the converse is not required. If the foster care rate is increased, there is no requirement to increase the adoption subsidy rate. It is perfectly lawful under Section 673(a)(3) and state law for the adoption subsidy rate to be less than the foster care rate. Likewise, there is no requirement in the Adoption Subsidy Agreement for the adoption subsidy rate to equal the foster care maintenance rate. Nor is there a requirement in the Adoption Subsidy Agreement for DSS to increase the adoption subsidy whenever the foster care rate is increased. The Fourth Circuit recognized that the increase in the foster care rate in 2004 did not "trigger" or "violate" the requirements under Section 673(a)(3), which are incorporated as part of the Adoption Subsidy Agreement.

In sum, the Plaintiff BLH alleges that the \$20 reduction in monthly benefits constitutes a breach of the Adoption Subsidy Agreement. The Adoption Subsidy Agreement, however, includes the following language: "Adjustments in monthly cash payments may be made with the concurrence of the adoptive parent(s) based upon changes in the needs of [BLH], changes in circumstances of the adoptive family, or *changes in the maximum allowable subsidy payment*." (Emphasis added). This language is required by and must be construed in conformity with the AACWA. For, it is the AACWA that requires a state to "enter into adoption assistance agreements ... with the adoptive parents of children with special needs." 42 U.S.C. § 673(a)(1)(A). The Adoption Subsidy Agreement must therefore be construed consistently with the AACWA, and the Fourth Circuit's ruling on what is required by the AACWA is clearly entitled to

preclusive effect and cannot be re-litigated.² Likewise, for the reasons stated, the Plaintiff's breach of contract claim is barred as a result of the modification of the Adoption Assistance Agreement by operation of law and by the defense of contract novation by operation of law.

II. Third-Party Beneficiary Theory

The named Plaintiff and class representative is BLH. The contracting parties to the Adoption Subsidy Agreement, however, are DSS and the adoptive parents, namely Kenneth Hensley and Angela Hensley. BLH is not a contracting party and lacks standing to sue for her adoptive parents, but instead she is attempting to assert her claim as a third-party beneficiary. As mentioned, this was done in an attempt to avoid a dispositive statute of limitations defense on the parents' claims in the prior federal court action.

The Plaintiff and the other class members should be precluded from pursuing a third-party beneficiary theory. “Ordinarily, a person who is not a party to a contract may not enforce the contract in a civil action.” *Beverly v. Grand Strand Regional Medical Center, LLC*, 435 S.C. 594 869 S.E.2d 812, 815 (2022). The Supreme Court, however, recognizes that “when the parties intentionally provide in the terms of the contract a direct benefit to a third party, the third party may enforce the contract.” *Id.* In other words, “if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.” *Id.*

To prevail, the Plaintiff BLH and the class members are required to demonstrate that DSS and the adoptive parents intended to create a direct benefit to BLH and the adoptive children.

² Even if not deemed subject to collateral estoppel, the Fourth Circuit's interpretation of the AACWA and its application to this case are correct and should be entitled to great weight.

The Adoption Subsidy Agreement, however, states: “The amount of this monthly cash payment is based on the needs of the child and the circumstances of the adoptive parent(s) and has been determined by mutual agreement between the adoptive parent(s) and DSS.” Neither that language nor any other language in the Adoption Subsidy Agreement shows any intent to create a direct benefit or to permit the adoption subsidy to be paid directly to the adoptive children.

Likewise, the Plaintiff BLH cannot point to any language in the AACWA that creates a direct benefit to the adoptive children as opposed to an incidental or consequential benefit. Section 673(a)(3) of the AACWA requires that the “[t]he amount of the payments to be made ... shall be determined through agreement between the adoptive parents and the State or local agency administering the program under this section.” 42 U.S.C. § 673 (a)(3). There is nothing in the AACWA authorizing any direct payment of the subsidy to the adoptive children. The same is true with respect to the governing South Carolina statutes and regulations.

The Plaintiff BLH has not cited any authority from any jurisdiction, state or federal, allowing the adoptive children to sue the agency administering the adoption subsidy program to recover the amount of the adoption subsidy. Again, there is no authority that the adoptive child may be paid directly or may directly recover the amount of the adoption subsidy (or any portion thereof). The right to enforce the Adoption Subsidy Agreement and to sue for its alleged breach lies with the adoptive parents who are the contracting parties.

There is no on-point or even analogous authority that supports BLH’s position. There is authority in South Carolina, however, that rejects the idea that a child support agreement or even life insurance benefits paid to a child are the subject of implied contractual rights. Specifically, in *Bowen & Smoot v. Plumlee*, 301 S.C. 262, 391 S.E.2d 558 (1990), the Supreme Court ruled that an attorney who recovered a child support award could not seek attorney’s fees by suing the

minor children despite that award being for the children's benefit. Similarly, in *Bonaparte v. Bonaparte*, 317 S.C. 256, 452 S.E.2d 836 (1995), the Supreme Court rejected both implied contract and "common fund" theories as a means to recover attorney's fees from children who were beneficiaries of a life insurance policy. While those cases are not on point, they do demonstrate that children do not have implied contractual rights under South Carolina law and likely will not be deemed to have third-party beneficiary contractual rights for child support payments or adoption subsidies.

Importantly, the measure of damages sought by the Plaintiff BLH and the other class members is the payment of \$20 per month in benefits directly to the adoptive children. If the Court allows BLH and the other class members to proceed under a third-party beneficiary theory, the direct payment of \$20 per month cannot be the proper measure of damages. As indicated, the adoption subsidy was paid to the adoptive parents and not to the child. Per the contract language, the payments were to be used "to aid the adoptive parent(s) in providing proper care for [the] child." Therefore, if a third-party beneficiary theory is allowed, the proper measure of damages for BLH and the class members is not the payment of \$20 per month but rather the impact that that reduction had on the child, which in most cases was likely negligible or non-existent. Each adoptive child will need to show how he or she was harmed by the reduction in the subsidy payment – presumably the change in his/her care or support caused by \$20 less per month in the subsidy paid to the adoptive parents – rather than the monetary figure due to be paid to his/her adoptive parents. Importantly, a third-party beneficiary is not an assignee.³ A third-party beneficiary may only claim his/her damages proximately caused by the breach and *cannot* claim the damages actually sustained by the contracting party. Recently, in *Beverly v. Grand*

³ See, *Medical University Hospital Authority v. Oceana Resorts, Inc.*, 2012 WL 683938 (D.S.C. 2012) (distinguishing assignee from third-party beneficiary).

Strand Regional Medical Center, LLC, 435 S.C. 594, 869 S.E.2d 812 (2022), the Supreme Court explained that “the third-party beneficiary question arises from a situation in which a person who is not a party to the contract attempts to bring a civil action against a party to the contract for damages *allegedly caused to the non-party* by the party’s breach.” 869 S.E.2d at 816. (Emphasis added). The Supreme Court then gives examples of cases where a third-party beneficiary sued *for its own resulting harm and damages* and not the harm or damages sustained by the contracting party. *Id.*

In the case at bar, the adoptive parents lost the \$20 per month in subsidy payments, but that does not necessarily mean there were damages caused thereby to the adoptive child. That child may have received the exact same care from his/her adoptive parents. Thus, the damages sustained by the adoptive children, who are the class members, will differ from person to person, and that will require an individualized inquiry if the Court allows BLH and the class members to pursue a third-party beneficiary theory.⁴

III. Exhaustion of Administrative Remedies

The Defendant DSS is also entitled to summary judgment because the Plaintiff BLH’s adoptive parents did not exhaust available administrative remedies and instead simply filed suit first for themselves and then in BLH’s name. In its earlier decision in this litigation, the Supreme Court provided some preliminary comments and supporting authorities regarding a plaintiff’s need to exhaust administrative remedies in this context:

⁴ See, *Hensley v. South Carolina Department of Social Services*, 429 S.C. 144, 838 S.E.2d 510, 515 (2020) (“DSS raises the additional question of whether the calculation of damages requires significant individual treatment, or -- as the Hensleys contend -- the damages can be calculated by simple formula. All of these questions relate directly to whether the circuit court will ultimately permit this lawsuit to be maintained as a class action”).

DSS contends each class member was required to appeal DSS's decision to reduce the monthly cash payments through the administrative appeals process. *See Stinney v. Sumter Sch. Dist.* 17, 391 S.C. 547, 550 n.1, 707 S.E.2d 397, 398 n.1 (2011) (“exhaustion of administrative remedies ... applies when a litigant invokes the original jurisdiction of the circuit court to adjudicate a claim based upon a statutory violation for which the legislature has provided an administrative remedy”); S.C. Code Ann. § 20-7-1960 (Supp. 2002) (“A decision concerning supplemental benefits by the department which the adoptive parents consider adverse to the child is reviewable according to department regulations.” (currently codified at S.C. Code Ann. § 63-9-1790 (2010))); S.C. Code Ann. Regs. 114-100 to -190 (2012 & Supp. 2019) (generally discussing the DSS decision-making process); *id.* at 114-110 (“allow[ing] an individual to contest an adverse action taken by [DSS] and to have his or her objections to the adverse action heard by an impartial hearing officer or committee”).

Hensley v. South Carolina Department of Social Services, 429 S.C. 144, 838 S.E.2d 510, 515 (2020).

As the Court of Appeals has explained, “[t]he failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction.” *Holman v. South Carolina Education Lottery Commission*, 441 S.C. 18, 891 S.E.2d 701, 708 (Ct. App. 2023). “Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.” *Id.*

In *Holman*, *supra*, which was a class action lawsuit brought against the South Carolina Education Lottery Commission, the Court of Appeals affirmed the trial court's grant of a motion to dismiss based on the plaintiffs' failure to exhaust administrative remedies. The Court of Appeals recognized that the South Carolina Education Lottery Act as well as regulations promulgated by the Commission provided administrative remedies which the plaintiffs did not

pursue prior to bringing suit.

The same is true in the case at bar. As the Supreme Court has already recognized, the Children's Code includes Section 20-7-1960 (currently codified as Section 63-9-1790) which provides: "A decision concerning supplemental benefits by the department which the adoptive parents consider adverse to the child is reviewable according to department regulations." S.C. Code Ann. § 20-7-1790 (Supp. 2002). The DSS regulations include a section captioned "Supplemental Benefits Appeals," which state:

1. The family has the right to appeal any decision made by the Department on Supplemental Benefits both before and after finalization of the adoption, according to the Department's approved fair hearing appeal process.
2. The family will be informed of its right to a judicial review in accordance with the Administrative Procedures Act.

See, S.C. Reg. § 114-4380(G). In addition, the Adoption Subsidy Agreement provides notice to the adoptive parents of their appeal rights as follows: "Adoptive parent(s) may appeal DSS's decision to reduce, change or terminate any adoption subsidy in accordance with rules and procedures of the state's fair hearing and appeal process. Information may be requested from DSS." Consequently, the BLH's adoptive parents were advised by law and in the Adoption Subsidy Agreement of their appeal rights with respect to any decision by DSS to reduce, change, or terminate the adoption subsidy. The same is also true for the adoptive parents for the other class members. Yet, by the Plaintiff's own admission, her adoptive parents did not pursue their appeal rights. *See*, Plaintiff's Responses to First Set of Interrogatories, dated September 8, 2020, #14 ("The Plaintiff BLH's parents did not elect to appeal to DSS because they were unsure of the process and believed that legal representation would be more expensive than the hoped for result"). By failing to pursue their appeal rights, the Plaintiff cannot demonstrate that the

administrative remedies have been exhausted, and on that basis, as in *Holman*, the Plaintiff's Complaint should be dismissed.

CONCLUSION

Based on the foregoing discussion and analysis, the Defendant South Carolina Department of Social Services respectfully requests that the Court grant its motion for summary judgment and dismiss the Plaintiff's Complaint with prejudice.

Respectfully submitted,

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Department of Social Services*

April 1, 2024

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

BLH by parents/general guardians	)	
Kenneth and Angela Hensley, and on	)	Civil Action No. 2013-CP-42-1569
behalf of all others similarly situated,	)	

Plaintiff,	)	

v.	)	

**NOTICE OF FILING OF
SUPPLEMENTAL CITATION**

South Carolina Department	)	
of Social Services,	)	

Defendant.	)	

The Defendant South Carolina Department of Social Services (“DSS”) hereby gives notice of filing of the attached supplemental citation of the case of *Patterson v. South Carolina Department of Employment and Workforce*, Op. No. 6055 (S.C. Ct. App. filed April 3, 2024), which is submitted in support of the Defendant DSS’s pending Motion for Summary Judgment.

In its motion, the Defendant DSS argues that it is entitled to summary judgment because the Plaintiff BLH’s adoptive parents did not exhaust available administrative remedies and instead simply filed suit first for themselves and then in BLH’s name. Like the case at bar, *Patterson v. South Carolina Department of Employment and Workforce* is a class action lawsuit where the plaintiff and the class members sought as monetary relief the payment of “all benefits denied as a result of [DEW’s] policy of online applications.” (Slip Op. at 4-5). The Court of Appeals addresses in detail the law governing the exhaustion of administrative remedies. Ultimately, the Court of Appeals reversed and ruled that “the circuit court erred by finding Claimants were not required to exhaust their administrative remedies.” (Slip Op. at 13).

Respectfully submitted,

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Department of Social Services*

April 3, 2024

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Lorenda Robinson, Elaine Nix, Archie Patterson and
Tami Bollerman, Plaintiffs,

Of Whom Archie Patterson and Tami Bollerman are the
Respondents,

v.

South Carolina Department of Employment and
Workforce, Appellant.

Appellate Case No. 2019-000599

Appeal From Barnwell County
Doyet A. Early, III, Circuit Court Judge,
Clifton Newman, Circuit Court Judge

Opinion No. 6055
Heard August 17, 2023 – Filed April 3, 2024

REVERSED

Robert E. Tyson, Jr., Vordman Carlisle Traywick, III,
and Robert E. Stepp, all of Robinson Gray Stepp &
Laffitte, LLC, all of Columbia; and Kenneth P.
Woodington and William H. Davidson, II, both of
Davidson, Wren & DeMasters, of Columbia, all for
Appellant.

C. Bradley Hutto, of Williams & Williams, of
Orangeburg; Daniel Webster Williams, of Bedingfield &
Williams, of Barnwell; Susan B. Berkowitz and Adam

Protheroe, both of South Carolina Appleseed Legal Justice Center, of Columbia; and Alexander D. Pattera, of The Pattera Law Firm, LLC, of Greenville, all for Respondents.

Kenneth M. Moffitt, Jessica J. Godwin, and John Potter Hazzard, V, all of Columbia, for Amicus Curiae Thomas Alexander, President of the South Carolina Senate.

Patrick Graham Dennis, Haley Mottel Symmes, and Steven Robert Davidson, all of Columbia, for Amicus Curiae G. Murrell Smith, Speaker of the South Carolina House of Representatives.

VINSON, J.: In this declaratory judgment action, the South Carolina Department of Employment and Workforce (DEW) appeals the circuit court's orders¹ granting judgment in favor of named plaintiffs Archie Patterson and Tammie Bollerman (collectively, Claimants), arguing the circuit court erred by (1) certifying a class, and in the alternative, failing to require a claims-made process, (2) declaring DEW was required to promulgate regulations implementing its online work search requirement, and (3) concluding Claimants were not required to exhaust their administrative remedies prior to bringing this action. We reverse.

FACTS AND PROCEDURAL HISTORY

In the 2011–2012 Appropriations Act, the General Assembly enacted the following budget proviso pertaining to DEW:

(DEW: SUTA Contingency Assessment Funds) Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages

¹ DEW appeals seven orders: the (1) May 5, 2016 order certifying the class; (2) April 27, 2017 order finding Claimants had standing; (3) October 30, 2017 order denying DEW's motion to reconsider the April 27, 2017 and May 5, 2016 orders; (4) February 15, 2019 order ruling in favor of Claimants on the merits; (5) March 11, 2019 order denying DEW's motion to reconsider the merits order; (6) March 21, 2019 order granting Claimants' motion to amend the merits order; and (7) July 22, 2020 order denying DEW's motion to reconsider the March 21, 2019 order.

paid by employers shall be spent on enforcement of [s]ection 41-35-110(3) and [s]ection 41-35-120(5) of the [South Carolina Code (2021)]², via Eligibility Reviews, Random Verification of Job Contacts and Wage Cross Matches during those weeks covered by the South Carolina State Unemployment Tax Authority (SUTA), and to ensure seated meetings with Unemployment Insurance claimants *and requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified.* The agency must also inform claimants in advance that Eligibility Reviews and Random Verification of Job Contacts will be used by the Department to verify compliance with laws administered by the agency.

Act No. 288, 2012 S.C. Acts 448, § 67.7 (emphasis added). The General Assembly passed identical provisos in 2013, 2014, and 2015. *See* Act. No. 101, 2013 S.C. Acts 475-76, § 83.6; Act No. 286, 2014 S.C. Acts 503, § 83.6; Act No. 91, 2015 S.C. Acts 484-85, § 83.5. The proviso remained in effect until July 1, 2016.³ In August 2012, after providing advance notice to unemployed insurance benefits claimants, DEW began requiring these individuals to conduct at least one job search per week using SCWOS in accordance with the directive contained in the proviso. DEW distributed a letter titled "Procedure Transmittal Letter Number 1267-3" to all department heads, area directors, claim supervisors, and staff managers on August 10, 2012. The letter explained that beginning with the claim week ending August 11, 2012, any claimants who failed to comply with the online job search requirement for a given week would be notified their benefits were stopped because they failed to make a job search through SCWOS for the specified claim week. The letter further provided,

² *See* § 41-35-110(3) (providing "[a]n unemployed insured worker is eligible to receive benefits with respect to a week only if [DEW] finds he: . . . is able to work and is available for work . . . and . . . is himself actively seeking work"); § 41-35-120(5) (providing, in pertinent part, "[a]n insured worker is ineligible for benefits . . . [i]f [DEW] finds he has failed, without good cause: . . . to apply for available suitable work, when so directed by the employment office or [DEW]").

³ In 2017, DEW promulgated a regulation addressing this requirement. *See* S.C. Code Ann. Regs. 47-104 (Supp. 2023).

Warnings are NOT acceptable for SCWOS work searches. Claimants will not be given a warning if they fail to meet this requirement. There may be a few extraordinary circumstances, such as a court order prohibiting a claimant from using the Internet, or for a claimant whose first language is not English and (s)he cannot read the instructions on SCWOS, where a claimant may be justified in failing to make job searches through SCWOS.

Prior to DEW's implementation of the online work search requirement, individuals claiming unemployment benefits received weekly benefits automatically through DEW's automated system. In other words, benefits were paid unless DEW staff took action to stop the payment. Although DEW required claimants to maintain a paper form, "Form UCB-303," documenting contacts with potential employers each week, verifications of this information did not occur on a weekly basis but occurred on an unspecified, periodic basis. Once the online work search requirement took effect, however, DEW's system automatically stopped benefits payments when it detected a claimant failed to conduct the online search. These claimants then received a written notice explaining their benefits had been stopped and instructing them to report to their local "SC Works Center" immediately if they "would like to receive future benefits." It also instructed them to bring the written notice and their Form UCB-303. The instruction telling them to report to a local employment center was the claimant's opportunity to provide DEW with a statement regarding their failure to perform the online search and to seek payment of the benefits for which they had been deemed ineligible; however, the written notice did not explain this. Numerous individuals failed to comply with this online work search requirement and were denied their weekly benefits as a result.

On February 14, 2013, Claimants filed this declaratory judgment action as a putative class action.⁴ Claimants moved to certify the class in May 2013. In their amended complaint filed February 17, 2015, Claimants⁵ requested the circuit court (1) certify the class, (2) declare DEW was required to promulgate regulations implementing its online work search requirement, (3) temporarily enjoin DEW from enforcing its policy requiring an online job application, and (4) require DEW

⁴ Circuit Court Judge Doyet A. Early, III, designated the case as complex and appointed himself to hear all matters in the case until its conclusion.

⁵ Although additional individuals were initially named as plaintiffs, ultimately, only Claimants proceeded as class representatives.

to account for and pay all benefits denied as a result of its policy of online applications.

Claimants asserted in their amended complaint that they were wrongfully denied benefits for failing to conduct an online search through SCWOS because DEW implemented this policy without first promulgating regulations. They asserted sections 41-27-510⁶ and 41-35-610⁷ of the South Carolina Code (2021) and the Administrative Procedures Act, sections 1-23-10 to -680 of the South Carolina Code (2005 & Supp. 2023), required DEW to promulgate regulations before implementing the online work search requirement. Alternatively, they alleged this new policy constituted a binding norm that must be implemented through regulation.

In its amended answer, DEW asserted Claimants were not entitled to relief because they failed to exhaust their administrative remedies and it was not required to promulgate regulations because the online work search requirement was authorized by the General Assembly through the proviso.

DEW filed its first motion for summary judgment in March 2014, which the circuit court denied. In its second motion for summary judgment filed in April 2015, DEW argued that as to Claimants' amended complaint, the directives contained in the proviso authorized it to implement the online work search requirement and it was therefore not required to promulgate regulations to implement it. DEW additionally asserted Claimants were not entitled to relief because they lacked standing and failed to exhaust their administrative remedies. Claimants filed a cross-motion for summary judgment. The circuit court heard both motions in January 2016. In its May 5, 2016 order, the circuit court granted Claimants' earlier motion to certify the class, concluding Claimants met the five prerequisites for class certification pursuant to Rule 23, SCRCF, and denied the parties' cross-motions for summary judgment.

DEW filed a Rule 59(e), SCRCF, motion to alter or amend the class certification order, arguing the circuit court failed to address the issue of standing and adequate

⁶ See § 41-27-510 ("[DEW] must promulgate regulations applicable to unemployed individuals, making distinctions in the procedures regarding total unemployment, part-total unemployment, partial unemployment of the individuals attached to their regular jobs and other forms of short-time work as [DEW] considers necessary.").

⁷ See § 41-35-610 ("[A] claim for benefits must be made pursuant to regulations [DEW] promulgates.").

representation in its order. The parties filed a consent motion seeking an evidentiary hearing on the issue of standing of the individual plaintiffs and to hold DEW's 59(e) motion in abeyance. The circuit court held hearings on the standing issue on November 2, 2016, and January 11, 2017. Claimants both testified.

Bollerman testified that when she failed to receive her benefits check, she contacted DEW. She explained to a DEW staff member⁸ that she conducted at least four job searches, including the online job search. Bollerman noted she completed a Form UCB-303 but was not asked to provide it. She testified she told the staff member she went through SCWOS but might have inadvertently navigated away from the site when she attempted to apply for a position. Bollerman stated she also explained to the staff member she conducted some of her searches on Saturday and was told DEW was "having problems" with the system and it "was[no]t counting Saturday searches." Bollerman acknowledged the determination she received from DEW informed her the decision would be final unless she filed an appeal within ten days. She stated she did not file an appeal of that determination.

Patterson testified that when he did not receive his benefits check for the week ending August 25, 2012, he visited the unemployment compensation office. He stated he could not remember if he was told the reason he did not receive a check was because he failed to complete one of his job searches online. Patterson indicated he *did* complete an online job search for that week but when he did not receive a check he "assum[ed] that [DEW] did[no]t get [his] paperwork." He explained that when he reported to the unemployment compensation office, the staff member "said just put anything down, so [he] said [he] forgot" to do the search. He agreed he did not appeal.

The circuit court issued an order on April 27, 2017, finding Claimants had standing to bring the action and represent the class. The circuit court determined Claimants each had individual standing and rejected DEW's argument that they lacked standing because they failed to exhaust their administrative remedies when they failed to appeal DEW's denial of benefits. The circuit court reasoned "any appeal concerning whether [they] were required to complete an online job search would be futile" because Romi Robinson, chief administrative hearing officer of DEW,

⁸ A DEW employee, Kevin Cummings, testified during the November 2016 hearing on standing that Bollerman gave her statement to a "factfinder" who then provided her statement to a "claims adjudicator," and the claims adjudicator determined Bollerman was not eligible for benefits for that week.

testified a hearing officer had no authority to rule on the issue of whether DEW was required to promulgate a regulation regarding the online searches. The circuit court further reasoned exhaustion was not required because Claimants alleged DEW acted outside of its authority. DEW filed a Rule 59(e), SCRCF, motion to reconsider the April 27, 2017 order. On October 30, 2017, the circuit court denied DEW's motions to reconsider its May 5, 2016 class certification order and April 27, 2017 order finding Claimants had standing.⁹

The circuit court held a merits hearing on October 31, 2018. Prior to the hearing, the parties stipulated either party could submit affidavits, deposition testimony, and testimony from previous court hearings as evidence; no witnesses testified during the merits hearing.¹⁰ The evidence included affidavits, deposition testimony, and hearing testimony of several DEW employees, including Cummings and Robinson. In addition, Claimants included a Legislative Audit Council review that recommended DEW promulgate regulations implementing the online search requirement. On February 15, 2019, the circuit court issued an order ruling in favor of Claimants. The circuit court stated DEW failed to promulgate regulations regarding the online work search requirement and was therefore without authority to implement it. The circuit court concluded the budget proviso simply directed the expenditure of monies and did not suspend any other statutes governing DEW or relieve DEW of its statutory duty to promulgate regulations to implement the online work search requirement. The circuit court again determined Claimants met their burden of establishing standing. The circuit court next concluded Claimants' failure to exhaust their administrative remedies was excused because (1) pursuing such remedies would have been futile and (2) DEW was acting outside of its authority when it implemented the online work search requirement without first promulgating regulations. Additionally, the circuit court rejected DEW's argument Claimants were time barred from bringing this action under section 41-35-660 of the South Carolina Code (2021)¹¹ because this was not an appeal from an initial

⁹ DEW appealed the circuit court's May 6, 2016 and April 27, 2017 orders. This court dismissed DEW's appeal as not immediately appealable, and our supreme court denied DEW's petition for a writ of certiorari.

¹⁰ In addition, Claimants submitted a proposed class notice to the circuit court. By consent order, the parties agreed to withhold sending notice to class members until a final resolution of this case.

¹¹ See § 41-35-660 (providing a claimant may "file an appeal from an initial determination, redetermination, or subsequent determination *not later than ten days* after the determination was mailed to his last known address" (emphasis added)).

determination, redetermination, or subsequent determination. Finally, the circuit court reaffirmed its previous order certifying this case as a class action. The circuit court additionally included a requirement that the class proceed on a "claims-made" basis. The circuit court required class members must "still show that they satisfied the requirements to receive benefits for the week or weeks in question[] once the disqualification for failure to make an online work search is removed." Claimants filed a 59(e), SCRCF, motion, requesting that the circuit court remove the requirement that the class proceed on a claims-made basis. The circuit court granted the motion and issued an amended order on March 21, 2019, concluding a claims-made process was unnecessary.

DEW filed Rule 59(e), SCRCF, motions as to both the February 15, 2019 order and the March 21, 2019 order. On July 22, 2020, the circuit court¹² granted DEW's 59(e) motion only as to the parties' stipulation to modify the language in the March order and the corresponding language in the February order regarding notice to the class. This language was modified to provide that persons who had otherwise exhausted the full amount of unemployment benefits they were entitled to receive during any pertinent period were excluded from the class. This appeal followed.

STANDARD OF REVIEW

"Whether administrative remedies must be exhausted is a matter within the [circuit court]'s sound discretion and [its] decision will not be disturbed on appeal absent an abuse thereof." *Cox v. S.C. Educ. Lottery Comm'n*, 441 S.C. 209, 217, 893 S.E.2d 342, 346 (Ct. App. 2023) (alterations in original) (quoting *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994)). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

LAW AND ANALYSIS

DEW argues Claimants were statutorily required to exhaust their administrative remedies and the futility exception did not apply. DEW asserts the exclusive method for challenging its determinations regarding unemployment benefits and review of such decisions is provided by statute. DEW further contends that DEW,

¹² The Chief Judge for Administrative Purposes, Circuit Court Judge Clifton Newman, heard this motion because Judge Early retired after entering the prior orders at issue.

the Appellate Panel, and the Administrative Law Court (ALC) all had authority to address the issue of whether DEW was required to promulgate a regulation regarding the online work search requirement. We agree.

"Relief is not generally available to one who has not exhausted administrative remedies." *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 821 (1995). "Declaratory relief will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances." *Id.* "Where an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts." *Hyde*, 314 S.C. at 208, 442 S.E.2d at 583.

"[T]he doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Cox*, 441 S.C. at 218, 893 S.E.2d at 347 (alteration in original) (quoting *Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trs.*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012)).

"The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule." *Hyde*, 314 S.C. at 208, 442 S.E.2d at 583. "A [circuit court] must have a sound basis for excusing the failure to exhaust administrative relief." *Id.* at 209, 442 S.E.2d at 583.

There are two types of exhaustion of remedies: judicially imposed and statutorily mandated. The general rule is that while there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few. When the exhaustion of remedies is statutorily mandated . . . legislative intent prevails.

Ward v. State, 343 S.C. 14, 18-19, 538 S.E.2d 245, 247 (2000) (citations omitted) (footnotes omitted). "[An] exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act." *Id.* at 19, 538 S.E.2d at 247. "Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" *Cox*, 441 S.C. at 221, 893 S.E.2d at 348 (quoting *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010)); see also *Smith v. S.C. Ret. Sys.*, 336 S.C. 505,

526-27, 520 S.E.2d 339, 350-51 (Ct. App. 1999) (holding a party's belief "even with good reason[] that [the agency would] reject her claim[] d[id] not establish futility as a basis for excusing exhaustion in the absence of a definitive statement by the agency administrator").

"A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Charleston Trident Home Builders, Inc. v. Town Council of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006); *id.* (holding the plaintiff was not required to exhaust administrative remedies when it challenged the validity of an ordinance itself). "[A]s a general rule, if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling." *Ward*, 343 S.C. at 18, 538 S.E.2d at 247; *id.* at 19-20, 538 S.E.2d at 247-48 (holding the circuit court erred in dismissing a declaratory judgment action for failure to exhaust administrative remedies when the action challenged the constitutionality of a statute, which was an issue the ALC could not decide).

Section 41-35-690 of the South Carolina Code (2021) pertaining to DEW provides:

The procedure provided in this chapter for appeals from a determination or redetermination to the appeal tribunal and for appeals from the tribunal, first to the [DEW] Appellate Panel, as established by [s]ection 41-29-300[of the South Carolina Code (2021)], and afterward to the [ALC], pursuant to [s]ection 41-29-300(C)(1), *is the sole and exclusive appeal procedure.*

(emphasis added). Section 41-35-740 of the South Carolina Code (2021) provides "judicial review is permitted only after a party claiming to be aggrieved by [DEW's decision] has exhausted his administrative remedies."

We hold the circuit court erred by finding Claimants were excused from their failure to exhaust administrative relief. *See Ward*, 343 S.C. at 18, 538 S.E.2d at 247 ("[W]hile there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few."). First, the record does not support a finding that DEW took a hard and fast position that made an adverse ruling a certainty. Rather, according to Cummings's March 2014 affidavit, "Approximately 1,300 appeals related to the online job search requirement were taken between August 2012 and early February

2013. In those appeals, there were 214 reversals of disqualifications." This equals about a 16 percent success rate on appeal. Further, according to Robinson, of the total 2,613 appeals pertaining to a claimant's failure to satisfy the online job search requirement that were heard and decided on the merits, 728 (or 28 percent) were reversed. Although the rate of reversals was not high, it was not so low as to support a finding that DEW took a hard and fast position that made an adverse ruling a certainty. *See Smith*, 336 S.C. at 526-27, 520 S.E.2d at 350-51 (holding a party's belief "even with good reason[] that [the agency would] reject her claim[] d[id] not establish futility as a basis for excusing exhaustion in the absence of a definitive statement by the agency administrator"). Thus, we conclude the record does not support the circuit court's ruling that Claimants' pursuit of administrative relief would have been futile.

Second, we hold the circuit court erred in concluding exhaustion was not required because DEW acted outside of its authority. In reaching this conclusion, the circuit court cited to three cases: *Responsible Economic Development v. South Carolina Department of Health & Environmental Control*, 371 S.C. 547, 641 S.E.2d 425 (2007); *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010); and *Ex parte Allstate Insurance Co.*, 248 S.C. 550, 151 S.E.2d 849 (1966). We hold these authorities do not support its conclusion that Claimants should be excused from their failure to exhaust their administrative remedies.

In *Responsible Economic Development*, our supreme court did not address the issue of exhaustion of administrative remedies. *See* 371 S.C. at 550-53, 641 S.E.2d at 427-28. In fact, in that case, the parties did go through the administrative process by bringing a contested case before the ALC, appealing that decision to the board, and further appealing that decision to the circuit court before appealing to the court of appeals. *Id.* at 549, 641 S.E.2d at 426. Although our supreme court stated that "[a]s a creature of statutes, regulatory bodies . . . have only the authority granted them by the legislature" and that "[a]ny action taken by [a regulatory body] outside of its statutory and regulatory authority is null and void," it did not specifically address whether the exhaustion requirement would apply when a case involves a challenge to agency authority. *Id.* at 553, 641 S.E.2d at 428 (citations omitted). Thus, we conclude *Responsible Economic Development* does not support the circuit court's determination that Claimants were not required to exhaust their administrative remedies because they alleged DEW acted outside of its authority.

Next, in *Brown*, this court noted "[an] exception to the exhaustion requirement is recognized when an agency has acted outside of its authority." 389 S.C. at 55, 697

S.E.2d at 611-12 (citing *Responsible Econ. Dev.*, 371 S.C. at 553, 641 S.E.2d at 428). However, in *Brown*, this court concluded the appellant was entitled to appeal directly to the circuit court rather than participating in a hearing before the board of trustees because the board had already reached a final determination not to renew her teaching contract and therefore her participation in a hearing after the fact would have been a futile act. *Id.* at 55, 697 S.E.2d at 612. Thus, the court applied the futility exception and did not directly consider whether the appellant was excused from exhausting her administrative remedies based on the board's acting outside of its authority. Thus, we conclude *Brown* likewise does not support the circuit court's conclusion on this issue.

Finally, in *Ex Parte Allstate*, our supreme court determined the requirement of exhaustion of administrative remedies was excused because the issue was solely one of law as to the statutory authority or jurisdiction of the Chief Insurance Commissioner. 248 S.C. at 567-68, 151 S.E.2d at 855. The court concluded that "[u]nder the undisputed facts, the Commissioner was obviously without [the] authority" to conduct an "investigation into purely political activities of the [insurance] companies and their agents." *Id.* at 567, 151 S.E.2d at 855. However, that case did not involve a statutory provision requiring exhaustion or stating that the administrative remedy was the sole and exclusive appeal procedure as provided in section 41-35-690, which applies in this case. *See id.* at 567-68, 151 S.E.2d at 854-55. Furthermore, the Commissioner made no administrative decision or order in that case and therefore there was no administrative decision that appellants could have appealed. *See id.* at 562, 151 S.E.2d at 852. For the foregoing reasons, we conclude *Ex Parte Allstate* is distinguishable and does not support the circuit court's conclusion on this issue.

Here, Claimants have not challenged the constitutionality of a statute or regulation. Rather, they challenged DEW's authority to enforce the online work search requirement based on DEW's failure to promulgate regulations pertaining to such requirement. As relief, Claimants seek to receive the amount in benefits to which they would have been entitled had DEW not determined they failed to comply with the online work search requirement. Although Robinson testified DEW's appeals process would not have addressed the issue of whether DEW was required to promulgate regulations prior to implementing its online work search requirement, we hold this did not excuse Claimants' failure to pursue administrative remedies. In both Claimants' cases, had they appealed the denial of benefits, DEW might have excused their failures to comply with the requirement and issued their benefits for the applicable week, which would have dispensed with their claims and would not have required a resolution of the question of DEW's authority.

Further, notwithstanding Robinson's testimony, nothing prevented the Appeal Tribunal or Appellate Panel from deciding the issue of whether DEW was required to promulgate regulations to implement the online work search requirement. *See* S.C. Code Ann. Regs. 47-51(C)(1) (Supp. 2023) ("All Appeal Tribunal hearings shall be de novo in nature and conducted in such manner as to ascertain the substantial rights of the parties."); S.C. Code Ann. Regs. 47-51(E)(1)(a) (Supp. 2023) ("In addition to the issues raised by the appealed determination the Appeal Tribunal may consider all issues affecting claimant's rights to benefits from the beginning of the period covered by the determination to the date of the hearing."). Moreover, if the Appeal Tribunal and Appellate Panel ruled against Claimants, the ALC could have ruled on the issue upon review of such determinations. *See* § 1-23-380(5)(a)-(c) (providing a court reviewing a final agency decision "may reverse or modify the decision [when] . . . the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; [or] (c) made upon unlawful procedure"). Thus, we hold the circuit court erred by concluding Claimants were excused from pursuing administrative remedies based on their claim that DEW lacked authority to implement the online work search requirement.

For the foregoing reasons, we hold the circuit court erred by finding Claimants were not required to exhaust their administrative remedies. Because our determination as to this issue is dispositive of the remaining issues on appeal, we decline to address those issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address an appellant's remaining issues when the determination of a prior issue was dispositive). Accordingly, the circuit court's order granting judgment in favor of Claimants is

REVERSED.

KONDUROS, J., and LOCKEMY, A.J., concur.

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,	)	
	)	<u>PLAINTIFFS' NOTICE OF MOTION FOR</u>
vs.	)	<u>SUMMARY JUDGMENT AND MOTION</u>
	)	<u>AND MEMORANDUM IN OPPOSITION</u>
South Carolina Department of Social	)	<u>TO DEFENDANT'S MOTION FOR</u>
Services	)	<u>SUMMARY JUDGMENT</u>
	)	
Defendant.	)	
	)	

Plaintiffs, Kenneth and Angela Hensley, on behalf of their minor child BLH, and All Others Similarly Situated, (hereinafter "Plaintiffs" or "BLH") present the following memorandum in opposition to South Carolina Department of Social Services', (hereinafter "Defendant" or "DSS") Motion for Summary Judgment.

Additionally, the Plaintiffs, will move before the Honorable J. Mark Hayes, II of the Seventh Judicial Circuit at the Spartanburg County Courthouse, Spartanburg, South Carolina, at such time and place as may be set by the Court, for an Order, pursuant to Rule 56, SCRC, granting partial summary judgment to the Plaintiffs. Incorporated herewith is Plaintiffs' Motion and Memorandum in Support of the Plaintiffs' Motion for Partial Summary Judgment as to the undisputed facts in the above captioned matter. Plaintiffs did not previously file a Motion for Summary Judgment, due to the March 8, 2024 email to the Court regarding the inquiry into Plaintiffs' Class Notice issue resolution, prior to a dispositive ruling on the legal merits of the case. As such, Plaintiffs respond to Defendant's Motion for Summary Judgment out of precaution, and likewise, file their Motion for Summary Judgment, as Plaintiffs and Defendant agree, there is no dispute as to the material facts in the case, and this is solely a

legal matter for the Court to resolve. Likewise, Plaintiffs move for Summary Judgment that (1) Plaintiffs are not collaterally estopped from pursuing the action; (2) Plaintiffs have standing to bring the action; (3) that the correct measure of damages is \$20.00 per month as opposed to each adoptive child being required to show how he or she was harmed by the reduction in the subsidy payment; and (4) Plaintiffs are not required to exhaust their administrative remedies prior to instituting this action. As outlined below, the facts in this case are material facts to aid the trier of fact and are not disputed in the context of this action.

UNDISPUTED FACTS

It is undisputed that DSS reduced the foster care payments by twenty dollars at the same time DSS reduced the adoption assistance subsidy for the same amount... It was only in 2002, when South Carolina decreased by twenty dollars all foster care maintenance payments, that the state also decreased BLH's adoption assistance subsidy by twenty dollars. The State's failure to do so would have violated state and federal law. (*Hensley v. Koller*, 722 F.3d 177, 183 (4th Cir. 2013). This cut was reversed in 2004 and the twenty dollars (\$20.00) per month was restored to the South Carolina Foster Care Subsidies. The Defendant later reinstated the foster care subsidy but not the adoption subsidy, causing BLH and approximately 4,100 other special needs children in South Carolina to be underfunded. Further, Plaintiffs agree with the Defendant's Undisputed Statement of Facts in its Memorandum in Support. (Def. Mem. Pg. 3, filed April 1, 2024).

To put these few facts in a more specific context, in June 2002, the then-Director of DSS issued across-the-board cuts in the adoption subsidies that DSS had contracted to pay some 4,100 families, including BLH's adoptive parents. In 2004, the DSS rescinded a similar cut in subsidies for children in foster care yet has *never restored* the cut in benefits for adoptees

whose adoptive parents had earlier accepted all the legal responsibilities of parenthood. BLH, in this lawsuit, alleges a *single count* against DSS for a breach of contract.

I. Summary Judgment Standard

Rule 56(c) of the *South Carolina Rules of Civil Procedure* states a motion for summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). *Catawba Indian Nation v. State*, 407 S.C. 526, 535–36, 756 S.E.2d 900, 905–06 (2014).

II. The Plaintiff is Not Collaterally Estopped from Litigating.

Defendant seems to allege that Plaintiff is taking a position inconsistent with the Fourth Circuit's ruling. Specifically, Defendant argues that the Plaintiffs are ignoring “the requirement of “parental concurrence” in the Adoption Subsidy Agreement, which the Plaintiff contends was breached, *is inapplicable to the 2002* decrease of \$20 per month because federal law required the subsidy to be reduced so that it did not violate federal law and exceed the foster care maintenance rate.” (emphasis added) (Def. Mem. Pg. 3). Of course, this conundrum, painted by the Defendant, omits further reading from the Order (directed at former Defendants):

For, under § 673 (a)(3), a failure to reduce BLH’s adoption assistance payment would have resulted in a payment “exceed[ing] the foster care maintenance payment” she would have received had she remained in foster care. For these reasons, the Hensleys cannot establish *that the Directors* violated the Hensleys’ right under the Act and therefore *the Directors* are entitled to qualified immunity.... For the reasons stated, we reverse the judgment of the district court and remand the case for entry of a judgment consistent with this opinion. *Hensley v. Koller*, 722 F.3d 177, 183 (4th Cir. 2013).

Collateral Estoppel should not be raised as DSS is misguided as to the parties or subject of the Court's 2013 Order. The (1) subject parties in the first action, cited by DSS, are not the same target(s), and (2) thus the law was applied differently in the previous summary judgment regarding the 42 U.S.C. § 1983 cause of action.

“Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action.” *S.C. Prop. & Cas. Ins. Guaranty Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). Stated another way, “[t]he party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct.App.2009).

The doctrine of collateral estoppel is also known as “issue preclusion.” *In re Crews*, 389 S.C. 322, 698 S.E.2d 785 (2010); *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008); *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 481 S.E.2d 706 (1997). Issue preclusion bars the relitigation of only the particular issues that were actually litigated and decided in the prior suit. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997). As a result, the doctrine of collateral estoppel is inapplicable when the argument turns on an assertion that the other party *should* have litigated a particular issue in the prior action. *See id.* at 216, 493 S.E.2d at 835. *Catawba Indian Nation v. State*, 407 S.C. 526, 536–37, 756 S.E.2d 900, 906 (2014).

Respectfully, the action pending before the Court involves (1) issues; (2) against a different defendant, (3) different cause of action; and (4) contains specific facts constituting a [state law] breach of contract claim. In fact, there are substantially more differences than similarities. Further, the issue before the Court is not the 2002 across-the-board budget cut, it

is 2004 issue when DSS *rescinded* the cut for children in foster care yet has *never restored* the cut in benefits for adoptees.

Not only are the issues distinct, but the argument that Plaintiff has been collaterally estopped has also already been decided. Defense counsel specifically represented he would not seek to bar this action on the basis of collateral estoppel as no basis for collateral estoppel would be present on a dismissal without prejudice.

He said specifically:

57

11 BY FEMALE SPEAKER:

12 Can you make a representation that you're not

13 going to bring a 1983 action in state court?

14 BY MR. LANGLEY:

15 Yes, ma'am.

16 BY FEMALE SPEAKER:

17 Okay.

18 BY MR. LANGLEY:

19 And stipulate that there's not a bar to the

20 state court contract claim in state court?

21 BY FEMALE SPEAKER:

22 Yeah.

23 BY MR. LANGLEY:

24 Yes, ma'am, Your Honor.

25 BY FEMALE SPEAKER:

58

1 Well, we're not deciding whether there's a bar

2 or not. We're just dismissing without prejudice.

3 **BY MR. LANGLEY:**

4 **Well, on the grounds of res judicata or**

5 **collateral estoppel by virtue of some dismissal with**

6 **prejudice ---**

7 **BY MR. LINDEMANN:**

8 **If it's without prejudice, there would be no**

9 **such argument.**

10 **BY FEMALE SPEAKER:**

11 Right.

12 **BY MR. LINDEMANN:**

13 And that wasn't my intent to try to make that

14 argument, I can represent to the Court.

15 **BY FEMALE SPEAKER:**

16 Okay. Thank you very much.

17 **BY MR. LINDEMANN:**

18 Thank you.¹

Defendant's motion seeks precisely the relief its counsel represented to three federal appellate judges he would not seek.

As cited above, collateral estoppel is also inapplicable under these circumstances because the issue in the present lawsuit of state law breach of contract was: (1) not actually litigated in the prior action; (2) not directly determined in the prior action; and (3) not necessary

¹ Transcript of Oral Argument, attached as Exhibit A (emphasis added).

to support the prior judgment.

As Judge Motz (the “female speaker” noted above) indicated, the 4th Circuit did not decide the state court breach of contract issues or any issue regarding the state law claims. The only issue decided by the 4th Circuit was the applicability of a *federal provision*. The Plaintiff alleges Defendant breached its agreement with the Plaintiff’s to provide funds pursuant to South Carolina contract law not a violation of federal law. Thus, the issue was not litigated or directly determined previously.

Contrary to the assertions of the Defendant, the Fourth Circuit held that the reinstatement of the foster care rate did not constitute a “readjustment” of the adoption rate under federal law. The court, in fact, gave tacit approval to such a claim as noted in the discussion cited above by Judge Motz. The court certainly could have held a state law claim for breach of contract was preempted but it did not; leaving open the right for Plaintiffs to bring this action. The rationale for that decision is because after the 2004 foster care reinstatement the federal justification for the adoption subsidy cut was no longer applicable. Thus, after 2004 because the foster care rate cut was removed the adoption rate cut had to be reinstated to meet the terms of the contract. This is the reason the class definition includes only those subsidies list after 2004 and does not seek recovery back to 2002.

a. Adoption Subsidy Agreement

Defendant’s Motion and Memorandum also attempts to insinuate a wholly distinct [prior] federal law claim is dispositive of the [existing] state law claim. Plaintiffs allege this breaches the agreement they have with Defendant. As stated, Defendant is attempting to conflate the earlier Fourth Circuit and District Court decision with the present action. These earlier actions arise from a 42 U.S.C. Section 1983 action against the individual employees of SCDSS. The individual Defendants moved for summary judgment on qualified immunity

grounds, and this was denied. The 4th Circuit Court of Appeals reversed this denial of summary judgment but dismissed without prejudice so there would be no basis for collateral estoppel or res judicata. On April 1, 2013, Plaintiffs filed a breach of contract claim against DSS, which was not a defendant in the federal case. The claims were based on state law only and were not filed prior to any adjudication on the federal claims. The remaining issue before the fourth circuit was only the claim under Section 673 (a)(3) of the Federal Adoption Assistance and Child Welfare Act (“AACWA”). On Jul 3, 2013, the Court issued an Order holding as a matter of law that Section 673 (a)(3) of the AACWA did give rise to a privately enforceable federal right. However, the Court granted Defendants qualified immunity on the basis of a limited federal exception in 673 (a)(3), requiring adoption assistance subsidies to be less than the foster care maintenance rates. Contrary to the assertions raised by the Defendant, the Fourth Circuit held that the reinstatement of the foster care rate did not constitute a “readjustment” of the adoption rate under federal law but did not address any element of the state law claim for breach of contract that was pending in state court. Furthermore, this action addresses the 2004 failure to readjust the foster care rate consistent with the rate increase to the adoption subsidy.

III. Plaintiffs Have Standing to Bring the Action Through the Third-Party Beneficiaries

Defendant next attempts to argue that BLH does not have standing to litigate the issue as the parents, Kenneth and Angela Hensley, were the contracting parties to the Adoptive Assistance Agreement instead of BLH.

The contract at issue states that it is for the purpose of “facilitating the legal adoption of BLH . . . and to aid the adoptive parents in providing proper care for this child.” (See Exhibit A). Thus, BLH is a direct intended third party beneficiary. As third-party beneficiaries, BLH and the putative class members have the right to enforce the terms of the contract. 30 S.C. Jur. Contracts § 68 (citing *Svenningsen v. Knight*, 286 S.C. 299, 333 S.E.2d 78 (Ct. App. 1985); see

also, *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n.*, 384 F.3d 157 (4th Cir. 2004) (finding that under South Carolina law, when contract is made for benefit of third person, that person may enforce contract if contracting parties intended to create direct benefit to such third person)). Further, *Fabian v. Lindsay*, 765 S.E.2d 132 (2014), involved an intended beneficiary of a trust that sued the settlor's attorney over a drafting error that thwarted the settlor's intention. 410 S.C. at 478, 765 S.E.2d at 134. Our supreme court observed a client intends for an estate plan to follow his or her wishes and that "[t]he focus of a will or estate document is, inherently, on third-party beneficiaries." *Id.* at 491, 765 S.E.2d at 141. It also noted that when an estate planning document does not carry out the client's intent, the client typically may not sue for malpractice because the client is deceased. *Id.* at 490, 765 S.E.2d at 140.

There is no requirement under the law that third-party beneficiaries show that the contractually owed amount, if paid, would have actually 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 (according to the contract) flowed from the breach. Plaintiff has established a compelling 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 clearly is intended for the benefit of the child and the child has the right to enforce that contract because the benefit of the bargain was "to aid the adoptive parents in providing proper care for this child." (Contract).

Thus, Defendant's argument that BLH lacks standing should be rejected as well and summary judgment denied.

IV. Plaintiffs Are Not Required to Exhaust Administrative Remedies

DSS contends that the plaintiffs “failed to exhaust their administrative remedies as available under South Carolina statutory law and the regulations promulgated by DSS prior to filing this action.” (see DSS notice of motion and motion for summary judgment at paragraph 5). As to this issue, DSS and the plaintiff agree that there are undisputed facts. DSS and the plaintiff also agree that the administrative remedies issue is appropriate for summary judgment. “Whether administrative remedies must be exhausted is a matter within the [circuit court]’s sound discretion and [its] decision will not be disturbed on appeal absent an abuse thereof.” See *Holman v. S.C. Education Lottery Commission*, 441 S.C. 18, 29, 891 S.E.2d 701 (2023) (citing *Hyde v. S.C. Dep’t of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994)). “An abuse of discretion occurs where the [circuit court] was controlled by an error of law or where [the circuit court’s] order is based on factual conclusions that are without evidentiary support.” *Stanton v. Town of Pawleys Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (quoting *Coleman v. Dunlap*, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992)).

Where DSS and the plaintiff differ is the outcome of that analysis. DSS’ memorandum correctly notes that the South Carolina Supreme Court offered “some preliminary comments and supporting authorities” regarding the exhaustion of administrative remedies. The department is incorrect, however, that the Supreme Court implied the “plaintiff’s need to exhaust administrative remedies.” (See DSS memorandum, page 13). The block quote that appears at page 14 of the DSS memoranda is an accurate, yet incomplete, quote from the Supreme Court decision. What DSS fails to recite is the following language from the court:

If the requirement to exhaust administrative remedies does not apply to this case, then the court would have to go through no individualized process. If the requirement does apply, however, the circuit court may have to conduct individual trials or hearings. The circuit court did not address this question, and the question is not before the Court at this time. The answers to the question when nonetheless affect whether the case is appropriate for class treatment. *Hensley v. South Carolina Department of Social Services*, 429 S.C. 144, 838 S.E.2d 510, 515 (2020).

Hence, the Supreme Court did not imply, one way or the other, the outcome of the administrative remedies question. The court only directed the reader to relevant statutes, regulations, and case law. As will be discussed below, this authority (as well as additional common law), supports the plaintiffs' position.

a. Exhaustion of Administrative Remedies is Permissive and not Mandatory or Statutorily Required

The contract (adoption subsidy agreement) (See Exhibit A) provides notice to the adoptive parents of their appeal rights as follows: "Adopted parents **may** appeal DSS' decision to reduce, change, or terminate any adoption subsidy in accordance with the rules and procedures of the state's fair hearing and appeal process. Information **may** be requested from DSS." (emphasis added). As the bolded language makes clear, the adoption subsidy agreement does not mandate adoptive parents to pursue this administrative remedy.

Similarly, the statute regarding redress for subsidy reductions is not mandatory. Rather, like the adoption subsidy agreement, it offers a mechanism for redress, but does not purport to be an exclusive or compulsory mechanism. The statute below informs adoptive parents that pursuit of the administrative remedy is optional or discretionary.

SECTION 63-9-1790. Review of decisions.

A decision concerning supplemental benefits by the department which the adoptive parents consider adverse to the child is reviewable according to department regulations.

The DSS regulations on this subject are equally permissive, and not mandatory:

1. The family **has a right** to appeal any decision made by the department on supplemental benefits, both before and after finalization of the adoption, according to the Department's approved appeal process.
2. The family will be informed of its right to a judicial review in accordance with the Administrative Procedures Act. (See S. C. Reg. Section 114-4380(G)) (emphasis added).

Compare the statute addressed in the recent decision of *Patterson v. South Carolina Department of Employment and Workforce* (DEW) Opinion No. 6055 (filed April 3, 2024). In *DEW*, the court of appeals held that the claimants were “statutory required to exhaust their administrative remedies” and this was the “exclusive method for challenging determinations regarding unemployment benefits.” (emphasis added; See *DEW*, first full paragraph under **LAW AND ANALYSIS** heading). The Code section offered only one method of appeal:

SC Code § 41-35-690 (2022)

The procedure provided in this chapter for appeals from a determination or redetermination to the appeal tribunal and for appeals from the tribunal, first to the Department of Employment and Workforce Appellate Panel, as established by Section 41-29-300, and afterward to the administrative law court, pursuant to Section 41-29-300(C)(1), is the sole and exclusive appeal procedure.

It is apples and oranges to equate the “sole and exclusive appeal procedure” mandated above with the discretionary procedure offered in both the adoption subsidy agreement, section 63-9-1790 and the DSS regulations. Having a right to an appeal is a far cry from having a sole and exclusive mechanism for appeal. Similarly, *Holman v. South Carolina Education Lottery Commission*, 441 S.C. 18, 891 S.E.2d 701 (Ct. App. 2023), which is relied upon so heavily in DSS’s memorandum, involves a statute where exhaustion of administrative remedies is the sole and exclusive remedy.²

The availability of administrative remedies does not compel a litigant to pursue those remedies when both the contractual and statutory language is discretionary, and not mandatory. Consider the following excerpt taken verbatim from the case of *Edge v. State Farm Insurance*

² “We hold the circuit court did not abuse its discretion in finding Appellants were required to exhaust their administrative remedies under the Act and SCEL C regulations. . . . Section 59-150-230(C) provides, “[SCEL C] shall promulgate regulations and adopt policies and procedures to establish a system of verifying the validity of lottery games tickets or shares claimed to win prizes and to effect payment of prizes.” Regulations 44-70(E)-(F) of the South Carolina Code of Regulations (2011) state the SCEL C executive director may deny awarding a prize to a claimant if the ticket was issued or produced in error and the executive director’s decision is subject to an appeal to SCEL C. Section 59-150-300(A) provides that any “lottery game ticket holder aggrieved by an action of the [SCEL C] board may appeal that decision to the [ALC].” A final decision of the ALC involving SCEL C must be appealed to the circuit court. See S.C. Code Ann. § 59-150-300(D).”

Company, 345 S.C. 136, 139-40, 546 S.E.2d 647, (2021). A similar regulation as in the instant case made administrative remedies available, but in no way required administrative remedies to be the exclusive remedy of insured.

South Carolina Reg. 69-13.1(IV), states the following:

A. Any insured aggrieved by an insurer's application of the Plan or assignment of points *may appeal to the Chief Insurance Commissioner* for a review thereof. Unless otherwise ordered by the Commissioner, investigation and review of an appeal under this Section shall be conducted informally and without a hearing.

...

C. Any decision of the Commissioner will be made in writing, and a copy thereof will be mailed to the insured and the insurer. *Any such decision may be appealed by either party in accordance with South Carolina Code Section 38-3-210 (1976),[3] as amended.* (emphasis added).

The words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation. *Byerly v. Connor*, 307 S.C. 441, 415 S.E.2d 796 (1992).

Pursuant to the plain and ordinary meaning of the regulation, an aggrieved party *may* appeal to the Commissioner; however, nothing prevents the aggrieved party from bypassing an administrative hearing before the Commissioner and bringing an action in the circuit court as Edge did in this matter. By using the word "may" instead of "shall," the regulation allows, but does not *require*, an aggrieved party to appeal to the Commissioner. *See Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995) (use of word "may" signifies permission and generally means the action spoken of is optional or discretionary); *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980) (same).[4]

There is nothing in the regulation to indicate an intent on the part of the regulation's promulgator, that is, the Department of Insurance,[5]to force an aggrieved party to pursue an administrative remedy. *Edge v. State Farm Insurance Company*, 345 S.C. 136, 139-40, 546 S.E.2d 647, (2021) (footnotes omitted)

So, too, in the instant case, there is nothing in the adoption subsidy agreement, DSS regulation, or statute to indicate an intent of the legislature to force an aggrieved adoptive parent to pursue an administrative remedy against the department.

b. Requiring Adoptive Parents to Exhaust Administrative Remedies would be Futile when the Decision came from the Highest-Ranking Person within the Department

On June 20, 2022, adoptive parents received a letter from Elizabeth G. Patterson, then state Director of the Department of Social Services. (See Exhibit B). The letter described foster and adoptive parents as “among the agencies most valuable resources” and offered Ms. Patterson’s “most heartfelt thanks for nurturing and caring for the children of South Carolina.” She then announced a unilateral and across-the-board reduction in the monthly subsidy rate of \$20 per child. This is an undisputed fact.

This decision did not come from a DSS county director; the decision was not made by an area director or the director of economic services; the decision was not made by the chief financial officer or the director of human resources. The decision to cut the monthly subsidy came from the State Director.

The letter from Ms. Patterson stated that the department “**has made every effort** to avoid taking any action that affects critical services to children and families. However, **it is now necessary** to take additional measures in order to stay within the department budget.” (emphasis added). Ms. Patterson continued: “Please be assured that **this action has not been taken without much thought and consternation. I would not be asking families to make this financial sacrifice if I did not feel it was necessary in order to continue to provide essential, protective service and assistance to as many children as possible.**” (emphasis added). In short, the letter from Director Patterson announced that this was a necessary action, and a decision made at the highest level of the agency.

A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a “vain or futile act.” *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct.App. 2010). Given the finality expressed in this decision by the department’s highest-ranking officer, it

would have been futile for an adoptive family to ask for review and expect there would have been a different result.

Similarly, the Supreme Court of South Carolina has found that it would be futile to require a parent to exhaust administrative remedies when a school board of trustees has already acted adversely to the parent. In *Storm M.H., v. Charleston County Board of Trustees*, 400 S.C. 478, 735 S.E.2d 492 (2012), a parent from Berkeley County sought to enroll her child in a magnet school in Charleston County. When the Board of Trustees decided that only Charleston County residents were eligible for enrollment, the parent did not pursue available administrative remedies, but instead filed an action in the circuit court. The Supreme Court held that “we find it would have been futile for Parent to exhaust her administrative remedies as the Board’s decision was certainly to be unfavorable.” *Id.* at 487. There, like here, when the highest placed and most powerful person or entity has already spoken, it is futile for a parent to assume the outcome of an administrative procedure would be different.

CONCLUSION

For the reasons stated herein, Plaintiffs pray that the Court deny Defendant’s Motion for Summary Judgment, and instead, grant the Plaintiff’s Motion for Summary Judgment as Plaintiffs and Defendants agree on the material facts in this action.

[SIGNATURE PAGE TO FOLLOW]

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DATED: April 15, 2024

EXHIBIT A

**South Carolina Department of Social Services
ADOPTION SUBSIDY AGREEMENT**

The following agreement has been entered into by and between the South Carolina Department of Social Services, P.O. Box 1520, Columbia, S.C. 29202-1520, 803-898-7561 or 1-800-922-2504, hereafter called the "DSS" and

Adoptive Mother Social Security No. Adoptive Father Social Security No.

Mailing Address Select County ... Telephone

hereafter called the "adoptive parent(s)," for the purpose of facilitating the legal adoption of _____, Child's First Name
_____, born on _____, and to aid the adoptive parent(s) in providing proper care for this child.
Social Security No. Date
The date of the initial adoption placement agreement for _____ is _____, the date of
Child's First Name Date
the initial adoption subsidy agreement is _____, and the date the adoption was legalized is _____.
Date Date

This document is the Initial Agreement.

The adoptive parent(s) agree that he/she/they intend to adopt _____ and have
Child's First Name

- ☐ signed this document prior to legalization of the adoption for the purpose of receiving financial assistance or
☐ the child had a pre-existing medical or rehabilitative need and this agreement is being signed after legalization.

Provisions of Agreement

I. Assistance

A. Nonrecurring Adoption Expenses:

Attorney Fee \$ _____ Court Costs \$ _____ Other \$ _____ Unknown at this time _____

B. Monthly Cash Payment: ☐ Yes ☐ No Date Payments Initiated: _____

Current Funding Source: ☐ IV-E Adoption Assistance ☐ State Funded Supplemental Benefits

Amount \$ _____

The amount of this monthly cash payment is based on the needs of the child and the circumstances of the adoptive parent(s) and has been determined by mutual agreement between the adoptive parent(s) and DSS.

The amount of the payment does not exceed the foster care maintenance payment for _____
Child's First Name

if he/she were in a foster family home in the state of South Carolina. Other cash income received by the family

on behalf of _____ is \$ _____ from _____.
Child's First Name Amount Source

This income is considered in determining the monthly cash payment. Adjustments in monthly cash payments may be made with the concurrence of the adoptive parent(s) based upon changes in the needs of

_____, changes in circumstances of the adoptive family or changes in the
Child's First Name
maximum allowable subsidy payment. Documentation of changes in the child's needs or family circumstances may be required.

C. Special Service Through Supplemental Benefits:

_____ is eligible to receive _____ for the following special service:
Child's First Name Amount

D. Medical Benefits:

_____ is eligible for medical benefits, as provided under Title XIX of the Social Security Act (Medicaid), in accordance with the procedures of the state in which the child resides.

1. Eligibility is based on:

☐ IV-E Adoption Assistance for: _____

Child's First Name

☐ State Funded Supplemental Benefits for: _____

Child's First Name

2. Other medical payments through Supplemental Benefits will be provided by DSS for the following specific condition: _____, if not provided by Title XIX,

family health insurance or other resources. Amount \$ _____ per year, as long as funds are available.

3. Prior approval is required for all purchases of equipment over \$500.00 and all inpatient or residential psychiatric treatment to be paid for through state funded Supplemental Benefits. Respite care may be covered under guidelines determined by the Department. Prior approval must be given.

4. Resources for meeting cost of medical care: Medical Insurance Company: _____

Policy No.: _____ Campus No.: _____ Medicaid No.: _____

E. Social Services:

1. _____ is eligible for IV-E Adoption Assistance and, therefore, social services as provided under Title XX of the Social Security Act in accordance with the procedures of the state of South Carolina.

Child's First Name

2. To access Title XX services in South Carolina, the family must apply with the Department of Social Services.

3. Children who are eligible for IV-E Adoption Assistance are eligible to receive Medicaid and Title XX social services regardless of the state in which the adoptive family lives. The family agrees to contact DSS prior to moving to a new state for instructions on accessing services in that state.

II. Notification of Change

A. The adoptive parent(s) shall immediately notify DSS, in writing, if he/she/they are no longer legally responsible for the child or are no longer financially supporting the child.

B. The adoptive parent(s) shall notify DSS, in writing, when there is a change in other income received by the family on behalf of the child.

C. DSS shall notify the adoptive parent(s) in writing of changes in adoption subsidy payments resulting from increases or decreases in allowable rates.

D. The adoptive parent(s) will contact DSS before moving out of state to implement the Interstate Compact on Adoption and Medical Assistance. The interstate interest of _____ is protected through the Compact.

Child's First Name

E. In the month before the anniversary of the child's birth, DSS shall contact the adoptive family to ascertain:
a. if there are any changes which need to be made on the Agreement, and
b. if the child is still in the care and custody of the adoptive family.

III. Termination

Termination will occur in any of the following circumstances:

- A. Upon the conclusion of the terms of this agreement.
- B. Upon the adoptive parent(s)' written request.
- C. IV-E Adoption Assistance payments can continue after a child reaches the age of 18 if the child continues to have a medical or rehabilitative need. The family will have to provide documentation each year upon a request from DSS. These payments can continue until the child's 21st birthday. Supplemental Benefits may be provided at the discretion of DSS until the child is 21 years of age if the child is still in school.

_____ is/will be over 18 years of age before the next renewal date of the
Child's First Name
 agreement.

_____ is attending _____
Child's First Name School

Location

and plans to finish school on _____
Date

Attach documentation of school enrollment such as grade sheets or a letter from the school. Verification is required to continue receiving Supplemental Benefits past the child's 18th birthday.

- D. Upon the child's death.
- E. Upon the death of the parent(s) of the child (one in a single parent family and both in a two-parent family).
- F. Upon cessation of the adoptive parent(s)' legal responsibility for the child.
- G. Upon determination that the child is no longer receiving financial support from the adoptive parent(s).

IV. Appeal

Adoptive parent(s) may appeal DSS's decision to reduce, change or terminate any adoption subsidy in accordance with rules and procedures of the state's fair hearing and appeal process. Information may be requested from DSS.

☒	_____	_____
	Adoptive Mother's Signature	Date
☒	_____	_____
	Adoptive Father's Signature	Date
	_____	_____
	Authorized Agency Representative's Signature	Date

	Title	

A signed copy of the Adoption Subsidy Agreement was given/sent to adoptive parent(s) on _____
Date

EXHIBIT B

file

11/81/01 NCSTD



Serving Children and Families

ELIZABETH G. PATTERSON, J.D., STATE DIRECTOR

June 20, 2002

Dear Foster or Adoptive Parent:

As you know, at the beginning of this Administration we advocated for and were able to obtain an increase in foster board payments and adoption subsidy. In July 1999, standard foster care board and adoption subsidy payments were increased by \$120 for each child. This increase resulted in this state being moved from the last tier of states in the nation to midrange in providing for additional support for foster and adoptive parents.

As a result of South Carolina's budget crisis this agency has received a 30% cut or a loss of \$30 million in state funds alone since fiscal year 2002 and 2003. While the Department has reduced or eliminated spending in many areas over the past year and a half, it has made every effort to avoid taking any action that affects critical services to children and families. However, it is now necessary to take additional measures in order to stay within the Department's budget.

We deeply regret to inform you that effective July 1, 2002, foster care board and adoption subsidy payments will be reduced by \$20 per month for each child, leaving in place 83% of the increase that was received in 1999. Please be assured that this action has not been taken without much thought and consternation. I would not be asking families to make this financial sacrifice if I did not feel it was necessary in order to continue to provide essential protective service and assistance to as many children as possible.

I ask that you bear with us during this stressful time for our state and agency. I hope that this reduction in foster care board and adoption subsidy payments will be temporary and the rates can be increased when the budget crisis has eased.

As foster and adoptive parents, you are among the agency's most valuable resources. Please accept my most heartfelt thanks for nurturing and caring for the children of South Carolina. Please do not hesitate to contact Mary C. Williams, Director of Human Services, at (803) 898-7318 if you have any questions or concerns.

Sincerely,

Elizabeth G. Patterson
State Director

EGP/lwb

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

BLH by parents/general guardians)
Kenneth and Angela Hensley, and on)
behalf of all others similarly situated,)

Civil Action No. 2013-CP-42-1569

Plaintiff,

**REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

v.

South Carolina Department)
of Social Services,)

Defendant.

The Plaintiff BLH has filed a Motion for Summary Judgment in conjunction with her response in opposition to the Motion for Summary Judgment filed by the Defendant South Carolina Department of Social Services (“DSS”). The Defendant DSS opposes the Plaintiff’s motion and submits that the Plaintiff is not entitled to judgment as a matter of law on her breach of contract claim. Specifically, the Defendant DSS reiterates and incorporates herein the arguments as set forth in its Motion for Summary Judgment that was filed on April 1, 2023. (ECF #37). The Defendant DSS also offers some additional analysis as follows:

I. Collateral Estoppel Effect of Federal Litigation

As to the collateral estoppel issue, the Plaintiff improperly relies on an unofficial, non-certified transcript of the oral argument held before the Fourth Circuit Court of Appeals to reach the erroneous conclusion that Defendant's counsel somehow waived a collateral estoppel defense in the

state court action. The Plaintiff misconstrues the colloquy that occurred during the Fourth Circuit oral argument and its ultimate meaning and implications.

At the time of the oral argument in the Fourth Circuit, the Plaintiff had alleged a cause of action under the Contracts Clause of the United States Constitution, in addition to a claim for alleged violation of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"). The Federal Court Defendants (consisting of four former DSS Directors) argued that they were entitled to summary judgment on the Contracts Clause claim because "recourse to § 1983 for the deprivation of rights secured by the Contracts Clause is limited to the discrete instances where a state has denied a citizen the opportunity to seek adjudication through the courts as to whether a constitutional impairment of a contract has occurred, or has foreclosed the imposition of an adequate remedy for an established impairment." *Crosby v. City of Gastonia*, 635 F.3d 634, 640 (4th Cir. 2011). The Federal Court Defendants pointed out that the Plaintiff was not foreclosed from pursuing a state law breach of contract claim, and hence, had no viable claim under the Contracts Clause.

During oral argument, Judge Andre Davis (identified in the unofficial transcript as "male speaker") inquired whether defense counsel had "any strenuous objection to a dismissal of the Contract Clause claim without prejudice." (Tr. 55). That was asked because prior to the oral argument the Plaintiff had filed a voluntary withdrawal of the Contracts Clause claim. (See attached). The Federal Court Defendants had filed a return consenting to the dismissal of the Contracts Clause claim but only *with* prejudice. (See attached). Defense counsel reiterated during oral argument that he opposed a dismissal without prejudice because the Plaintiff could amend the pending state court action to re-allege the Contracts Clause claim. (Tr. 55-56). Thereafter, Judge Diane Motz (identified in the unofficial transcript as "female speaker") asked

whether defense counsel would be satisfied with a representation/stipulation by Plaintiff's counsel that the Contracts Clause would not be re-alleged in the state court action. (Tr. 56-57). Plaintiff's counsel agreed to that representation but also asked that his stipulation not be used as a bar to the state contract claim based on res judicata or collateral estoppel. (Tr. 57-58). Defense counsel responded: "If it's without prejudice, there would be no such argument," (Tr. 58) meaning that a dismissal without prejudice is never given preclusive effect, which is well-settled law. *See, International Fidelity Ins. Co. v. China Const. America (SC) Inc.*, 375 S.C. 175, 650 S.E.2d 677, 680 (Ct. App. 2007) ("a dismissal of a claim without prejudice is not an adjudication of the merits of the controversy and has no preclusive effect as a matter of law"). Thus, defense counsel only agreed in this colloquy that the stipulation by the Plaintiff to refrain from re-filing the federal Contracts Clause claim in state court could not possibly create any preclusive effect because it was a dismissal without prejudice.

In effect, the voluntary dismissal of the Contracts Clause claim has no preclusive effect, but the Fourth Circuit's rulings on the AACWA claim do have preclusive effect. The colloquy makes no mention of the AACWA claim, which of course was not voluntarily dismissed by the Plaintiff but rather was dismissed by the Fourth Circuit *on its merits*.

Importantly, there was never the representation or agreement that the Fourth Circuit's rulings *on the merits* of the AACWA claim would have no preclusive effect in later litigation. The Court respectfully should reject the Plaintiff's erroneous interpretation of the colloquy at the close of the Fourth Circuit oral argument as some waiver of a collateral estoppel defense – which *incidentally is a defense based on rulings on the AACWA claim that the Fourth Circuit had not*

even made yet at the time of the oral argument.¹ Of course, "a waiver is a voluntary and intentional abandonment or relinquishment of a known right," and "a party claiming waiver must show the other party possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they were dependent." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384, 387-88 (1992). The Defendant DSS, which was not even a party to the Fourth Circuit appeal, certainly did not abandon a collateral estoppel defense based on a Fourth Circuit decision that had not even been issued at that point. In short, there was no waiver of any collateral estoppel argument based on any rulings by the Fourth Circuit on the merits.

In addition, the Plaintiff appears to conflate collateral estoppel and res judicata. Collateral estoppel is, of course, issue preclusion and not claim preclusion. The Fourth Circuit's adjudication of the AACWA claim is not res judicata because the federal statutory claim is different from the state breach of contract claim. However, and most importantly, the Fourth Circuit's adjudication of *issues* common to both the AACWA claim and the state contract claim is subject to collateral estoppel. As previously discussed in the Defendant's Motion for Summary Judgment and supporting memorandum, the Plaintiff cannot re-litigate those *issues* as already decided by the Fourth Circuit. That is particularly true given the Court of Appeals' recent decision in *Taylor v. Richland County Sheriff's Department*, Op. No. 2024-UP-030 (S.C. Ct. App. 2024), where the Court reversed the trial court's decision not to give rulings in a companion federal action preclusive effect under the collateral estoppel doctrine in subsequent state court litigation.

As the Fourth Circuit has ruled, DSS was prohibited by federal law from allowing the adoption subsidy to exceed the foster care maintenance rate. The Plaintiff is collaterally

¹ Oral argument was held on May 16, 2013, and the Fourth Circuit did not issue its opinion until July 3, 2013.

estopped from re-litigating this issue or taking a position inconsistent with the Fourth Circuit's ruling which is now a final judgment. The foster care board rate on July 1, 2002 decreased from \$675.00 to \$655.00 per month. Therefore, both the AACWA and South Carolina Code of Regulations § 114-4380 mandated that the subsidy paid to the Hensleys on July 1, 2002, as well as future payments, be decreased by at least \$20.00 to \$655.00 per month as well. There is no breach of contract. The Adoption Subsidy Agreement, consistent with its terms, allows for an adjustment to comply with "changes in the maximum allowable subsidy payment."

Additionally, the Defendant DSS did not breach the Adoption Subsidy Agreement when foster care maintenance payments were increased in 2004, by not increasing the adoption assistance subsidy at that same time. On this issue, the Plaintiff is likewise collaterally estopped from taking a position contrary to the rulings of the Fourth Circuit Court of Appeals in *Hensley v. Koller*, 722 F.3d 177 (4th Cir. 2013). The Fourth Circuit has already ruled that "the 2004 increase did not 'readjust' the amount of the adoption assistance subsidies; accordingly, the Directors' 2004 action did not trigger -- let alone violate -- the parental concurrence requirement." 722 F.3d at 183. Therefore, because there was no requirement for DSS to "readjust" the amount of the adoption subsidy, as already determined by the Fourth Circuit, there was no breach of the Adoption Subsidy Agreement when the adoption assistance subsidy was not increased in 2004.

As previously addressed, the Plaintiff's position is also unsupported by any case law or other authority, and in fact, her argument is contrary to the express language of Section 673(a)(3). A clear reading of Section 673(a)(3) demonstrates that there is no requirement for the adoption subsidy rate to equal the foster care maintenance rate. Those rates are not required to be the same. Instead, Section 673(a)(3) clearly establishes a cap or ceiling for the adoption

subsidies – they may "in no case" exceed the foster care rate. Thus, when the foster care rate is reduced below the adoption subsidy rate, the adoption rate must also be reduced. However, the converse is not required. If the foster care rate is increased, there is no requirement to increase the adoption subsidy rate. It is perfectly acceptable under Section 673(a)(3) for the adoption subsidy rate to be less than the foster care rate. Likewise, there is no requirement in the Adoption Subsidy Agreement for the adoption subsidy rate to equal the foster care maintenance rate. Nor is there a requirement in the contract for DSS to increase the adoption subsidy whenever the foster care rate is increased. The Fourth Circuit recognized that the increase in the foster care rate in 2004 did not "trigger" or "violate" the requirements under Section 673(a)(3), which are incorporated as part of the Adoption Subsidy Agreement.

In sum, the Plaintiff is not correct that DSS somehow waived a collateral estoppel defense during the Fourth Circuit oral argument, and (2) that the Fourth Circuit's rulings were based "solely on federal law" and thus have no preclusive effect. The Plaintiff alleges that the \$20.00 reduction in monthly benefits in 2002 constitutes a breach of the Adoption Subsidy Agreement. The Adoption Subsidy Agreement, however, includes the following language: "Adjustments in monthly cash payments may be made with the concurrence of the adoptive parent(s) based upon changes in the needs of [BLH], changes in circumstances of the adoptive family, or *changes in the maximum allowable subsidy payment.*" (Emphasis added). This language is required by and must be construed in conformity with the AACWA. For, it is the AACWA that requires a state to "enter into adoption assistance agreements ... with the adoptive parents of children with special needs." 42 U.S.C. § 673(a)(1)(A). The Adoption Subsidy Agreement must therefore be construed consistently with the AACWA, and the Fourth Circuit's ruling on what is required by the AACWA is clearly entitled to preclusive effect and cannot be re-litigated.

II. Exhaustion of Administrative Remedies

The Defendant DSS is also entitled to summary judgment because the Plaintiff BLH's adoptive parents did not exhaust available administrative remedies and instead simply filed suit first for themselves and then in BLH's name. Based on the Plaintiff's response memorandum, it is undisputed that BLH and her parents did not exhaust available administrative remedies. BLH, however, contends that her claim is not barred by this defense because the exhaustion of administrative remedies would be futile and that it was discretionary or optional for the adoptive parents to pursue their appeal rights before filing suit. Both positions lack merit.

In its recent decision in *Patterson v. South Carolina Department of Employment and Workforce*, ___ S.C. ___, ___ S.E.2d ___, 2024 WL 1423899 (S.C. Ct. App. filed April 3, 2024), the Court of Appeals explained that "an exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act." 2024 WL 1423899 at *5. "Futility, however, must be demonstrated by a showing comparable to the administrative agency taking a hard and fast position that makes an adverse ruling a certainty." *Id.* In the case at bar, the Plaintiff contends that the decision in 2002 to cut the adoption subsidy amount by \$20.00 was made by the DSS Director and thus it would be futile to challenge that decision. However, the Plaintiff BLH is not challenging that decision. BLH contends that DSS breached its contract not by reducing the subsidy in 2002, but rather in failing to "readjust" or increase the subsidy in 2004 when the foster care maintenance payments were increased. The Plaintiff, who has the burden of proving futility, has made no showing that a request to increase the adoption subsidy in 2004 would have been futile. In fact, the Adoption Subsidy Agreement expressly provides as follows: "Adjustments in monthly cash payments may be made with the concurrence of the adoptive parent(s) based upon changes in the needs of [the

adopted child], in circumstances of the adoptive family, or *changes in the maximum allowable subsidy payment.*” (Emphasis added). Thus, the language in the Agreement allows for adjustments to be made in the adoption subsidies where the amount in the allowable subsidy payment increases. There is no evidence that such adjustments or requests for such adjustments were futile or could not have been handled on a case-by-case basis.

Further, the Plaintiff BLH argues that exhaustion of administrative remedies was discretionary or optional with the adoptive parents. The applicable statute and regulations do not support that interpretation. As the Supreme Court has already recognized in its earlier decision in this case, the Children’s Code includes Section 20-7-1960 (currently codified as Section 63-9-1790) which provides: “A decision concerning supplemental benefits by the department which the adoptive parents consider adverse to the child is reviewable according to department regulations.” S.C. Code Ann. § 20-7-1790 (Supp. 2002). The DSS regulations include a section captioned “Supplemental Benefits Appeals,” which state:

1. The family has the right to appeal any decision made by the Department on Supplemental Benefits both before and after finalization of the adoption, according to the Department’s approved fair hearing appeal process.
2. The family will be informed of its right to a judicial review in accordance with the Administrative Procedures Act.

See, S.C. Reg. § 114-4380(G). In addition, S.C. Reg. § 114-110 “allows an individual to contest an adverse action taken by [DSS] and to have his or her objections to the adverse action heard by an impartial hearing officer or committee.” *See*, S.C. Reg. § 114-110. In fact, S.C. Reg. § 114-130, which describes the fair hearing process, also provides that “[t]he final decision rendered by the OAH is subject to administrative or judicial review as provided by law.” S.C. Reg. § 114-130(M)(1). In sum, those provisions describe the right to an administrative appeals process

followed by judicial review; however, there is no language that would suggest that the General Assembly intended for the appeal rights to be optional or that adoptive parents could file a lawsuit instead of first pursuing the available administrative remedies.

The *Patterson* case is instructive on this point. Like the case at bar, *Patterson* is a class action lawsuit where the plaintiff and the class members sought as monetary relief the payment of “all benefits denied as a result of [DEW’s] policy of online applications.” The Court of Appeals addresses in detail the law governing the exhaustion of administrative remedies. Ultimately, the Court of Appeals reversed and ruled that “the circuit court erred by finding Claimants were not required to exhaust their administrative remedies.” The Plaintiff BLH suggests that *Patterson* is distinguishable because S.C. Code Ann. § 41-35-690 states that the process described by statute is the “sole and exclusive appeal procedure.” BLH claims that the “right to an appeal” in S.C. Reg. § 114-4380(G) is a “far cry” from having a “sole and exclusive appeal procedure.” That is not the case. The DSS statutes and regulations do not provide any other mechanism for an appeal nor create a private right of action to sue for money damages.

In short, BLH’s parents, as well as the other class members’ adoptive parents, had administrative remedies available to them. That is undisputed. There is, however, no language in the applicable statutes and regulations that support BLH’s claim that the administrative appeal rights were optional or discretionary. Frankly, it makes no sense for the General Assembly and DSS to create appeal rights, but then not to make the exhaustion of those rights mandatory before an aggrieved party can file a lawsuit. As recognized by the Court of Appeals in *Patterson*, it is contrary to the public policy favoring judicial economy to suggest that administrative appeal rights are optional, and certainly if that were the intent, it should be spelled out with clarity in the statutes and regulations. In absence of such clear legislative intent, the general rules of

exhaustion should apply, including that “[r]elief is not generally available to one who has not exhausted administrative remedies.” *Patterson*, 2024 WL 1423899, *5. This is consistent with well-settled principles of judicial economy. *See, Stanton v. Town of Pawley's Island*, 309 S.C. 126, 420 S.E.2d 502 (1992) (plaintiff is generally required to exhaust administrative remedies before seeking relief from the courts); *Moore v. Sumter County Council*, 300 S.C. 270, 387 S.E.2d 455 (1990) (court could not adjudicate takings issue until plaintiff had exhausted administrative remedies).

In fact, our appellate courts have rejected the use of judicial proceedings, including declaratory judgment actions, that circumvent an existing statutory process created by the legislature. Specifically, in *Williams Furniture Corp. v. Southern Coatings & Chemical Co.*, 216 S.C. 1, 56 S.E.2d 576 (1949), the Supreme Court held that “ordinarily the Court will refuse a declaration where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances.” 56 S.E.2d at 578-579. “Gratuitous interference with the orderly processes of special statutory tribunals should be avoided.” 56 S.E.2d at 579. Moreover, “[t]he wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.” 56 S.E.2d at 578. *See, Garri v. Governing Board of South Carolina Reinsurance Facility*, 319 S.C. 388, 461 S.E.2d 819, 821 (1995) (“[d]eclaratory relief will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances”). *See also, Smith v. South Carolina Retirement System*, 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999).

It is undisputed that BLH’s adoptive parents did not pursue their appeal rights. By failing to pursue their appeal rights, the Plaintiff cannot demonstrate that the administrative remedies

have been exhausted, and on that basis, as in *Patterson*, the Plaintiff's Complaint should be dismissed.

CONCLUSION

Based on the foregoing discussion and analysis, the Defendant South Carolina Department of Social Services respectfully request that the Court deny the Plaintiff's Motion for Summary Judgment. The Defendant DSS also renews its request that the Court grant its Motion for Summary Judgment and dismiss the Plaintiff's Complaint with prejudice.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

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Columbia, South Carolina 29260
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*Counsel for Defendant South Carolina
Department of Social Services*

April 22, 2024

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG) **IN THE COURT OF COMMON PLEAS**

BLH by parents/general guardians)
Kenneth and Angela Hensley, and on) Civil Action No. 2013-CP-42-1569
behalf of all others similarly situated,)

Plaintiff,)

v.)

**NOTICE OF MOTION AND
MOTION TO DECERTIFY CLASS**

South Carolina Department)
of Social Services,)

Defendant.)

TO: T. RYAN LANGLEY AND JAMES F. THOMPSON, COUNSEL FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant South Carolina Department of Social Services (“DSS”) will move before the Honorable J. Mark Hayes, II of the Seventh Judicial Circuit at the Spartanburg County Courthouse, Spartanburg, South Carolina on June 5, 2024, or at such other time and place as may be set by the Court, for an Order decertifying the class that was previously certified in this action.

The Plaintiff BLH brings this action by and through her adoptive parents, Kenneth and Angela Hensley, as a class action alleging a third-party beneficiary breach of contract cause of action against the Defendant DSS.¹ The Plaintiff BLH contends that DSS breached an Adoption Subsidy Agreement entered March 22, 1999, when DSS implemented an across-the-board decrease of \$20 to any foster care board rate or adoption subsidy payments in June 2002. The

¹ When this action was filed on April 1, 2013, the Plaintiff BLH was a minor. BLH has since reached majority, and at this point, the action should be prosecuted by BLH. Kenneth and Angela Hensley should be dismissed as party-Plaintiffs.

Adoption Subsidy Agreement was entered between DSS and BLH's adoptive parents, but BLH seeks to recover as a third-party beneficiary.

By way of background, on May 29, 2014, Judge Brian Gibbons issued an Order on Plaintiff's Motion for Class Certification. DSS then filed a Rule 59(e) motion. On February 27, 2015, Judge Gibbons held an additional hearing. As a result, he issued an Order Granting in Part and Denying in Part Motions for Reconsideration which was filed on April 30, 2015. In that Order, Judge Gibbons again granted the motion for class certification. He included a different analysis of the five requirements for class certification and modified his previous rulings setting forth the process for notification of the class members. In certifying the class action, Judge Gibbons identified the class as follows:

All children, age 19 or younger on the date of the filing of the first state court Complaint (September 16, 2011), who are current and former beneficiaries of existing adoption assistance subsidy agreements between their adoptive parents and the South Carolina Department of Social Services, executed on or before June 20, 2002 and had at least five (5) months of lost benefits due to the cut in the assistance agreement beginning on the date of the foster care reinstatement in 2004.

The Defendant DSS now moves to de-certify the class. In *Hensley v. South Carolina Department of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020), the South Carolina Supreme Court anticipated that this Court would likely need to hear and adjudicate a motion to de-certify the class in conjunction with addressing the merits of the Plaintiff's claim, issues related to the measure of damages, certain defenses asserted by DSS, including the exhaustion of administrative remedies defense, and other potential issues. In laying out a roadmap for the trial court after remand, the Supreme Court observed as follows:

The exhaustion of administrative remedies question DSS raises is not whether the Hensleys or any particular class member's parents completed the administrative appeals process. That would be a

question addressed to the merits. Rather, DSS raises the question of what process—if any—the circuit court must go through to answer that merits question. If the requirement to exhaust administrative remedies does not apply in this case, then the court would have to go through no individualized process. If the requirement does apply, however, the circuit court may have to conduct individual trials or hearings. The circuit court did not address this question, and the question is not before this Court at this time. The answer to the question will nevertheless affect whether this case is appropriate for class treatment.

The court of appeals identified other issues that may require individualized trials or hearings. *See id.* (identifying the following issues—“whether each set of adoptive parents accepted or consented to the reduction in payments, ... entered into renewal agreements, or at any pertinent time terminated their agreements”—that “will require individualized inquiry”). DSS raises the additional question of whether the calculation of damages requires significant individual treatment, or—as the Hensleys contend—the damages can be calculated by simple formula. ***All of these questions relate directly to whether the circuit court will ultimately permit this lawsuit to be maintained as a class action. See Salmonsens, 377 S.C. at 454, 661 S.E.2d at 88 (“class certification may be altered at any time prior to a decision on the merits”).***

838 S.E.2d at 515. (Emphasis added).

Of note, the Supreme Court cited favorably to *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), in which the Supreme Court held that “class certification may be altered at any time prior to a decision on the merits” and further explained that a subsequent circuit court judge may entertain a motion to decertify a class or even change an earlier class certification order issued by a different judge.

In conjunction to this Court’s consideration and adjudication of the parties’ pending cross motions for summary judgment (filed April 1, 2024 and April 15, 2024), which address the merits of the Plaintiff’s claim, the measure of damages, and certain defenses asserted by DSS, the Court is also requested, consistent with the Supreme Court’s “roadmap,” to adjudicate the

Defendant DSS's motion to de-certify the class.

Based on its arguments presented in its pending motion for summary judgment and herein, the Defendant DSS asserts that de-certification of the class is proper based on a lack of commonality. In the leading case of *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), 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. Likewise, the Supreme Court held that "a representative plaintiff cannot establish commonality if the court must investigate each plaintiff's individual claim." *Id.*

Further expounding on its earlier holdings, in *Hensley, supra*, the Supreme Court addressed the commonality requirement and explained 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), SCRC] 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).

In properly evaluating a proposed class action for commonality, the *Gardner* case is very instructive. In that case, a proposed plaintiff class of taxpayers sued the Department of Revenue and numerous 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 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 is necessary in the present case. As discussed in DSS's pending motion for summary judgment and herein, there are issues requiring individualized inquiry such as whether each set of adoptive parents exhausted available administrative remedies or whether the adoptive parents utilized the administrative process to

obtain an adjustment in the subsidies or whether the adoptive parents at any pertinent time terminated their agreements. In addition, as discussed in the pending motion for summary judgment, there is not a common factual question as to the calculation of damages because of varying factual circumstances experienced by the class members (i.e., the adopted children and not their adoptive parents), and that will require individualized trials or hearings as recognized as being potential necessary by the Supreme Court in this case. *See, Hensley*, 838 S.E.2d at 515.

In addition, the Adoption Subsidy Agreement includes a "termination" provision which includes eight different bases for termination. One such basis is termination of the subsidy payments when the adoptive child reaches the age of eighteen. The Court has attempted to address that specific termination possibility in the proposed class definition. However, there are seven other ways that the Adoption Subsidy Agreement could have been terminated prior to age eighteen, including the death of the adoptive parents, where the adoptive parents are no longer legally responsible for the child, and where the adoptive parents requested termination of the benefits. Thus, an individualized inquiry must be made whether the agreement with each class member's adoptive parents was terminated by DSS or by the adoptive parents prior to age eighteen.

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 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”).

In sum, based on the issues raised in the Defendant’s motion for summary judgment and herein, the Court is respectfully requested to de-certify the class.

Respectfully submitted,

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*Counsel for Defendant South Carolina
Department of Social Services*

May 31, 2024

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG) **IN THE COURT OF COMMON PLEAS**

BLH by parents/general guardians)
Kenneth and Angela Hensley, and on) Civil Action No. 2013-CP-42-1569
behalf of all others similarly situated,)

Plaintiff,)

NOTICE OF FILING EXHIBITS

v.)

South Carolina Department)
of Social Services,)

Defendant.)

The Defendant hereby files the below exhibits as referenced in its Reply Memorandum in Support of Motion for Summary Judgment and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment previously filed on April 22, 2024:

1. Appellees' Fourth Circuit Court of Appeals Notice of Withdrawal of Contracts Clause Claim, filed April 3, 2013 (ECF #35)
2. Appellants' Return to Appellees Notice of Withdrawal of Contracts Clause Claim, filed April 10, 2013 (ECF #37)
3. Fourth Circuit Order Granting Appellees' Fourth Circuit Court of Appeals Notice of Withdrawal of Contracts Clause Claim, filed May 29, 2013 (ECF #39)
4. Unofficial Transcript of Fourth Circuit Oral Argument

LINDEMANN LAW FIRM, P.A.

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June 4, 2024

Counsel for Defendant

RECORD NO. 12-2147

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BLH by Parents/General Guardians KENNETH and ANGELA
HENSLEY and on behalf of all others similarly situated

Plaintiff-Appellee,

LILLIAN KOLLER, individually and in her official Capacity as Director for
the S.C. Dep't. of Social Services; ELIZABETH PATTERSON,
Individually as former director of the S.C. Dep't of Social Services;
KATHLEEN HAYES individually as Former Director of the S.C Dep't.
of Social Services; and KIM AYDLETTE, individually as Former Director
of the S.C. Dep't of Social Services

Defendants – Appellants.

NOTICE OF WITHDRAWAL OF CONTRACTS CLAUSE CLAIM

Appellants Reply Brief filed in February, 2013 outlines the reasons why Appellee's have a remedy under state law for breach of contract. Appellee's have reviewed and now accept this concession. Accordingly, Appellee's have pursued this remedy in the South Carolina State Courts by filing a breach of contract class action complaint on behalf of BLH and all others similarly situated. [Case No. 13-CP-42-1569; Filed: 4/1/2013]. Therefore, Appellees hereby withdraw, without prejudice, the Contracts Clause claims pending before the Court.

Respectfully Submitted by HODGE & LANGLEY LAW FIRM, P.C. and
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Charles J. Hodge

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Counsel for Appellees

DATED: April 2, 2013

RECORD NO. 12-2147

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BLH by Parents/General Guardians KENNETH and ANGELA HENSLEY
and on behalf of all other similarly situated,

Plaintiff-Appellee,

v.

LILLIAN KOLLER, individually and in her official capacity as State Director for
the South Carolina Department of Social Services; ELIZABETH PATTERSON,
individually and as Former Director of the South Carolina Department of Social
Services; KIM AYDLETTE, individually as Former Director of the South Carolina
Department of Social Services; KATHLEEN HAYES, individually as Former
Director of the South Carolina Department of Social Services,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

**APPELLANTS' RETURN TO APPELLEE'S
NOTICE OF WITHDRAWAL OF
CONTRACTS CLAUSE CLAIM**

On April 3, 2013, the Appellee BLH filed a document captioned "Notice of
Withdrawal of Contracts Clause Claim" whereby BLH purports to dismiss without

prejudice its Contracts Clause claim.¹ BLH seeks to dismiss that claim based on what it describes as a "concession" made in the Appellants' Reply Brief to the effect that "Appellee's have [sic] a remedy under state law for breach of contract." (Dkt. #35).

The Appellants make two principal points in response. First, the Appellants made no concession in their Reply Brief that BLH will actually recover under state law for breach of contract. Instead, the Appellants only made the point that a state law breach of contract claim against the South Carolina Department of Social Services (DSS) is not barred by sovereign immunity. The Appellants in no way stated or insinuated that BLH or her adoptive parents would be successful on a breach of contract claim against DSS. To the contrary, the Appellants wrote: "If DSS failed to satisfy its contractual obligations under the Adoption Assistance Agreement, which is denied, BLH (or her adoptive parents) as contracting parties would have the right to sue for breach of contract." Thus, the Appellants denied that DSS failed to meet its contractual obligations. In addition, by footnote, the Appellants pointed out that a "breach of contract claim would be subject to available common law defenses, including a statute of limitations defense." That

¹ Where a plaintiff seeks to dismiss its complaint or a portion of a complaint without prejudice after the defendant has answered, a court order is required under Rule 41(a)(2), FRCP. Typically, a court order is sought by motion. In this instance, the Appellee BLH has unilaterally attempted to dismiss without prejudice a cause of action without filing a motion. Moreover, BLH has not even sought a court order either in the district court or in this Court. Although no motion has been filed, the Appellants have filed this return because of the Court's request for a response. (Dkt. #36).

remains true. Moreover, it remains at issue whether BLH would even have standing to sue for breach of contract under state law. These are issues and defenses that will need to be litigated as part of the state court complaint that has now been filed by BLH. In short, the Appellants did not and do not concede that a breach of contract claim in state court against DSS would be successful.

Second, the Appellants do not consent to the dismissal of the Contracts Clause claim *without prejudice*. The Appellants, however, will consent to the dismissal *with prejudice*. The Appellants believe that the Contracts Clause claim has no merit for the reasons discussed in their briefs to this Court and which BLH appears almost willing to concede. The Appellants wish to obtain an adjudication now rather than face the possibility of having to repeat this same process again.

Frankly, a dismissal without prejudice of one cause of action requires an analysis under Rule 41(a)(2), FRCP. *See, Howard v. Inova Health Care Services*, 302 Fed. Appx. 166 (4th Cir. 2008). Yet, the Appellants are unaware of any procedure for an appellate court to make that determination initially as opposed to on review from the district court. Therefore, if BLH insists on dismissing the Contracts Clause claim without prejudice, that will likely require a remand to the district court which should not be permitted given the current stage of this appeal and with oral argument scheduled for the May term.

Based on the foregoing, the Appellants submit that the dismissal or withdrawal of BLH's Contracts Clause claim should be permitted at this stage only if it is taken *with prejudice*.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: s/ Andrew F. Lindemann

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Counsel for Appellants

Columbia, South Carolina

April 10, 2013

FILED: May 29, 2013

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-2147
(7:11-cv-02827-GRA)

KENNETH HENSLEY, as adoptive parents of BLH; ANGELA HENSLEY, as adoptive parents of BLH; BLH, by parents-general guardians Kenneth and Angela Hensley,

Plaintiffs – Appellees,

v.

LILLIAN KOLLER, individually and in her official capacity as State Director for the South Carolina Department of Social Services; ELIZABETH PATTERSON, individually as Former Director of the South Carolina Department of Social Services; KIM AYDLETTE, individually as Former Director of the South Carolina Department of Social Services; KATHLEEN HAYES, individually as Former Director of the South Carolina Department of Social Services,

Defendants – Appellants,

and

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Defendant.

O R D E R

On April 3, 2013, the Hensleys filed a "Notice of Withdrawal of the Contracts Clause Claim." The court interprets this "notice" as a motion to dismiss pursuant to Fed. R. Civ. P. 41(a)(2). Having had the benefit of oral argument, and considering the representations of Hensleys' counsel that the Hensleys would not amend their pending state court action to include a federal Contracts Clause claim under 42 U.S.C. § 1983, the court **GRANTS** the Hensleys' motion to dismiss their Contracts Clause claim without prejudice.

Entered at the direction of the panel: Judge Motz, Judge Davis, and Judge Wynn.

For the Court

/s/ Patricia S. Connor, Clerk

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG 2013-CP-42-1569

BLH (D/O/B [REDACTED] BY PARENTS/GENERAL)
GUARDIANS KENNETH AND ANGELA HENSLEY,)
AND ON BEHALF OF ALL OTHERS SIMILARLY)
SITUATED,)

PLAINTIFF,)

VERSUS)

SOUTH CAROLINA DEPARTMENT OF SOCIAL)
SERVICES,)

DEFENDANT.)

TRANSCRIPTION OF AUDIO

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TRANSCRIBED BY:
JILL BISHOP EDWARDS

1 BY MR. LINDEMANN:

2 May it please the Court, my name is Andrew
3 Lindemann. I represent the appellants in this
4 matter. The appellants are the current director of
5 the South Carolina Department of Social Services and
6 the three former directors, all of whom are sued in
7 their individual capacities.

8 We're here today based upon a denial of
9 qualified immunity in the court below. This case
10 involves two causes of action: one where the
11 plaintiff below, who is an adopted child of Mr. and
12 Mrs. Henley, has asserted a claim pursuant to the
13 Adoption Assistance and Child Welfare Act,
14 specifically Section 673(a)(3) of that particular
15 act, as well as a contracts clause claim. This case
16 involves specifically adoption subsidies and what is
17 the requirements under federal law as far as
18 consultation or concurrence from the adoptive
19 parents when any type of changes, either reductions
20 or increases, are made in adoption subsidies that
21 are provided for under the Adoption Assistance and
22 Child Welfare Act.

23 In 2002, the State of South Carolina, like most
24 states, probably all states were undergoing severe
25 budgetary issues. And as a last resort, the

1 director of DSS at that particular time made a
2 decision to reduce the foster care maintenance board
3 rate, and as a result, also made the same reduction
4 in the adoption subsidy rate. And it was a \$20 per
5 month reduction. These cuts were not
6 individualized. They were across the board, and
7 that's actually very significant.

8 In this particular case, the adoptive child is
9 taking the position that they have a federal
10 statutory right. How that statutory right has
11 exactly been framed has differed from the court
12 below to this court. And frankly, I think the way
13 it's been termed in the plaintiff's, excuse me, in
14 the appellee's brief doesn't make too much sense.
15 But I think what the statutory right they're
16 claiming is -- and you've got to recognize this
17 claim was originally brought by the adoptive
18 parents. Because of statute of limitations issues,
19 I presume, which we immediately raised, the party --
20 the plaintiff actually changed from the initial
21 complaint to the first amended complaint, and
22 subsequently the additional amended complaint since,
23 that the actual plaintiff is the adoptive child and
24 not the parent.

25 BY MALE SPEAKER:

1 And so because the child is a minor, the bar
2 doesn't close on the child's claim until she's,
3 what, 24? What's the ---

4 BY MR. LINDEMANN:

5 Well, under South Carolina law, it would be
6 until 19.

7 BY MALE SPEAKER:

8 Nineteen?

9 BY MR. LINDEMANN:

10 One year after majority.

11 BY MALE SPEAKER:

12 One year? One-year statute of limitations?

13 BY MR. LINDEMANN:

14 That's right. And quite frankly, I mean, we've
15 got arguments as to that particular point. But
16 based upon the fact that we're here on an
17 interlocutory appeal based on denial of qualified
18 immunity, that issue hasn't been briefed and isn't
19 before this court. And in fact ---

20 BY MALE SPEAKER:

21 No, and I didn't mean to divert your attention
22 to that because ---

23 BY MR. LINDEMANN:

24 Oh, and that's fine.

25 BY MALE SPEAKER:

1 Under class action certification here?

2 BY MR. LINDEMANN:

3 The class -- the class has been certified.

4 Now, that issue, of course, is also not before this
5 court because, again, we're here primarily or
6 exclusively on an interlocutory appeal based upon
7 qualified immunity.

8 BY MALE SPEAKER:

9 And you're seeking that insofar as the civil
10 damage claim only?

11 BY MR. LINDEMANN:

12 That's correct. I mean, there is ---

13 BY MALE SPEAKER:

14 Not insofar as the declaratory and
15 injunctive claims?

16 BY MR. LINDEMANN:

17 The declaratory and injunctive relief claims
18 may or may not be resolved by this Court's decision
19 in this case. Obviously ---

20 BY MALE SPEAKER:

21 We couldn't do it.

22 BY FEMALE SPEAKER:

23 Yeah, we wouldn't have any jurisdiction over
24 that.

25 BY MR. LINDEMANN:

1 You wouldn't have jurisdiction over it. The
2 only way this Court's decision could have an effect
3 is if you make a ruling based on the first prong of
4 qualified immunity and ultimately agree with the
5 appellant's position, DSS's position that there is
6 no -- either number one, our first argument, which
7 is there's no private right of action pursuant to
8 the Adoption Assistance and Child Welfare Act. Or
9 number two, the more likely scenario I would submit,
10 which is that that particular provision of the act,
11 673(a)(3), doesn't require parental concurrence in
12 situations such as what we have here, which are
13 across the board ---

14 BY MALE SPEAKER:

15 I'm sorry. Aren't -- there are three
16 appellants. Is that right?

17 BY MR. LINDEMANN:

18 There are actually four appellants.

19 BY MALE SPEAKER:

20 Four appellants?

21 BY MR. LINDEMANN:

22 There's the current DSS director ---

23 BY MALE SPEAKER:

24 Okay. The current ---

25 BY MR. LINDEMANN:

1 --- and the three predecessors.

2 BY MALE SPEAKER:

3 Okay. All right. I'm sorry. All right.

4 BY MR. LINDEMANN:

5 And only the current director has been sued in
6 their official capacity, and that is for purposes of
7 the prospective relief.

8 BY MALE SPEAKER:

9 Right. But the current director is also sued
10 individually?

11 BY MR. LINDEMANN:

12 Yes. And the idea, you know ---

13 BY MALE SPEAKER:

14 Well, wait a minute. How can -- how can the
15 current director, who had nothing to do with the
16 reduction, leaving everything else to one side, how
17 could you possibly recover damages from the current
18 director?

19 BY MR. LINDEMANN:

20 I think the plaintiff's theory on that is that
21 each of the directors, since the initial one in
22 2002, made the decision. None of the subsequent
23 directors, including the current one, has reversed
24 that and reinstated the \$20 per month payment. Of
25 course, our position is even if that's been properly

1 pled, clearly, that's not ---

2 BY MALE SPEAKER:

3 How could they possibly state a claim?

4 BY MR. LINDEMANN:

5 Right. Clearly, that's not required under the
6 act. The act sets a ceiling based upon the -- and
7 the ---

8 BY MALE SPEAKER:

9 Can you imagine a scheme where a government
10 official, given what government looks like today,
11 that you ask somebody to become Secretary of XYZ.
12 And they give up the home life that a public
13 official gives up, the remunerative professional
14 opportunities that such people sometimes give up.
15 All you give up, you step into a job and you get
16 sued for money damages for something that happened
17 ten years ago.

18 BY MR. LINDEMANN:

19 Well, and ---

20 BY FEMALE SPEAKER:

21 No, I thought your representation was that they
22 said that you should -- they would do away with the
23 law. So, it was only going -- it was the going
24 forward denial.

25 BY MR. LINDEMANN:

1 No, there's no evidence in the record that I'm
2 aware of, and of course, this is a very limited
3 record ---

4 BY FEMALE SPEAKER:

5 No, no, no. I'm not talking about evidence and
6 whether that is, in fact, the case. I thought that
7 that was the basis for the complaint.

8 BY MR. LINDEMANN:

9 I think that the ---

10 BY FEMALE SPEAKER:

11 In other words, when you came into office, you
12 didn't do away with this.

13 BY MR. LINDEMANN:

14 That's correct.

15 BY FEMALE SPEAKER:

16 And so we're owed the money for after you came
17 into office.

18 BY MR. LINDEMANN:

19 You didn't reverse the prior decision and
20 reinstate the \$20 per month. That's the argument.

21 BY FEMALE SPEAKER:

22 But in any event, you agree the money damages
23 is the only thing that's in front of us.

24 BY MR. LINDEMANN:

25 Yes.

1 BY MALE SPEAKER:

2 And I'm just trying to clarify whether money
3 damages are sought against the current -- you said
4 yes, ---

5 BY MR. LINDEMANN:

6 Yes.

7 BY MALE SPEAKER:

8 --- that they are seeking money damages, not
9 just prospective injunctive relief in her official
10 capacity, but your understanding is they've sued her
11 for money damages for what her predecessors did.

12 BY MR. LINDEMANN:

13 That's correct. And ---

14 BY FEMALE SPEAKER:

15 But isn't there also -- they did that for sure.

16 But how long has that person been in office?

17 BY MR. LINDEMANN:

18 She's been in office since the current
19 administration, which went in in two thousand and --
20 let me get this right. 2011. January of 2011.

21 BY FEMALE SPEAKER:

22 So they say that she is due the money damages
23 for the last two years because she didn't do away
24 with this policy. Is that correct?

25 BY MR. LINDEMANN:

1 That would be their theory, as I understand it.

2 BY MALE SPEAKER:

3 Not for the previous years because ---

4 BY FEMALE SPEAKER:

5 No.

6 BY MALE SPEAKER:

7 --- the question that comes up is the reason
8 would be if it's clearly established, she should
9 have done away with it. And that's the whole basis
10 of you saying qualified immunity doesn't apply here
11 because it wasn't clearly established.

12 BY MR. LINDEMANN:

13 Well, that's a big part of it. We're moving on
14 both prongs. And frankly, on the first prong, as I
15 indicated -- and set aside the issue of whether or
16 not there's a private enforceable right. I'm not
17 abandoning that issue ---

18 BY FEMALE SPEAKER:

19 When you say qualified immunity ---

20 BY MR. LINDEMANN:

21 But it -- I'm sorry, Judge Mott.

22 BY FEMALE SPEAKER:

23 Go ahead.

24 BY MR. LINDEMANN:

25 I'm not abandoning that issue, but I think we

1 have a very strong position on both prongs because,
2 number one, based upon the fact that you can't have
3 parental concurrence. A proper reading of 673(a)(3)
4 doesn't allow for parental concurrence for
5 reductions or cuts if you've got across the board
6 cuts. And you've got to remember the second or the
7 last provision of that particular section requires,
8 as a federal mandate and is also adopted in South
9 Carolina regulations, as well, that the adoption
10 subsidy can never -- they use the words in no case
11 -- can ever exceed what the foster care board rate
12 is. You can't ---

13 BY FEMALE SPEAKER:

14 But you don't -- that's your harder argument.
15 You don't have to win on that argument. All you
16 have to win on is the argument that that right,
17 whatever it is, is not clearly established. Isn't
18 that right?

19 BY MR. LINDEMANN:

20 Yes, that's -- that's true. Actually, I think
21 the harder argument is that there's no enforceable
22 right. I think but then ---

23 BY FEMALE SPEAKER:

24 That's what I just said, yeah.

25 BY MR. LINDEMANN:

1 But then the other prongs, I don't think, are
2 nearly as hard. And obviously, the real and
3 probably the easiest way for this Court to decide it
4 would be going to the second prong, which obviously,
5 after Pearson versus Callahan you can do. And in
6 fact, a case that I was involved in and Judge Davis
7 was involved in that came down yesterday, Jerome
8 Williams, the prison visitation case, that's exactly
9 what this case did.

10 BY FEMALE SPEAKER:

11 I take it you were not counsel together.

12 BY MR. LINDEMANN:

13 No. No, no.

14 BY FEMALE SPEAKER:

15 That sounded like it was way too cozy.

16 BY MR. LINDEMANN:

17 Judge Davis issued a concurring opinion. And
18 anyway, but that was what this Court did in that
19 particular case that came down yesterday. And
20 obviously, you can do that in this particular case,
21 as well. In fact, going to ---

22 BY FEMALE SPEAKER:

23 That he has no right to the qualified immunity
24 question.

25 BY MR. LINDEMANN:

1 And jumping to the second prong, whether or not
2 it was clearly established. In 2002, there was
3 absolutely no case law. There have been four cases
4 since then that have dealt with, in one way or
5 another, Section 673(a)(3). There's a Ninth Circuit
6 case from 2005 which dealt with whether or not there
7 was an enforceable right under -- that could be
8 pursued. That was the extent of the Ninth Circuit's
9 decision. They found that there was an enforceable
10 right. It was done on a 12(b)(6) motion. And they
11 actually indicated in that decision -- that's the
12 ASW versus State of Oregon case -- that they weren't
13 going to address the merits. There's an unpublished
14 decision from Missouri that the plaintiffs rely on
15 that dealt with this section, but struck down or at
16 least granted a preliminary injunction dealing with
17 a durational requirement that was put in by the
18 State of Missouri. Doesn't have anything to do with
19 what we have in this case. There's no durational
20 requirement.

21 BY MALE SPEAKER:

22 --- in 2002, at the very least.

23 BY MR. LINDEMANN:

24 None of them were.

25 BY MALE SPEAKER:

1 But could have implications if there had been a
2 clearly established right, would it? If it became
3 clearly established somewhere since 2002, would
4 there be potential liability for that point forward?

5 BY MR. LINDEMANN:

6 Well, I would submit not, because frankly, you
7 know, this court has held routinely and held in
8 Jerome Williams, the case that came down yesterday,
9 as well, that you focus on controlling authority,
10 either from the United States Supreme Court or
11 within this circuit. And ---

12 BY FEMALE SPEAKER:

13 At the time the decision is made, but I think
14 Judge Wynn's question is since the complaint, I
15 think, alleges ongoing violation of the rights. So
16 if there was clearly established law after the
17 original decision was made, would that make any
18 difference?

19 BY MR. LINDEMANN:

20 Well, and it would if it was from the United
21 States Supreme Court or within this circuit. And I
22 would submit ---

23 BY MALE SPEAKER:

24 That is my question.

25 BY MR. LINDEMANN:

1 And there's none of that. There's absolutely
2 no authority whatsoever. And the little bit of
3 authority from other jurisdictions -- as I
4 indicated, the Ninth Circuit case didn't decide the
5 merits. The Missouri case is unpublished and dealt
6 with a state regulation that's totally different
7 than what we have here. You have an Indiana case
8 which actually supports our position. In fact, the
9 Indiana District Court case, and this is CH versus
10 Payne from 2010. It's cited in our brief. They
11 actually make the point that we're arguing. If I
12 could read, it says in our view, the only time an
13 across the board cut of adoption assistance payments
14 might be allowable under the statute would be in
15 circumstances where a state's adoption assistance
16 payments exceed its foster care maintenance
17 payments. And that's exactly what happened in this
18 case. The state lowered the foster board
19 maintenance payments and had to lower -- because at
20 that particular time, the adoptive child, BLH, was
21 entitled -- was getting the same amount of money in
22 adoption subsidies as she would have been entitled
23 to in foster care. And so ---

24 BY MALE SPEAKER:

25 Go back to my question initially on the

1 declaratory injunctive relief.

2 BY MR. LINDEMANN:

3 Sure.

4 BY MALE SPEAKER:

5 I'm trying to understand that. You mentioned,
6 sort of indicated, well, if we answered it in a
7 certain way. And it seems clear in Pearson that the
8 way we can avoid this question of whether there's a
9 right is simply go and say if you were -- if we went
10 with your direction on the clearly established, then
11 that's going to leave those claims out there.
12 That's a pretty significant exposure, too, isn't it?
13 The declaratory injunctive relief?

14 BY MR. LINDEMANN:

15 That's going to leave the claim for the lower
16 court to decide, yes, the prospective relief. And
17 we would be making the same argument. We made those
18 same arguments at summary judgment and it was
19 denied. But we would be making the same legal
20 arguments and ---

21 BY FEMALE SPEAKER:

22 And it sort of seems like judicial economy we
23 would decide them, but we have to talk about our
24 jurisdiction. And we only have -- we don't have
25 jurisdiction over them, right?

1 BY MR. LINDEMANN:

2 No. You do have jurisdiction because it's the
3 first prong of the -- you don't have the
4 jurisdiction to actually strike down and say there's
5 no injunctive relief, but you have jurisdiction to
6 decide the first prong of the qualified immunity ---

7 BY FEMALE SPEAKER:

8 Yes.

9 BY MALE SPEAKER:

10 In other words, we could end the case if we
11 decide prong one, but we can't end the case if we
12 decide -- in your favor. But we can't end the case
13 if we decide prong two in your favor.

14 BY MR. LINDEMANN:

15 That's correct.

16 BY MALE SPEAKER:

17 That's what you're saying.

18 BY MR. LINDEMANN:

19 That's correct.

20 BY FEMALE SPEAKER:

21 Unless we should do some, you know, appellate
22 jurisdiction ---

23 BY MALE SPEAKER:

24 Yeah.

25 BY MR. LINDEMANN:

1 But you clearly have jurisdiction to decide
2 prong one, and prong one will decide the case
3 because if you agree with our position that there is
4 no federal right -- either there's no federal right
5 or that the actions that were taken by the
6 Department of Social Services didn't violate
7 673(a)(3), or for that matter, the contracts clause.
8 And I think the contracts clause issue is very
9 straightforward. And I see my time is coming to an
10 end and I'll deal with the contracts clause question
11 briefly on rebuttal because I know there was an
12 attempt to withdraw that claim. And I know the
13 Court hasn't ruled yet on whether they're going to
14 allow the plaintiffs to withdraw that claim in light
15 of them filing a state court action.

16 BY MALE SPEAKER:

17 Have you filed anything in the state court
18 action yet?

19 BY MR. LINDEMANN:

20 We have not filed an answer. It has been
21 served and it has been -- the time to answer has not
22 run yet.

23 BY MALE SPEAKER:

24 Does your mention of answer mean you're not
25 going to file a motion to dismiss?

1 BY MR. LINDEMANN:

2 Do not know how we're going to handle that.

3 BY MALE SPEAKER:

4 Okay. Fair enough. I'm not trying to ---

5 BY MR. LINDEMANN:

6 Probably ---

7 BY MALE SPEAKER:

8 I'm not trying to trick you or anything.

9 BY MR. LINDEMANN:

10 I think under our state procedure, we're going
11 to need to move for summary judgment because it will
12 be based on, like, statute of limitations and some
13 affirmative defenses like waiver and estoppel and
14 those sorts of things.

15 BY MALE SPEAKER:

16 Thank you.

17 BY MR. LINDEMANN:

18 Thank you.

19 BY FEMALE SPEAKER:

20 Mr. Langley?

21 BY MR. LANGLEY:

22 Thank you, Your Honor. May it please the
23 Court. I'm Ryan Langley on behalf of the plaintiff
24 BLH and others similarly situated. The issue that I
25 want to sort of hit first is that the fact issue

1 that's come about in this case because of the moving
2 sort of explanation that we've gotten for the
3 justification for this cut. At the outset in 2002,
4 it was a budget-based decision. All of the language
5 and the correspondence with the families is all
6 about the budget. Since that time, in the briefing
7 from the appellants before this Court and at the
8 summary judgment stage at the lower court, it was
9 all about the interplay between two sections of
10 673(a)(3): the concurrence of the parents section
11 and the not to exceed section, which they've cited
12 that the adoption subsidy payments cannot exceed the
13 foster care payments. Well, that's really separate
14 from what we're claiming is the federal right.

15 BY FEMALE SPEAKER:

16 Well, they're not necessarily contradictory.

17 BY MR. LANGLEY:

18 Well, here's why they are. Because the federal
19 right that we're claiming, Judge, is that a budget-
20 based decision cannot be made in derogation of
21 contract-based rights. And that goes back to the US
22 Trust case and to the Energy Reserves case, Allied
23 Steel Case, a number of cases that were well-
24 established long prior to 2002. That's what my
25 learned colleague here suggested was confusing in

1 our brief. And I want to make that clear. That's
2 the right that we're seeking enforcement of.

3 BY MALE SPEAKER:

4 Here's one of my problems. You're suing the
5 appellants in their individual capacity under
6 Section 1983 for contract damages owed, if by
7 anybody or anything, the State of South Carolina.
8 So, I'm a little discombobulated by that idea. I
9 don't understand it to be a valid contract claim to
10 sue A because A is merely an agent of the promisor
11 B.

12 BY MR. LANGLEY:

13 All right.

14 BY MALE SPEAKER:

15 So, maybe you could start there.

16 BY MR. LANGLEY:

17 Sure.

18 BY MALE SPEAKER:

19 Explain that to me.

20 BY MR. LANGLEY:

21 Your Honor, I think it's deeper than that. All
22 right. It's not just a contract clause claim, or
23 it's not just a contract claim. The reason that
24 it's ---

25 BY MALE SPEAKER:

1 Well, that's all it is.

2 BY MR. LANGLEY:

3 Well, no, sir, Your Honor. I ---

4 BY MALE SPEAKER:

5 Well, it's a -- it's a contract claim brought
6 pursuant to Section 1983. I get that because ---

7 BY MR. LANGLEY:

8 Well, it's a federal right claim pursuant to
9 1983, and the federal right is under Section ---

10 BY FEMALE SPEAKER:

11 I think that's correct, but you started out
12 saying it was a contract claim.

13 BY MALE SPEAKER:

14 Exactly. You started talking about contracts
15 ---

16 BY FEMALE SPEAKER:

17 So, you know, pay us your money and you
18 take your choice here.

19 BY MR. LANGLEY:

20 Yeah. Yes, ma'am, Your Honor. I didn't mean
21 to suggest that it was a contract claim.

22 BY FEMALE SPEAKER:

23 Okay.

24 BY MR. LANGLEY:

25 It is a claim under 1983 for violation of this

1 federal right, that parties who have obligations
2 that are reduced to contract with the state or just
3 statutory obligations from the state that cannot be
4 abrogated on the back of the budget ---

5 BY MALE SPEAKER:

6 I'm sorry to interrupt, but I'm really curious.
7 Are there any -- what's your best case ---

8 BY MR. LANGLEY:

9 The US Trust case.

10 BY MALE SPEAKER:

11 No. Let me finish. What is your best case for
12 a damages action against a state official in his or
13 her implementation of a federal program under the
14 spending clause?

15 BY MR. LANGLEY:

16 The best case ---

17 BY MALE SPEAKER:

18 Yeah.

19 BY MR. LANGLEY:

20 --- under specific spending clause legislation?

21 BY MALE SPEAKER:

22 Yeah. Yeah.

23 BY MR. LANGLEY:

24 Well ---

25 BY MALE SPEAKER:

1 In other words, what we have here is we have a
2 situation where Congress has said here are some
3 things we want the states to do. We're going to --
4 you know, the classic spending clause situation.
5 We're going to give you the money, some of the
6 money, maybe most of the money to do this. You've
7 got to put in a little bit yourself, State, because
8 we think this is a worthwhile goal. So, state
9 officials start implementing the program. Is there
10 any case anywhere ever in which any court has
11 recognized a 1983 action or just a state law action
12 against a state official under those circumstances?

13 BY MR. LANGLEY:

14 I don't think there would be a state law action
15 against a state official because they would be
16 acting in their agent capacity. Okay. Why there's
17 a 1983 action goes back to is there an established
18 right to be free from a budget-oriented cut. And
19 that's what we're saying, that that ---

20 BY MALE SPEAKER:

21 And so you don't have any such cases asserting
22 this right to be free from a budget-oriented cut?

23 BY MR. LANGLEY:

24 Sure. The US Trust case.

25 BY MALE SPEAKER:

1 The US Trust case?

2 BY MR. LANGLEY:

3 Yes, and that's a 1977 -- or excuse me. A ---

4 BY MALE SPEAKER:

5 That wasn't a ---

6 BY MR. LANGLEY:

7 It was a 1977 case that involved a bond. Okay.

8 And there were individuals in New Jersey. The state

9 took out a bond to do some public works project.

10 One of the covenants that went along with the bond

11 was that the state was obligated to use the money

12 funding the bond only for these particular set of

13 public works projects.

14 BY MALE SPEAKER:

15 Right.

16 BY MR. LANGLEY:

17 Well, the state issued a statute in 1974 that

18 said they didn't have to use the money for those

19 public works projects. And the court found that

20 that was a -- it was a contracts clause case, but it

21 was ---

22 BY MALE SPEAKER:

23 See, that's what I'm -- that's what I'm -- so

24 it wasn't a 1983 case?

25 BY MR. LANGLEY:

1 No, the Court said that that was a substantial
2 impairment to that contract.

3 BY MALE SPEAKER:

4 I was talking about 1983.

5 BY FEMALE SPEAKER:

6 What contract do you have here?

7 BY MR. LANGLEY:

8 The contract ---

9 BY FEMALE SPEAKER:

10 See, I thought -- we're going in a circle. You
11 said contract and Judge Davis tells you the problems
12 with the contract claim. Then you say no, it's a
13 statutory claim. So ---

14 BY MR. LANGLEY:

15 Well, it's both. I mean, that's the
16 difficulty. There is a statutory claim under
17 Section 673. And there's a contract that implements
18 that statutory obligation. So it's difficult to
19 parse it out. I mean, you can see the issue that
20 we've had with pleading it, attempting to plead it
21 both ways. What we're trying to do is recover for
22 these children that have been -- that have had the
23 money that they agreed to and the families that have
24 come from adoptive care or into adoptive care from
25 foster care that they can't go back now.

1 BY MALE SPEAKER:

2 Is the reason you have 1983 here is because --
3 and I don't mean this pejoratively -- is because
4 that's the only way you're going to get your
5 attorney's fees.

6 BY MR. LANGLEY:

7 Well, no, sir, Your Honor. We've got an
8 agreement with our clients that we'll get our
9 attorney's fees for the recovery that we obtain for
10 them. Is it a part of ---

11 BY MALE SPEAKER:

12 Somebody's paying attorney's fees to recover
13 \$20 a month per child?

14 BY MR. LANGLEY:

15 For ten years, it's a big deal to these
16 families, Your Honor. It's a big deal to these
17 families. It's a ---

18 BY MALE SPEAKER:

19 So the kids won't get all the \$20. I'm
20 probably going -- I'm probably going someplace I
21 shouldn't go, but ---

22 BY MR. LANGLEY:

23 Well, I think it's fair, Your Honor. Unless
24 there's a 1983 recovery, unless you recognize that a
25 state can't come in and say oh, willy-nilly, we've

1 got a budget issue and therefore your contract is
2 meaningless. Then you're right. These children
3 that have lost the money won't get all of the money
4 they should get back. But there's no other way for
5 us to organize it unless there's a 1983 claim
6 accepted.

7 BY MALE SPEAKER:

8 So, some members of your class, obviously, are,
9 what, 23, 25, 27 years old today?

10 BY MR. LANGLEY:

11 They are. They are. And some of the -- they
12 were ---

13 BY MALE SPEAKER:

14 And so -- go ahead. I didn't -- I mean, the
15 whole thing is just -- so, you've got a 27-year-old
16 adoptee who's going to get some of this money paid
17 either by -- if you win, paid by these individuals
18 out of their personal funds. Or if the state steps
19 in and, I guess from your perspective, does the
20 right thing, air quotes, and indemnifies these
21 former and current agency heads, then -- okay. That
22 vindicates Congress's intention to have this money
23 in the hands of the parents of these adopted
24 children?

25 BY MR. LANGLEY:

1 Well, it wouldn't be 27, Your Honor. It would
2 be for the time ---

3 BY MALE SPEAKER:

4 Okay, 23.

5 BY MR. LANGLEY:

6 Well, it wouldn't be 23. It could only be two
7 years -- they were 19 at the time that we brought
8 the action, the oldest child. So, it would be 21.
9 I think the action was filed about two years ago.

10 BY MALE SPEAKER:

11 Yeah, but isn't the class -- doesn't the class
12 include -- does the class include children adopted
13 in the last eight to ten years?

14 BY MR. LANGLEY:

15 Only -- no.

16 BY MALE SPEAKER:

17 No?

18 BY MR. LANGLEY:

19 This only goes back to 2002, Your Honor,
20 because it's only the children that were in ---

21 BY MALE SPEAKER:

22 That were formerly getting the ---

23 BY MR. LANGLEY:

24 Right. Yes, sir, Your Honor.

25 BY MALE SPEAKER:

1 --- higher amount.

2 BY MR. LANGLEY:

3 That's right. After 2002, then the children
4 that moved from foster care to adoption had a
5 separate contract, had a separate agreement. And
6 their agreement was set at that time based on the
7 rates that were at that time. So they don't have a
8 -- they're not included in the class because they
9 were not affected by this cut. They didn't have a
10 pre-existing ---

11 BY MALE SPEAKER:

12 How large is the class?

13 BY MR. LANGLEY:

14 How big is the class? Well, Your Honor, we've
15 been ---

16 BY MALE SPEAKER:

17 The best of your knowledge.

18 BY MR. LANGLEY:

19 Forty-one hundred children.

20 BY MALE SPEAKER:

21 Forty-one hundred children?

22 BY MR. LANGLEY:

23 That's right. There were 4100 children under
24 the care and custody of the Department of Social
25 Services in 2002. Or I shouldn't say it that way.

1 That had passed through the care and custody of the
2 Department of Social Services.

3 BY MALE SPEAKER:

4 Passed through. So, these were 4100 adoptees?

5 BY MR. LANGLEY:

6 Yes, sir, Your Honor. And so, some of them may
7 have been 17, so they would get a year of benefits.
8 Some of them may have been three. So, you know,
9 they're continuing to go on.

10 BY MALE SPEAKER:

11 I see. I see your point. Okay.

12 BY MR. LANGLEY:

13 So, there will be one calculation that's
14 performed, but it will be a different number for
15 each. And so, to your point, that money goes back
16 to the parents that have -- that lost out. I mean,
17 remember, the state benefits ---

18 BY FEMALE SPEAKER:

19 Well, the state's only duty here is to confer
20 with the parents, right? The concurrence of the
21 parent?

22 BY MR. LANGLEY:

23 Concurrence of the parent. And it's
24 interesting, you know, the case ---

25 BY FEMALE SPEAKER:

1 The only possible duty.

2 BY MR. LANGLEY:

3 --- cited by Mr. -- I'm sorry, Your Honor?

4 BY FEMALE SPEAKER:

5 Sorry. Go ahead.

6 BY MR. LANGLEY:

7 The case cited by Mr. Lindemann, the CH Payne
8 case from Indiana, that court did find that Section
9 673 unambiguously requires that the state engage in
10 an individualized process with each family. That's
11 what concurrence meant. They suggested in their
12 brief that concurrence was vague and amorphous and
13 ambiguous. Well, the case they cite for that says
14 unambiguously ---

15 BY MALE SPEAKER:

16 That's the Ninth Circuit case?

17 BY MR. LANGLEY:

18 No, that's the Southern District of Indiana
19 case.

20 BY MALE SPEAKER:

21 Oh.

22 BY MR. LANGLEY:

23 But they do cite the Ninth Circuit case.

24 BY MALE SPEAKER:

25 Following the Ninth Circuit?

1 BY MR. LANGLEY:

2 The ASW, yes, sir, Your Honor. Yes, sir, Your
3 Honor. So, the fundamental point is that the
4 established right under 1983 is that you cannot use
5 the budget as a justification to cut an obligation
6 that you've already entered into that is concrete.
7 And the interesting thing is even ---

8 BY FEMALE SPEAKER:

9 Well, of course, they point to this provision
10 in 673(a)(3).

11 BY MR. LANGLEY:

12 Yes, sir, Your Honor. And if you accept that
13 provision -- we don't, but if you do, in 2004, that
14 goes away. Their justification in 2004 went away
15 because they reinstated the foster care cut. The
16 whole basis for the cut to adoption in 2002 was what
17 they created. They decreased the foster care
18 subsidy, which then they said, okay. Well, because
19 of what we've done, we've now got to do this and
20 decrease the adoption subsidy. Well, they increased
21 the foster care subsidy in 2004, but they didn't
22 increase the adoption subsidy. The reason why,
23 foster care parents can bring the children back.
24 So, they've got to continue to incentivize those
25 folks to hold onto them. And that's why they did

1 it. But now the adoptive families, they've made a
2 moral and contractual commitment to take care of
3 these children and so they cannot bring them back.
4 And so, the state's in a position where they've got
5 the leverage over those folks to treat them really
6 however you want. And that's really the danger if
7 you accept their position, is that if you say you
8 can -- a state, a state actor here can cut the
9 adoption subsidy -- excuse me. Cut the foster care
10 subsidy, and thereby obligate itself to cut the
11 adoption subsidy, what's to keep them from cutting
12 the foster care subsidy to one dollar ---

13 BY MALE SPEAKER:

14 Why is the federal government -- this is a
15 stupid question, I'm afraid. But why is the federal
16 government permitting South Carolina to get away
17 with this?

18 BY MR. LANGLEY:

19 Well, that's why we're here.

20 BY MALE SPEAKER:

21 No, that's not why you're here. My question is
22 why, not ---

23 BY FEMALE SPEAKER:

24 Also, you'd be suing the federal government
25 then.

1 BY MALE SPEAKER:

2 Yeah.

3 BY MR. LANGLEY:

4 Well, you know, I hope that you'll act on
5 behalf of the federal government and not allow South
6 Carolina to ---

7 BY FEMALE SPEAKER:

8 We're not that part of the federal government.

9 BY MALE SPEAKER:

10 No, no. We don't want any part to that. No, I
11 mean it very seriously, even though it was a dumb
12 question. I presume, and maybe I shouldn't, that
13 from a political perspective -- and I don't have any
14 hesitation in calling it that. When this happened
15 back in 2002 and 2003, that there were efforts on
16 behalf of your clients to persuade Health and Human
17 Services to contact South Carolina and bring to bear
18 whatever was available to get South Carolina not to
19 do this. Now, there is -- the appellants rely on
20 these -- what are they called, PIQs, policy
21 questions and guidances that seem to say that the
22 answer to my question is that the federal government
23 believes South Carolina can do this.

24 BY MR. LANGLEY:

25 Well, Your Honor, the one -- however you

1 pronounce it. PIQ or whatever ---

2 BY MALE SPEAKER:

3 Okay.

4 BY MR. LANGLEY:

5 --- that they rely on ---

6 BY MALE SPEAKER:

7 Well, they rely on a couple.

8 BY MR. LANGLEY:

9 The principal one that they relied on that Mr.
10 Lindemann referenced today for the automatic, across
11 the board decrease without obtaining the parents'
12 concurrence. Right next to decrease says or
13 increase. So, the obligation, from our perspective,
14 is if there's a decrease, that you don't -- you're
15 not obligated to get the parents' consent for and
16 there's an increase in the foster care rate that
17 initiated that decrease, if you reverse that, then
18 you go right back to that same provision. You can't
19 read the decrease language without the increase
20 language, is what I'm saying.

21 BY MALE SPEAKER:

22 Okay. I mean, that's a fair answer to my
23 question. But you know, I understand there's a
24 different administration there now and we're all
25 adults. I understand that different administrations

1 have different policy preferences and administer
2 federal programs differently. But I mean, here we
3 are, ten years later, 11 years later. And nobody on
4 the federal side that has the clear authority to
5 provide your clients with a remedy has stepped up.
6 And of course, you're in the right place, given
7 those circumstances. I understand that. Courts are
8 the last resort. But this strikes me as a really
9 tough pull for you.

10 BY MR. LANGLEY:

11 Well, thank you, Your Honor. It's -- and
12 remember, you're talking about children that have
13 come into the foster care and into the adoptive
14 system because they've been abused and neglected. I
15 mean, these are special needs kids. These are not
16 kids with abundant resources that have ever even met
17 a lawyer many times, much less have access to
18 somebody to write a letter to the Department of
19 Health and Human Services in DC and initiate a
20 complaint internally through a federal agency or the
21 persistence of time ---

22 BY FEMALE SPEAKER:

23 So I guess as to Judge Davis's question about
24 why hasn't this been done, why hasn't there been
25 political pressure put on the administration. But

1 surely they know about this lawsuit now. So I mean,
2 this is -- people in South Carolina, I assume, know
3 about the lawsuit, right?

4 BY MR. LANGLEY:

5 Well, I don't know.

6 BY FEMALE SPEAKER:

7 So there was a groundswell ---

8 BY MALE SPEAKER:

9 Yeah.

10 BY MR. LANGLEY:

11 Well, we've got one client, Your Honor. I
12 mean, that's who we represent as the class
13 representative. And so, we don't have a groundswell
14 of folks coming ---

15 BY FEMALE SPEAKER:

16 No, no, no, no. Groundswell in the popular
17 press or a groundswell among the legislators in
18 South Carolina.

19 BY MR. LANGLEY:

20 It hasn't happened. It hasn't happened yet. I
21 mean, that's what we're hoping for.

22 BY FEMALE SPEAKER:

23 Sure.

24 BY MR. LANGLEY:

25 And frankly, if they've conceded that they've

1 got exposure at the state level, I mean, we could
2 talk about the contracts clause claim for a minute
3 and why we're doing what we're doing there or why we
4 attempted to do what we did there with the
5 withdrawal, is essentially that we felt like their
6 reply was a concession that that was the place to
7 be. Of course, when we first filed the case, they
8 removed it to federal court. So, you know, it's --
9 we're trying to get a remedy for these children.

10 BY FEMALE SPEAKER:

11 Well, I ---

12 BY MR. LANGLEY:

13 Whatever that it is.

14 BY FEMALE SPEAKER:

15 I'm not certain that our -- okay. You don't
16 want to pursue your contract claim anymore and we
17 dismiss it. I don't know that that is anything, one
18 way or the other, to the state court. I mean, you
19 want to show it to the state court as the federal
20 court has jurisdiction.

21 BY MR. LANGLEY:

22 No, ma'am. No, ma'am.

23 BY FEMALE SPEAKER:

24 Has no jurisdiction, right? Because they're
25 dismissing it.

1 BY MR. LANGLEY:

2 Well ---

3 BY FEMALE SPEAKER:

4 They want to show it to the federal court as
5 we've rejected it somehow, or you've conceded on it.

6 BY MR. LANGLEY:

7 Right.

8 BY FEMALE SPEAKER:

9 But I don't know that it has either one of
10 those effects.

11 BY MR. LANGLEY:

12 Well, I don't mean to speak in terms of effect.
13 What I'm trying to help you understand is, from our
14 perspective, that we're trying to get a remedy for
15 these children, whatever the law is. And so ---

16 BY FEMALE SPEAKER:

17 I do understand that, but I really can't
18 understand your -- the argument that we've had about
19 what our dismissal of the contract clause claim is
20 no longer pursued has any effect at all in the state
21 court action.

22 BY MR. LANGLEY:

23 I don't think it does, Your Honor.

24 BY FEMALE SPEAKER:

25 Okay.

1 BY MR. LANGLEY:

2 I just wanted to answer the Court's question
3 about why we did what we did because there was a
4 response to that notice that suggested that it was
5 ---

6 BY FEMALE SPEAKER:

7 I know you're going to say that. But in other
8 words, you say that they've conceded that you're
9 properly in state court and not in federal court.
10 But I don't know that our plain dismissal of it does
11 that at all.

12 BY MR. LANGLEY:

13 No, ma'am.

14 BY FEMALE SPEAKER:

15 I mean, you may make that argument, but ---

16 BY MR. LANGLEY:

17 I don't think it has anything to do with the
18 Court's dismissal. It's their language from their
19 brief that says this is where it ought to be.
20 That's what I'm ---

21 BY MALE SPEAKER:

22 But you want us to dismiss that claim without
23 prejudice?

24 BY MR. LANGLEY:

25 Yes, sir, Your Honor.

1 BY MALE SPEAKER:

2 And is there tolling in South Carolina that
3 will permit you to avoid any limitations problems?

4 BY MR. LANGLEY:

5 Yes, sir, Your Honor. That's the argument we'd
6 make. I'm sure that they would make an argument to
7 the contrary. But that's ---

8 BY MALE SPEAKER:

9 Of course, they want it with prejudice?

10 BY MR. LANGLEY:

11 Right.

12 BY MALE SPEAKER:

13 But you want it without prejudice?

14 BY MR. LANGLEY:

15 Yes, sir, Your Honor.

16 BY MALE SPEAKER:

17 Okay. Is discovery complete in this case, by
18 the way?

19 BY MR. LANGLEY:

20 No. Your Honor, no discovery has been
21 undertaken.

22 BY MALE SPEAKER:

23 No discovery.

24 BY MR. LANGLEY:

25 That's why we initially asked for the Court to

1 remand it and not to dismiss the appeal so we'd have
2 the opportunity to flesh out some of these issues
3 and find out just why they made the decision that
4 they did.

5 BY FEMALE SPEAKER:

6 Yeah, but you understand the whole Qualified
7 Immunity Doctrine. They're entitled to an
8 interlocutory appeal before any discovery.

9 BY MR. LANGLEY:

10 Yes, ma'am, Your Honor. I think ---

11 BY FEMALE SPEAKER:

12 And if they win, as a matter of law, you're out
13 of court.

14 BY MR. LANGLEY:

15 Right. If it's a -- if there's a decision as a
16 matter of law, if the lower court's decision was
17 based on solely a legal issue, you know, from the
18 Witte case. But if you've got -- if you've got
19 factual issues that underlie the determination of
20 the district court, and that's what I was getting at
21 with the basis for the decision. Was it a budget-
22 based decision like they've now seemed to argue on
23 one side of their mouth. But then on the other, no,
24 it was based on 673 ---

25 BY MALE SPEAKER:

1 So you think it's a motivational determination?

2 I'm having difficulty understanding that.

3 BY MR. LANGLEY:

4 I do. I think it's what we've characterized as
5 an ex post facto attempt to justify what they
6 recognize now was improper, that they couldn't make
7 this decision and couldn't make this cut on the
8 basis of the budget ---

9 BY MALE SPEAKER:

10 Well, improper -- improper -- what you're
11 talking about when you use the term improper is a
12 breach of contract.

13 BY MR. LANGLEY:

14 No, sir, Your Honor. I'm talking about a
15 breach of a federal right not to have a federal
16 provision, a federal obligation abrogated for a
17 budget reason. I mean, that's what the US Trust
18 case said. I understand the Court's point that it's
19 not a 1983 action and that it's not a direct link
20 and it's not a cookie cutter fine example here. But
21 they shouldn't be able to just get away with it just
22 because they now have changed their tune ---

23 BY FEMALE SPEAKER:

24 There's no clearly established law. They
25 shouldn't be able to get away with it.

1 BY MR. LANGLEY:

2 No, Your Honor. I think it is. I think it is
3 clearly established.

4 BY FEMALE SPEAKER:

5 I understand that, but if there was -- if we
6 should conclude that there was no clearly
7 established law in your -- and the best you can do
8 is the case you cited to us. I mean, you don't have
9 another case, do you, in the Fourth Circuit or the
10 Supreme Court that would say that this was a
11 violation of the statute that was clearly
12 established?

13 BY MR. LANGLEY:

14 Yes, Your Honor.

15 BY FEMALE SPEAKER:

16 Oh, you do? Okay. What is that?

17 BY MR. LANGLEY:

18 The Allied Steel case and the Energy Reserves
19 case both support the position that we've taken that
20 there's ---

21 BY FEMALE SPEAKER:

22 They -- dealing with this statute?

23 BY MR. LANGLEY:

24 Not with this statute.

25 BY MALE SPEAKER:

1 Those are contract clause cases.

2 BY MR. LANGLEY:

3 Yes, sir, Your Honor.

4 BY MALE SPEAKER:

5 But we've held that you don't have a 1983

6 action under the contract clause.

7 BY MR. LANGLEY:

8 Yes, sir, Your Honor.

9 BY FEMALE SPEAKER:

10 So how do you ---

11 BY MALE SPEAKER:

12 So how do you marry those two?

13 BY MR. LANGLEY:

14 Well, that's what we're trying to do with the

15 statutory right under 673, that it's a 673 right ---

16 BY FEMALE SPEAKER:

17 That's where you then need the clearly

18 established law. That's what I asked you about.

19 BY MR. LANGLEY:

20 Yes, ma'am, Your Honor, and I acknowledge

21 there's not ---

22 BY FEMALE SPEAKER:

23 You've done the best you can.

24 BY MR. LANGLEY:

25 I've done -- we've done the best we can.

1 BY FEMALE SPEAKER:

2 Okay. Fair enough.

3 BY MALE SPEAKER:

4 And we appreciate that all the time.

5 BY FEMALE SPEAKER:

6 Yeah. Fair enough. Thank you very much.

7 BY MR. LANGLEY:

8 Thank you.

9 BY FEMALE SPEAKER:

10 Mr. Lindemann, you have a few minutes.

11 BY MR. LINDEMANN:

12 Thank you, Your Honor. Just a couple of
13 points. And I know the Court is, I believe,
14 recognizing these points already, but I just want to
15 make certain.

16 Mr. Langley has now come before you and said
17 the statutory right that he's claiming was violated
18 was, if I wrote it down right, the right to be free
19 from a budget-oriented cut. And the only thing he
20 relies on, as Judge Davis just picked up on, are
21 contract clause cases. In fact, the other two he
22 cited to the Court are contract clause cases. He
23 has absolutely no authority within this circuit or
24 outside this circuit that would find that such a
25 right exists under Section 1983 and certainly

1 doesn't exist within the specificity of the context
2 of this case, which is what's required under
3 Anderson versus Creighton and Edwards versus City of
4 Goldsboro when you evaluate the federal right within
5 its specific context. So, I would submit to this
6 Court that clearly you could rule, if you want to go
7 right to the second prong, which you can do under
8 Pearson. You could overturn and grant qualified
9 immunity to these individual defendants based on the
10 second prong on that alone. I would also make the
11 point, and this goes to another point that Judge
12 Davis made, wondering where's the federal
13 government. And then Judge Davis, you answered your
14 question. The federal government is absolutely fine
15 if you look at the way the house -- I mean, the HHS,
16 and specifically, the Administration of Children and
17 Families, which not only interprets this particular
18 statutory scheme but also enforces it. If you look
19 at exactly how it was that they answered these
20 questions, it's from the Child Welfare Policy
21 Manual. If I can read one sentence, it goes right
22 to this very point of what happened here. They said
23 once a child is adopted and determined to be
24 eligible for Title IV-E adoption assistance, the
25 adoption assistance payments may not be

1 automatically adjusted without the agreement of the
2 adoptive parents for any reason -- here's the key
3 language -- other than an across the board reduction
4 or increase in foster care maintenance rates. So
5 they just answered the question right there. South
6 Carolina reduced the foster care maintenance rates.
7 There's nothing in the statutory scheme that
8 prevents that. Doesn't matter what the rationale
9 was, but clearly, the letter from Director Patterson
10 at the time was talking about budget cuts in 2002.
11 She reduced the foster care maintenance rates, and
12 as a matter of federal law, 673(a)(3), the very last
13 sentence of that statute, that provision provides
14 that in no case may the adoption subsidy be more
15 than the foster care rate. So, as a result, you
16 have to drop that rate. And when it's across the
17 board, that doesn't require parental concurrence
18 because that doesn't make sense. The way 673(a)(3)
19 should be interpreted, I submit, and this would go
20 to the first prong argument, is that the parental
21 concurrence is required when you're looking at
22 individualized circumstances, not across the board
23 reductions or across the board increases. In fact,
24 Director Patterson's letter talks about how three
25 years before when she became director, she fought

1 for and got increases in both the foster board rate
2 as well as the adoption subsidy rate. Of course,
3 that was before the financial issues, economic
4 issues in the early 2000s. They didn't get parental
5 concurrence to increase those rates by \$120 because
6 they were all across the board. And so, that goes
7 to the first prong, but it also goes to the second
8 prong because the argument that the ACF sees it our
9 way, certainly, that's additional evidence to show
10 that what they're arguing wasn't clearly
11 established. The actual government agency that is
12 supposed to interpret and enforce this statute, by
13 clear questions and answers in their policy manual,
14 support what South Carolina did.

15 I would also like to touch on -- well, one
16 thing there was a question about is discovery
17 complete. My reading of the scheduling order, and
18 there's only one scheduling order in the case, had
19 discovery over in April of 2012, which was before
20 both sides filed motions for summary judgment.
21 There was an agreement from day one, and in fact, in
22 a footnote in my reply brief, I put several cites
23 where the plaintiffs themselves concede that there
24 are no facts in this. These are purely legal
25 issues. That's why they're perfect for qualified

1 immunity and perfect for an interlocutory appeal to
2 this Court to be decided in that manner.

3 One last point, there was a reference to the
4 Indiana case, the CH versus Payne. And
5 interestingly, Mr. Langley said that the Indiana
6 District Court in that particular case found that
7 673(a)(3) was non-ambiguous. Well, what's funny is
8 they didn't know how to interpret concurrence. And
9 I would submit the term concurrence really is fairly
10 ambiguous, and that's why it requires some judicial
11 interpretation. Because in that particular case,
12 the reason why they granted the temporary injunction
13 -- and that was all. They didn't get to the merits.
14 But they did find a likelihood of success on the
15 merits. But what they had a problem with there was
16 that Indiana, unlike South Carolina, reduced the --
17 reduced both rates, the board rate, as well as the
18 adoption subsidy rate. But the adoption subsidy
19 rate was still much less than the board's rate. And
20 so, therefore, the reduction in the subsidy rate, if
21 it had not been touched, it would have still been
22 below the new board rate, if that makes sense how I
23 said it. So that was the problem that the Indiana
24 court had. But still, they talked about 673(a)
25 requiring at least that the state first consult with

1 the adoptive parents and consider the individualized
2 needs of the children being adopted. They used the
3 word consult. I mean, quite clearly, the word
4 concurrence is subject to interpretation.

5 BY FEMALE SPEAKER:

6 Well, I don't know that you would have any
7 quarrel with us if we held that, too. I know your
8 position is that they shouldn't, but if we should
9 hold that there is a right under this statute to be
10 consulted ---

11 BY MR. LINDEMANN:

12 Oh, I don't ---

13 BY FEMALE SPEAKER:

14 --- then you would go to saying 673(a)(3) is an
15 exception to that.

16 BY MR. LINDEMANN:

17 Yeah, and I don't disagree that in an
18 individualized circumstance, without question, I
19 think that statute should be interpreted as
20 requiring consultation because you're taking in the
21 individual circumstance of that child. You're
22 taking the individual circumstances of the adoptive
23 parents' home and their financial situation. But
24 not when it's across the board.

25 BY FEMALE SPEAKER:

1 So you agree that there is a cause of action,
2 just not ---

3 BY MR. LINDEMANN:

4 I'm sorry, ma'am?

5 BY FEMALE SPEAKER:

6 There is a cause of action under the statute,
7 private cause of action?

8 BY MR. LINDEMANN:

9 I'm not conceding that. We've got that in our
10 brief, but I will recognize that that is a tougher
11 issue for me to pursue. The two courts that have
12 addressed it so far -- the Ninth Circuit, as well as
13 the Missouri court, as well as the Indiana court. I
14 shouldn't leave them out. Have found that there is
15 a private right of action. Based on the suitor
16 impasse, we disagree.

17 BY FEMALE SPEAKER:

18 But I thought that in response to my question
19 just a minute ago, you said yes, in the individual
20 determination, you agree that they should talk to
21 the parents.

22 BY MR. LINDEMANN:

23 I'm not ---

24 BY FEMALE SPEAKER:

25 That sounds like a right to consultation. You

1 just don't think they can enforce it?

2 BY MR. LINDEMANN:

3 Yeah, I'm not suggesting that that gives rise
4 to a federal right.

5 BY FEMALE SPEAKER:

6 Okay.

7 BY MR. LINDEMANN:

8 The statute is written as may, and obviously,
9 no -- I apologize, Your Honor. I wasn't conceding
10 that point and suggesting that there's no federally
11 created right there, but ---

12 BY FEMALE SPEAKER:

13 It says reasonable efforts will be made. Okay.

14 BY MALE SPEAKER:

15 You don't have any strenuous objection to a
16 dismissal of the contract clause claim without
17 prejudice, do you?

18 BY MR. LINDEMANN:

19 Well, here's my concern. This is what I put in
20 my return to this Court. And I'm not trying to be
21 difficult. The reason why I asked for it to be with
22 prejudice is because, number one, I think the City
23 of Gastonia case, Crosby versus The City of
24 Gastonia, which I know Judge Davis, you were on that
25 case, clearly holds that if you have a state law

1 breach of contract claim that you can bring, not
2 necessarily that you can win, but that you're not
3 foreclosed from pursuing your state law breach of
4 contract rights, you don't have a contract clause
5 claim. So, we believe that we should win as a
6 matter of law on that issue. But what I have a
7 problem with it being without prejudice is they have
8 just filed in state court. As the court well knows,
9 state court has concurrent jurisdiction over 1983
10 claims. What I want to avoid happening is them
11 amending down the road to bring their contracts
12 clause claim in the state court action. We have to
13 then remove the case and start over in federal
14 court.

15 BY MALE SPEAKER:

16 Well, you don't ever have to remove a case from
17 state court.

18 BY MR. LINDEMANN:

19 Well, we would. I would -- believe me, and
20 this is no disparagement to our South Carolina
21 judiciary, but I would much rather have a federal
22 contracts clause claim decided in federal court.

23 BY FEMALE SPEAKER:

24 What if they made representation in front of us
25 right now that they wouldn't bring a 1983 contracts

1 -- a 1983 claim in state court?

2 BY MR. LINDEMANN:

3 Yeah, if I can receive a stipulation to that
4 effect, I have no problems with them ---

5 BY FEMALE SPEAKER:

6 Are you ready to make that representation?

7 BY MR. LINDEMANN:

8 --- withdrawing the claim.

9 BY MR. LANGLEY:

10 I didn't understand it clearly, Your Honor.

11 BY FEMALE SPEAKER:

12 Can you make a representation that you're not
13 going to bring a 1983 action in state court?

14 BY MR. LANGLEY:

15 Yes, ma'am.

16 BY FEMALE SPEAKER:

17 Okay.

18 BY MR. LANGLEY:

19 And stipulate that there's not a bar to the
20 state court contract claim in state court?

21 BY FEMALE SPEAKER:

22 Yeah.

23 BY MR. LANGLEY:

24 Yes, ma'am, Your Honor.

25 BY FEMALE SPEAKER:

1 Well, we're not deciding whether there's a bar
2 or not. We're just dismissing without prejudice.

3 BY MR. LANGLEY:

4 Well, on the grounds of res judicata or
5 collateral estoppel by virtue of some dismissal with
6 prejudice ---

7 BY MR. LINDEMANN:

8 If it's without prejudice, there would be no
9 such argument.

10 BY FEMALE SPEAKER:

11 Right.

12 BY MR. LINDEMANN:

13 And that wasn't my intent to try to make that
14 argument, I can represent to the Court.

15 BY FEMALE SPEAKER:

16 Okay. Thank you very much.

17 BY MR. LINDEMANN:

18 Thank you.

19 BY FEMALE SPEAKER:

20 We will come down and greet the lawyers and
21 then -- I will first ask our Clerk to adjourn court
22 and then we'll go down and greet the lawyers.

23 BY THE CLERK:

24 This Honorable Court stands adjourned until
25 3:00 today. God save the United States and this

Honorable Court.

(END OF RECORDING)

STATE OF SOUTH CAROLINA CERTIFICATE OF NOTARY PUBLIC

COUNTY OF SPARTANBURG 2013-CP-42-1569

BLH (D/O/B [REDACTED] BY PARENTS/GENERAL)

GUARDIANS KENNETH AND ANGELA HENSLEY,)

AND ON BEHALF OF ALL OTHERS SIMILARLY)

SITUATED,)

PLAINTIFF,)

VERSUS)

SOUTH CAROLINA DEPARTMENT OF SOCIAL)

SERVICES,)

DEFENDANT.)

I, JILL BISHOP EDWARDS, A NOTARY PUBLIC FOR THE
STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED
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SEAL THIS 4TH DAY OF APRIL, 2014.

JILL BISHOP EDWARDS

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 7/14/2020

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3 B.L.S.,)
4 Plaintiff,) TRANSCRIPT OF RECORD
5 -vs-) 2013-CP-42-01569
6 South Carolina Department)
7 of Social Services,)
8 Defendant.) June 5, 2024
9 Spartanburg, South Carolina

10
11 B E F O R E:

12 HONORABLE J. MARK HAYES, II, JUDGE
13

14 A P P E A R A N C E S:

15 TIMOTHY RYAN LANGLEY, ESQUIRE
16 JAMES FLETCHER THOMPSON, ESQUIRE
17 Attorneys for the Plaintiff

18 ANDREW F. LINDEMANN, ESQUIRE
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20 Attorneys for the Defendant

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22 Linda D. Moffitt
23 Circuit Court Reporter
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INDEX

Motions -- page 3.
No sworn testimony.
No exhibits entered into evidence.

1 (Proceedings June 5, 2024)

2 THE COURT: Okay. I've got that we're here on several
3 different motions.

4 I've reviewed the -- I would propose that what we
5 start with are what I call the motions that deal with the
6 substantive, and then we have until probably -- we're going
7 to try to shoot, not go past, 4:30. And so if we have
8 time, then move to the decertification issue.

9 My understanding -- and y'all can argue and tell me
10 I'm wrong -- my understanding is there is some crossover on
11 the decertification issue with the substantive issue.

12 But let's -- that would be my proposal. And I say
13 that's my proposal because that's the way I think I can
14 digest it better with my simple mind. So, I will -- that's
15 what I would suggest.

16 Now, with it being cross motions, I really don't have
17 a preference since both of you want me to grant the
18 motions. So, I will be more than happy to start with
19 plaintiff.

20 MR. LANGLEY: Thank you, Your Honor.

21 THE COURT: Okay.

22 MR. LANGLEY: So, our motion is based on the
23 undisputed facts of course that are agreed to, and
24 essentially they are as follows: One, in 2002 D.S.S. cut
25 across the board every contract for adoption subsidy

1 assistance in the State of South Carolina. Some 4,100
2 contracts cut in the exact same amount at the exact same
3 time in the exact same way for every one of the members of
4 the class.

5 And, so, from our perspective that's classic
6 commonality, and cut it in an amount that at the highest
7 would be \$20 a month. So, at the highest it would be \$240
8 a year times 18 years if a child came into adoption. And
9 then of course there's a 5-month portion of the class
10 definition to address the requirement that each class
11 member have \$100 in damages.

12 So, at the most you'd have \$240 times 18 years of lost
13 benefits. So, somewhere around the \$4,000 range, not an
14 amount that would typically incentivize an individual to
15 litigate their claim on its own. And let me --

16 THE COURT: Let me interrupt you just for a second.

17 I'm -- I'm receiving that argument as dealing with the
18 issue of class decertification.

19 MR. LANGLEY: Well, I think it all goes together in
20 that one of the motions -- one of the components of the
21 motion for summary judgment is that -- and the element of
22 damages, that, and it was really just general background,
23 Your Honor, and if you want me to wait on any of the Rule
24 23 arguments until decertification, I can. But I think
25 there's some overlap in that the damages calculation

1 question deals with Rule 23 in Gardner and commonality, but
2 it also deals with the motion for summary judgment, because
3 there is a question based on the defense argument that
4 there -- it is not liability for damages because a -- they
5 have not been proven just solely by the face of the
6 contract at a loss of the \$20.

7 Our response to that is that a contractual loss is
8 set. It's a breach of contract claim. Mr. Lindemann's
9 argument on behalf of D.S.S. is essentially a tort defense
10 that we would have to prove that there was an actual loss
11 of these funds. And because it's not a tort claim, we
12 don't think that's required. Justice Few and I had that
13 conversation when the case was at the Supreme Court.

14 I don't believe that there was a response that changed
15 that view of the law from him. And what we had proposed
16 was simply because this is a contract claim the damages are
17 the loss on the face of the contract.

18 By analogy if we had, you know, parties in this
19 country are free to contract up to the limits of a gallery
20 for whatever they wish to contract for.

21 If I were to value a certain tree, for example, at a
22 very high amount and the contract was breached, that I
23 would not have to -- or the party that was not paid would
24 not have to prove the value of that tree. They would
25 simply have to prove that we had a contract agreement for

1 that value.

2 And when there's offer, acceptance and consideration,
3 that's a contract. And the parties have a meeting of the
4 minds like they did here, we're talking about the adoption
5 of a child, approving the loss in an individual home for
6 these funds that you're talking about adoptive families, a
7 lot of emotion, a lot of back and forth, what does it mean
8 to pay someone for taking on the responsibility of raising
9 a child, all of those questions would come into such an
10 analysis if it were a tort claim.

11 It is not. It's a contract claim. The parties had a
12 meeting of the minds that the unilateral breach of that
13 contract entitles them to the damage in the amount of the
14 breach based on the contract.

15 So, to answer your question, that was really the
16 overlap between the motion to decertify the class and then
17 the damages argument and the motion for summary judgment
18 that we cannot prove our damages adequately, and I believe
19 we can because, again, it's a summary-judgment claim.

20 To the order of the arguments made within the motion,
21 now, the first one is collateral estoppel or res judicata.
22 It's -- I was very surprised to see this argument again,
23 because it was very clear at the Fourth circuit in the
24 back-and-forth that I had with the Court that there was
25 going to be no res judicata or collateral estoppel.

1 The transcript is very clear that Mr. Lindemann agreed
2 to that. The law is very clear that they're not identity
3 of the parties or identity of issues.

4 The only even issue that's close to being identical,
5 which is not, is upon closer kind of inspection it's pretty
6 clearly distinct, but I think D.S.S.' argument kind of
7 inflates the 2002 to 2004 time period and the federal issue
8 of the reduction in the foster care subsidy and the federal
9 law that limits the adoption subsidy to no more than the
10 foster care subsidy for that 2002 to 2004 period.

11 That has been addressed, and that's the only thing
12 that's been addressed at federal law, but it's not an issue
13 in this case because the class definition does not begin
14 damages until 2014.

15 Very careful to make sure that the class definition
16 only starts the damages calculation once the foster care
17 subsidy was reinstated, because it's only at that period
18 that the contract terms become effective again, that
19 there's not a preemption by federal law, by this federal
20 law that says that the foster care subsidy must be at or
21 equal to the adoption care subsidy.

22 So, once the foster care subsidy cut is reinstated and
23 we kinda go back to status quo and the contract terms
24 apply, meaning that there's no longer a basis for D.S.S. to
25 reduce the adoption care subsidy and so they must reinstate

1 it per the terms of the contract. That was not addressed
2 at the federal level. Only the 2002 and 2004 time period
3 was really addressed.

4 It's clear in the colloquy with the Court that there
5 was an agreement. It was without prejudice. Mr. Lindemann
6 said there would be no such argument for collateral
7 estoppel.

8 And so I think the only real defense to that in the
9 reply is, well, you can't really look at the transcript
10 because it's not an official transcript. Well, that's as
11 official as they get at the Fourth Circuit. They gave us a
12 tape. We had to give it -- get it transcribed. That
13 transcription has been around for 12 years now. Mr.
14 Lindemann's had every opportunity to refute it and have
15 somebody else listen to the official tape and do another
16 transcription.

17 That transcription came from an official court
18 reporter. It came in a sealed package. We got that and
19 can provide it to the Court.

20 But there's no -- there's no argument other than some
21 perfunctory it doesn't have a Fourth Circuit stamp on it of
22 any inaccuracy in the testimony or in the -- the
23 transcription rather. It's only this, well, somehow it
24 doesn't meet the official stamped standard. But I think
25 that what's good for the goose is good for the gander.

1 There Mr. Lindemann cites the transcript and should be held
2 by it, as an officer of the Court held about his words
3 which he does not refute.

4 As to the -- to the subsidy agreement, I think I've
5 addressed that. If the Court as any other particular
6 questions about the application of the Federal Child
7 Welfare Act and what the Fourth Circuit ultimately ruled,
8 I'm happy to answer those. But they held that that foster
9 care reinstatement did not constitute a readjustment. And,
10 again, that's only for the purposes of 2002 to 2004
11 damages. And the class definition begins with damages in
12 2004, so it's not applicable in this breach of contract
13 claim.

14 The standing argument would be the next one. This has
15 been around for quite some time. It sort of goes to this,
16 this same concept of damages, can the parents be -- bring a
17 claim for the adoptive children through
18 third-party-beneficiary status.

19 They are named beneficiaries in the contract. They're
20 specifically identified. You couldn't have a more classic
21 case of a third-party beneficiary than this case where
22 it's -- there's -- the sole purpose for the contract is the
23 payment for the adoption of these third-party
24 beneficiaries.

25 And there is no, again, requirement under the law that

1 a contractually owed amount be proven of. It's enough to
2 show a breach of contract and the damages that flow from
3 that breach. And there's a couple of cases cited,
4 including Hotel and Motel Holdings, in our brief that just
5 lays out the basic elements of the breach of contract.

6 And then on the administrative remedies argument, Mr.
7 Thompson is going to handle that one for us, but be similar
8 to -- to the prior arguments, that it's not mandatory and
9 it's not based on the language of the contract.

10 And then any of the other individual defenses that had
11 been pled before, were either waived due to discovery
12 issues that D.S.S. had or were not asserted in this motion
13 for summary judgment. So, I believe they would be waived
14 as well.

15 So, barring any specific questions from the Court,
16 I'll pass it over to Mr. Thompson to address the
17 exhaustion-of-administrative-remedies argument.

18 THE COURT: Yes, sir.

19 MR. THOMPSON: Thank you, sir.

20 I always look for places that Mr. Lindemann and I can
21 agree, and we agree that summary judgment is right for the
22 issue of administrative remedies. Where we differ is the
23 outcome.

24 This issue, whether administrative remedies need to be
25 exhausted, is thoroughly in your discretion so long as

1 there is not an abuse of that discretion. But if we were
2 going to look at the heart of it, it's really the plain
3 language that the contract has.

4 By the way, I ask the Court not to be misled by the
5 initial argument by Mr. Lindemann when he cites some
6 Supreme Court language when we went up the first time.

7 That language is implied by him as there being a need
8 to exhaust administrative remedies. It simply just doesn't
9 that say.

10 THE COURT: Are you talking about the first time it
11 went to the South Carolina Supreme Court?

12 MR. THOMPSON: Yes, sir.

13 THE COURT: Okay.

14 MR. THOMPSON: Yes, sir. Talking about the 2020 case.

15 It said if the requirement to exhaust administrative
16 remedies does not apply to the case, then the Court would
17 have to go through no individualized process.

18 Obviously, if it did apply, there would be one. But
19 there was no assertion by the Supreme Court that it did or
20 didn't apply. And I read the brief from the defense as
21 implying otherwise.

22 We are on a clean slate here subject to your review of
23 the administrative remedies argument. It has not been
24 insinuated, implied, asserted by the Supreme Court of South
25 Carolina that it applies.

1 But let's just look at the language. The Exhibit A in
2 our contract, the adoption subsidy agreement, adoptive
3 parents may appeal the D.S.S. decision.

4 All right. It goes on to say information may be
5 requested from D.S.S.

6 It goes on to say that the statute regarding the
7 address -- that's 63-9-1790 -- this is in my brief but you
8 can see it there -- is reviewable. And then it refers, as
9 does the Supreme Court decision refers, to certain regs.
10 The regs, which you'll see at page 11 of our brief -- I
11 spelled them out there for you -- the family has a right to
12 appeal. Of course a right to appeal doesn't mean it's the
13 sole basis.

14 Mr. Lindemann then cites this new case of Patterson.
15 well, we were happy about Patterson. I don't know how he's
16 relying on it on the administrative remedies because it is
17 so night-and-day. It is so apples-and-oranges to what we
18 have.

19 Patterson had a statutory requirement to exhaust
20 administrative remedies. well, of course administrative
21 remedies are required if it's statutorily done. That
22 statute talked about an exclusive method for challenging
23 unemployment benefits. That's not what we have here.

24 By the way, the language is that in that statute,
25 41-35-690, which we cite on page 12 of our brief. The last

1 sentence of that statute talked about the administrative
2 law court is the sole and exclusive appeal procedure.

3 what we have here -- and, by the way, there are other
4 cases that were cited that were also specific in their
5 language about having to go through the administrative
6 process.

7 And, again, and I'm referring now to the Holman case
8 that Mr. Lindemann cited. That one was very specific. You
9 can't get to the circuit court until you go through the
10 administrative law court. It said that. So, of course
11 that's true.

12 None of that is applicable to our case. Our case is
13 an Edge case. Edge vs. State Farm Insurance Company, 2021.
14 It was so similar to this, a similar regulation as in our
15 case where there was no specified requirement for
16 administrative remedies.

17 I read this language. You'll see how closely aligned
18 it is to our language. It said that any insured aggrieved
19 by that insurance policy may appeal. All right. That's
20 not mandatory.

21 Then later on under subsection C of that reg it says
22 any such decision may be appealed by either party in
23 accordance with this statute.

24 It also went on to explain -- which I always liked
25 this because it seems like it's common sense and sometimes

1 the law needs a little common sense -- about plain and
2 ordinary meaning, to give plain and ordinary meaning to our
3 statutes.

4 That's what this case says. The words of a regulation
5 must be given their plain and ordinary meaning without
6 resort to subtle or forced construction. Mr. Lindemann's
7 argument is really forcing an argument. That may means
8 shall, when may means may.

9 That case went on to say pursuant to the plain and
10 ordinary meaning of the reg an aggrieved party may appeal.
11 However -- and this is the part that we rely on so heavily
12 and we offered to Your Honor directly, quote, "Nothing
13 prevents an aggrieved party from bypassing the
14 administrative hearing before the commissioner and bringing
15 an action in the circuit court as Edge did in this matter.
16 By using the word may instead of shall, the reg allows but
17 does not require an aggrieved party from doing that."

18 So, bottom line is we do not think the regulation --
19 it's also administrative remedies that's required.

20 Let's say it were. Even if it were, we know that
21 there is a longstanding, if you will, get-out-of-jail-free
22 card on these administrative remedies arguments if it would
23 have been futile.

24 Remember who did this. It was Elizabeth Patterson.
25 She wasn't like a county director that did this to our

1 clients, you know, or even the chief financial officer.
2 She was the state director. There's nobody higher than she
3 that would be looking at these regulations.

4 Her letter that she wrote everybody kind of already
5 looked at that issue when she says that the department,
6 quote, "Has made every effort to avoid taking any action
7 that affects critical services to children. However, it's
8 now necessary."

9 She goes on to say, "Please be assured that this
10 action has not been taken without much thought and
11 consternation. I would not be asking families to make the
12 financial sacrifice if I did not feel it was necessary in
13 order to continue to provide essential services."

14 I don't know why that language, that you'd consider a
15 person in that high rank to change her mind, but it seems
16 very reasonable to assume that it would have been futile
17 when the head honcho already says she's given it much
18 thought and consternation.

19 For these reasons we think that the administrative
20 remedies argument fails in the language. But then even if
21 it were to be, it's futile either way. We feel as though
22 that that defense should be dismissed.

23 THE COURT: The last part, what should be dismissed?

24 MR. THOMPSON: Their -- well, we do not think that the
25 defense that they've raised is accurate in this case, as

1 here our view is in the highest place, the most powerful
2 person has already spoken. It would be futile to assume a
3 different outcome should the parties have pursued
4 administrative remedies.

5 THE COURT: Okay. Thank you.

6 Yes, sir.

7 MR. LINDEMANN: Thank you, Your Honor. May it please
8 the Court. Andrew Lindemann for the defendant department
9 of social services.

10 I'm intending my arguments to be both in support of
11 the department's motion for summary judgment, as well as an
12 opposition to the plaintiff's motion for summary judgment.
13 And, obviously, to the extent, don't touch on a particular
14 point, a particular issue, we certainly rely on the briefs
15 as well.

16 Ultimately, Your Honor, let me give the Court a little
17 bit more background. I know Your Honor's pretty well
18 versed with this case since you've had it as complex
19 litigation for several years.

20 Ultimately, this litigation began in federal court. A
21 lawsuit was brought initially for some adoptive parents,
22 and then it was quickly changed to an adoptive child being
23 the plaintiff, and in this case it was B.L.H., as well as
24 in the federal case.

25 And of course that switch was made because the parents

1 who had not sued in 2002 or 2004, their statute of
2 limitations had run.

3 So, the claim was brought in the name of the minor
4 child and purported to make other adoptive children who
5 were all minors, I think, back under the federal claim, or
6 most of them were still minors when the federal claim was
7 started, to make them the plaintiffs. And all of that was
8 intended to circumvent a clear statute-of-limitations
9 problem.

10 So, what we're dealing with here is a plaintiff who is
11 the adoptive child of Mr. and Mrs. Hensley, and she goes by
12 B.L.H., by her initials, as a party in this case.

13 This particular state court case was filed in April of
14 2013. And since that occurred the plaintiff herself has
15 now reached majority. In fact, I don't -- I won't state
16 her date of birth on the record. For a long time it was in
17 the caption of this case. So, it's probably all over the
18 record based on the caption, even though we've stopped
19 putting it in the caption. The original complaint, I
20 believe, had it in the caption.

21 But she was born in 1997, and, so, clearly, she has
22 reached majority. So, one of the initial issues that we
23 pointed out to the Court -- didn't brief it in detail. In
24 fact, put it in the footnote, but the bottom line is the
25 case is still captioned as or still positive to the Court

1 as B.L.H. through her parents Kenneth and Angela Hensley.
2 And, you know, our first point is that needs to be changed
3 because she is no longer a minor. That B.L.H. should be
4 the named plaintiff and the parents should be dismissed.

5 But, ultimately, Your Honor, going back to the federal
6 case, the federal case involved two federal claims. And I
7 give you this background because whether the Court applies
8 collateral estoppel or not, the decision by the Fourth
9 Circuit in its interpretation of federal law, if it's not
10 binding through collateral estoppel, I would submit to the
11 Court, that it's -- should be very persuasive to this Court
12 in interpreting the federal statutes at play.

13 And why that is particularly relevant is because, as
14 Your Honor well knows, any contract that is based upon a
15 statutory scheme, that statutory scheme is implicitly read
16 in as conditions of the contract.

17 But to go back to my history -- and I'll try to make
18 this somewhat brief -- the federal lawsuit consists of two
19 federal claims, as I indicated.

20 One was a private right of action under the Adoption
21 Assistance and Child Welfare Act of 1980. And then the
22 second claim was a claim under the contract's clause of the
23 United States Constitution.

24 In that particular case -- it was before Judge G. Ross
25 Anderson -- Judge Anderson denied summary judgment to the

1 defendants in that case, and the defendants in that case
2 was four, at that time current or former, D.S.S. directors,
3 the current one when the suit was filed, as well as all the
4 directors from 2002 through the filing of the lawsuit.

5 And, ultimately, an interlocutory appeal, which is
6 allowed in federal court for issues in qualified immunity,
7 went to the Fourth Circuit, and the Fourth Circuit issued
8 its opinion. And I know Your Honor has probably read it
9 and have a copy of it. But in 2013, July of 2013, shortly
10 after the state case was filed in April, the Fourth Circuit
11 issued its decision. It's Hensley vs. Koller, 722 F3d.,
12 177.

13 And in that particular case, Your Honor, the
14 Fourth Circuit dealt only with the statutory claim, only
15 with the claim pursuant to the Adoption Assistance and
16 Child Welfare Act.

17 They first ruled against the defendants finding that
18 there was a private right of action that could be pursued
19 under that statute.

20 But, ultimately, they found no violation of that
21 statute by D.S.S. in their actions in both 2002 when they
22 had an across-the-board cut of the foster maintenance fee,
23 as well as the adoption subsidy of \$20 per month, and also
24 found no violation of the federal statute for not, quote,
25 "readjusting" to use the term of the Fourth Circuit, the

1 adoption subsidy in 2004 to add back or to raise the
2 adoption subsidy by \$20 per month.

3 And, so, the Court -- there was some suggestion in the
4 plaintiff's briefing that the Court did not decide the
5 merits of that issue. They most certainly did decide the
6 merits of the issue. And just to explain perhaps where the
7 misunderstanding comes from, if Your Honor's ever dealt
8 with a qualified immunity in a section 1983 case you know
9 that it's a two-prong test.

10 Number one, whether or not -- the first prong is
11 whether or not there was a constitutional or statutory
12 violation or deprivation; and, number two, if there was a
13 constitutional or statutory deprivation, the Court then
14 looks at whether the law was clearly established at the
15 time of the conduct to give fair notice to the governmental
16 actor as to whether their conduct was in violation of the
17 constitution or statutory law.

18 In this particular case, in deciding the case on an
19 interlocutory appeal for qualified immunity, the Fourth
20 Circuit never reached the second issue. They never -- the
21 second prong. They never determined whether the law was
22 clearly established.

23 They dealt with the first prong, which was dealing
24 with or addressing whether or not there was a statutory
25 violation. And they very clearly found there was not a

1 statutory violation.

2 Now, let me just, because we have raised collateral
3 estoppel for certain points, we just to make the record
4 very clear, we've never raised res judicata, never arguing
5 that there was a claim for collusion.

6 The federal case had two federal claims, one of them
7 by statute. And a contracts clause came under the United
8 States Constitution.

9 The state law case, which is still currently before
10 Your Honor, is purely a state-law claim involving a third
11 party beneficiary breach of contract claim.

12 So, we have never argued -- and you can go back
13 through the record -- res judicata applies. We are not
14 claiming a claim for collusion, but what we are arguing is
15 that this Court and the plaintiffs -- well, not this Court.
16 The plaintiff is precluded from arguing the federal law and
17 its significance, the federal rulings and its significance,
18 the interpretation of the federal act contrary to what the
19 Fourth Circuit has already determined.

20 And just to make the -- to make it very clear on the
21 record as well, and we say this in our brief, it's somewhat
22 of a side issue as to whether collateral estoppel applies,
23 because even if the Court were to rule that collateral
24 estoppel doesn't apply, we would encourage this Court to
25 follow the interpretation of federal law by the Fourth

1 Circuit.

2 So, even if collateral estoppel doesn't apply, I would
3 submit that there's very good reason to follow the logic
4 and reasoning of the Fourth Circuit on the points of
5 federal law that we're relying on.

6 But let me just touch on the collateral estoppel issue
7 real quickly.

8 Mr. Langley said they're not the same parties. Well,
9 that's true as far as the defendants go. In the federal
10 case you had the four current and former directors of
11 D.S.S. But the plaintiff was the same. B.L.H. acting
12 through her parents were the plaintiff in the federal case.
13 And for collateral estoppel to apply all the parties don't
14 need to be the same. I know Your Honor knows this. Just
15 the party against whom estoppel is asserted has to be the
16 same. So, we checked that box. The plaintiff was the same
17 in both cases and remains to be the same in both cases.

18 The plaintiff's counsel has raised an issue regarding
19 a colloquy that occurred during the Fourth Circuit oral
20 argument, and that dealt with solely the contract's claim
21 -- excuse me -- contract's clause claim brought pursuant to
22 the U.S. Constitution.

23 And the exhibits that we filed yesterday and, as I
24 indicated to your law clerk in my email, all of those
25 exhibits have previously been filed in the court, and I

1 filed them again just so for ease of finding them so you
2 didn't have look back in 2014 and '15.

3 But what those documents show is that just prior to
4 the oral argument before the Fourth Circuit the plaintiffs
5 filed a notice of withdrawal of the contract's clause
6 claim. And that's in the exhibits that I've submitted to
7 Your Honor. And they asked to be able to withdraw the
8 contract's clause claim without prejudice.

9 And just to make sure it's clear on the record, a
10 contract's clause claim is very different from a breach of
11 contract claim under state law.

12 So, that's what they -- they were moving to -- to
13 dismiss or withdraw, and they wanted to do so without
14 prejudice. But we filed a response -- or we meaning the
15 defendants in the federal action filed a response
16 indicating that we did not oppose them withdrawing that
17 claim but insisted that it be with prejudice.

18 And the reason that we explained -- and then we
19 explained this during oral argument as well -- that if --
20 if the Court allowed that dismissal to be without
21 prejudice, we had concern that the plaintiff would turn
22 around, move to amend their recently filed state court
23 case, the case that's still before Your Honor which had
24 just been filed in April of 2013, to amend that claim to
25 bring the contracts clause claim back to life in this Court

1 as opposed to having it adjudicated where we already were
2 at the Fourth Circuit. And so we insisted on that
3 dismissal being with prejudice.

4 And so towards the end of the oral argument, the
5 portion that's relevant for Your Honor to review -- and let
6 me step aside for one second. I'll go back to that.

7 It is an unofficial transcript. I'm not taking the
8 position that that's a reason to not address this
9 particular issue. That is not the argument that we have
10 made. We have pointed out it is an unofficial transcript.
11 It was prepared by a court reporter in South Carolina, not
12 by any court reporter with the Fourth Circuit. I don't
13 have a problem with Your Honor considering it. But that's
14 not the -- that's not the argument that we've made.

15 The argument we've made is that the colloquy with the
16 Fourth Circuit is being totally misconstrued and
17 misinterpreted to the Court, which is why I'll go back to
18 that point.

19 So, ultimately, one of the judges -- and we've
20 identified in our memorandum who the male voice is and who
21 the female voice is. A couple of the justices raised
22 questions about our opposition to a dismissal of the
23 contracts clause claim without prejudice.

24 And I raised exactly to them what I raise to this
25 Court right now. I said we don't have concerns with it

1 being dismissed. We have concerns with it being dismissed
2 without prejudice, because we have a new state court case
3 that was just filed and we don't want it to be added to
4 that case, because if it's without prejudice it's as if it
5 was never brought.

6 So, they have the ability to add it to the state court
7 case. And then we'd have to remove it and go back to Judge
8 Anderson and start over and make our way all the way back
9 to the Fourth Circuit again when that issue was fully
10 briefed and ready for adjudication by the Fourth Circuit.
11 That was our argument.

12 And one of the justices -- I believe -- judges -- I
13 believe it was Judge Diana Motz who is identified as female
14 voice -- raised the question of, well, what if they
15 stipulate that they won't refile it in state court. And I
16 indicated I wouldn't have a problem with that. If they
17 will stipulate that they will not refile it in state court,
18 that takes care of my concern and I have no problems then
19 being a dismissal without prejudice.

20 And Mr. Langley then raised the question as to whether
21 the dismissal without prejudice of the contract-clause
22 claim could then be used as res judicata later, and I made
23 the point if it's without prejudice res judicata doesn't
24 apply to it, there's no preclusion that applies to it.

25 But what I was talking about and what's clear in the

1 record is the contract-clause claim. I wasn't arguing that
2 the ultimate decision by the Fourth Circuit, which didn't
3 come until a couple of months later, would not have any
4 preclusive effect whatsoever in the state court case.

5 I mean, I'm not sure how you can waive something that
6 hasn't even happened yet. And of course we've recited Your
7 Honor the law on voluntary waiver in South Carolina, and I
8 know Your Honor knows that law.

9 But the whole point of that colloquy was to deal with
10 the contracts-clause claim which the plaintiff was trying
11 to withdraw and I was trying to prevent it from being --
12 there'd be an amendment in the state court case to bring
13 that claim back when we were ready to have a full
14 adjudication of it at the Fourth Circuit.

15 So, that is the stipulation that was made. And, quite
16 frankly, my point is if it's without prejudice it doesn't
17 have any type of preclusive effect because under South
18 Carolina law, at least, it's treated as if it was never
19 brought.

20 So, to make the record very clear, we are not arguing
21 collateral estoppel based on the dismissal of the
22 contracts-clause claim. Contracts-clause claim doesn't
23 impact this case whatsoever.

24 What does impact this case is the Fourth Circuit's
25 interpretation of the federal statute, the Adoption Subsidy

1 and Child Welfare Act. And, ultimately, several months
2 after that oral argument they issued their decision, and we
3 would argue that their decision's included -- is entitled
4 to preclusive effect that it fits all of the elements of
5 collateral estoppel.

6 And even if the court doesn't want to apply collateral
7 estoppel, it addresses the applicable federal law that's at
8 play in this very case, because, obviously, the federal
9 case and this case involved the exact same factual
10 scenario. Doesn't involve the exact same claims, but there
11 are a number of overlapping issues, which brings me to the
12 merits of the plaintiff's case.

13 As I indicated, the plaintiff has filed a third-party
14 beneficiary breach of contract claim. The plaintiff is
15 clearly not a signatory to the adoption subsidy agreement.
16 Your Honor has the specific agreement signed by the
17 Hensleys and by D.S.S. in the record. B.L.H. was not a
18 party, was not a signatory to that contract. In fact, she
19 was five years old at the time that contract was signed.

20 So -- so, I don't even believe that she would have the
21 ability to contract under South Carolina law. But, be that
22 as it may, it's a third-party-beneficiary claim.

23 So, the plaintiffs are contending that in 2002 when
24 D.S.S. made the decision to lower the foster care
25 maintenance fee by \$20 per month because the state was in a

1 physical crisis because of the recession that was going on
2 in the early 2000s, that ultimately that breached the
3 contract with the Hensleys and, in turn, allowed B.L.H. to
4 sue under a third-party-beneficiary hearing.

5 Our contention, first of all, is that does not
6 constitute a breach of contract. The -- there is
7 absolutely nothing in federal law, in state law that
8 prohibited the department from lowering the foster care
9 maintenance rate by \$20 a month, and that's not disputed.
10 The natural result of that --

11 THE COURT: What part was not disputed, the facts or
12 the conclusion?

13 MR. LINDEMANN: I believe the conclusion that the --
14 that the state has the authority to reduce the foster care
15 maintenance rate, that it can make adjustments to that.

16 In that particular case it was reduced by \$20 per
17 month due to the -- the physical situation that was pending
18 at that time. And as a result of that the adoption subsidy
19 rates had to -- could not exceed the foster care
20 maintenance rate.

21 In her -- in the Hensleys' adoption subsidy agreement
22 they were receiving a sum that at the time was equal to the
23 foster care maintenance rate. So, they did not violate
24 federal law. That totally -- the contract was entered into
25 was -- was -- was on all fours with federal law, because

1 federal law -- we've cited the specific statutes, and I'll
2 cite them to Your Honor again and make the record complete.

3 Section 673(a)(3) of the Adoption Assistance and Child
4 Welfare Act specifically provides that the adoption subsidy
5 payment may not under any circumstances exceed the foster
6 care maintenance payment, and that's -- that's in that
7 particular section.

8 That, incidentally, has also been adopted as part of
9 state law, which we've cited to as well in our memorandum.
10 Specifically -- give me one moment to find those.

11 (Pause.)

12 MR. LINDEMANN: And I'm referencing section 20-7-1950.
13 That's what the statute was at the time in 2002. It's now
14 codified as section 63-9-1770, and it says, quote, "The
15 amount of time-limited, long-range supplemental benefits
16 may not exceed that which currently would be allowable for
17 the child under foster family care."

18 That is also mandated by South Carolina regulations,
19 code of regulations, and we've cited that as well. Section
20 114-4380, E, 7 -- subsection E.7.

21 And that states, quote, "Supplemental benefits may not
22 exceed that which is reasonable for treatment services or
23 allowable for a child under foster family care."

24 So, the adoption subsidies can never exceed the foster
25 care maintenance payment. So, once the foster care

1 maintenance payment was reduced in 2002, the adoption
2 subsidies were reduced in 2002. And because the plaintiff
3 was receiving the same as the foster care maintenance rate,
4 when that was dropped by \$20 the Hensleys adoption subsidy
5 was dropped by \$20 a month. And that's in accordance with
6 federal law and that's where federal -- the Fourth Circuit
7 opinion comes in.

8 The Fourth Circuit found that that did not violate the
9 federal act. And if it didn't violate the federal act, it
10 certainly shouldn't violate the state law and the state reg
11 that I just cited as well.

12 And what's very important to recognize, Your Honor,
13 and I haven't said it yet but it's in our memo, the
14 requirement of this adoption subsidy agreement is a
15 requirement of the federal act.

16 Section 42 U.S.C., section 673(a)(1)(A) specifically
17 requires a state to, quote, "Enter into adoption subsidy
18 agreements with the adoptive parents of children with
19 special needs."

20 So, it requires there to be an adoption assistance
21 agreement. So, if federal law requires this agreement,
22 certainly federal law should be read into the agreement.
23 That's our position, and I believe that's very consistent
24 with contract law, that if it's based upon contractual
25 provisions, as I mentioned earlier, you read in the

1 federal, the statutory requirements, statutory law as a --
2 as an implied term in the contract.

3 So -- so, their first argument, Your Honor -- and they
4 can correct me if I'm wrong -- but, as I understand,
5 they're asserting first that there was a breach of contract
6 in 2002 by the reduction of the rate by \$20. And perhaps
7 that they have conceded that point. I wasn't clear. They
8 may have conceded that point because they do contend that
9 the damages don't begin until 2004.

10 But in case they haven't conceded that point, our
11 position is the reduction in 2002 does not violate the
12 contract, the adoption subsidy agreement, because all we
13 were doing was complying with federal law. And if we had
14 left their rate the same in 2002, it would have been higher
15 than the foster care maintenance fee, and that would
16 violate state law and that would violate federal law, and,
17 obviously, the contract can't violate state and federal
18 law.

19 So, our first argument as to what happened in 2002,
20 there is no breach of contract for -- for those reasons.
21 And you can see where the federal -- the Fourth Circuit
22 opinion comes into play.

23 To the extent that they have argued -- and I didn't
24 hear that today, so, maybe it's a nonissue. But that the
25 \$20 adjustment was made without parental concurrence, that

1 is also an issue that the Fourth Circuit has already dealt
2 with.

3 And the Fourth Circuit indicated that whereas changes
4 in the adoption subsidy -- there are a number of different
5 ways the adoption subsidy can change, that there is a
6 parental concurrence requirement for some of those but
7 there is not a parental concurrence requirement when the --
8 the amount of the subsidy has to change, has to be adjusted
9 because of a change in the foster care maintenance rate.
10 That is automatic. That's because federal law and state
11 law require it.

12 So, again, I don't know whether they've made that
13 argument or not. Just to be careful and be complete, we
14 have briefed that.

15 Now, the last issue that I believe that they have
16 argued is that in 2004 D.S.S. did increase the foster care
17 maintenance rate, and the plaintiff's argument is that
18 D.S.S. didn't in turn at that point also increase the
19 adoption subsidy.

20 The adoption subsidy had been legally reduced in 2002,
21 and there was no legal requirement for them to increase the
22 rate across the board for not just B.L.H. but for any --
23 any class.

24 Ultimately, there are provisions both in the -- in the
25 regulations, as well as statute, and in the agreement

1 itself, that if adoptive parents want to seek changes or
2 adjustments to the subsidy, they can certainly raise that
3 with D.S.S. and would be considered on a case-by-case
4 basis.

5 But there's nothing that legally required D.S.S. in
6 2004 to, as the Fourth Circuit used the term, readjust the
7 amount of the subsidies upward simply because the foster
8 care maintenance payment was -- was increased.

9 So, our position is there was no breach of contract.
10 The plaintiffs have not pointed this Court to any federal
11 case law, any state case law, any opinions, any
12 regulations, no law that would mandate that the adoption
13 subsidy be increased under those circumstances.

14 Along those same lines as I correlated, there's
15 absolutely no federal law, there's no state law, there's no
16 regulation that requires the adoption subsidy to equal the
17 foster care maintenance rate.

18 So, even though the foster care maintenance rate was
19 increased in 2004, that did not result in a breach of
20 contract to the Hensleys.

21 Ultimately, as I indicated, the Hensleys, just like
22 any party that were receiving adoption subsidies from the
23 State of South Carolina, had the right at that point to
24 seek an adjustment. And of course that goes shortly to my
25 exhaustion of administrative remedies argument. They did

1 not do so, but that does not mean that they didn't have the
2 ability to do so.

3 So, just looking at this case purely as a breach of
4 contract claim -- that's the only cause of action that's
5 been brought -- but there has been no breach of contract by
6 D.S.S.

7 Just to recap, the change in 2002 was to comply with
8 federal and state law, and that federal and state law is --
9 is implicitly part of the adoption subsidy agreement.

10 In fact, I would also point out that the adoption
11 subsidy agreement itself provides the following. This is
12 at the very bottom of the first page.

13 It says, "Adjustments in monthly cash payments may be
14 made with the concurrence of the adoptive parents based
15 upon changes in the needs of the child, changes in
16 circumstances of the adoptive family or changes in the
17 maximum allowable subsidy payment." Changes in the maximum
18 allowable subsidy payment.

19 So, there were changes in the maximum allowable
20 subsidy payment in 2002. This contract recognizes that
21 those changes would be made, and they were made. And I
22 would -- and therefore no breach of contract in 2002.

23 I've already touched on the parental concurrence
24 issue, and I haven't heard the plaintiffs argue that
25 position anyway.

1 And then, lastly, with 2004, to summarize, ultimately,
2 there's nothing in this contract; there's nothing in
3 federal law; there's nothing in state law nor the regs that
4 required D.S.S. to increase the rate once it was legally
5 reduced by \$20 in 2002. So, there was no breach of
6 contract.

7 I will reiterate -- I'll try not to kick this dead
8 horse -- you got to read the federal statute and the state
9 statutes. It's implied terms as part of this agreement in
10 order to determine whether there was any type of breach,
11 and there was not.

12 So, obviously, if Your Honor agrees with our position
13 on that, there's no breach of contract and -- and the case
14 ends.

15 We have also raised several additional issues that I
16 want to touch on, the most significant of which, and it's
17 become more significant with some recent case law from our
18 South Carolina appellate courts, is the exhaustion of
19 administrative remedies issue.

20 And, Your Honor, I do agree with Mr. Thompson. I do
21 agree that this issue is right for this court to make a
22 legal determination on these cross-motions for summary
23 judgment.

24 So, there was one thing we agreed on. I wanted to
25 make sure I concurred with that.

1 THE COURT: Thank you for that.

2 MR. LINDEMANN: Your Honor, I don't agree with Mr.
3 Thompson in that he suggested that with these South
4 Carolina Supreme Court's opinion that they have already
5 weighed on the merits of this issue.

6 what my brief says is it says in its earlier decision
7 in this litigation the Supreme Court provided some
8 preliminary comments and supporting authorities regarding
9 the plaintiff's need to exhaust administrative remedies in
10 this context.

11 But, ultimately, what the Supreme Court did was
12 recognize that was an issue that Your Honor would have to
13 address. And of course the Supreme Court was not looking
14 at the merits. They were looking at whether or not this
15 case is appropriate for class certification. And as I put
16 in my memoranda, as well as my motion to decertify, what
17 they did was lay out a roadmap. I think Your Honor may
18 have used that term in the past with us basically giving
19 this Court some guidance as to how to proceed upon remand.

20 And, so, all I'm pointing out here is the Supreme
21 Court on page 515 in their opinion -- that's the S.C. 2d
22 pinpoint -- does identify exhaustion of administrative
23 remedies as an issue that this Court will need to address
24 and decide whether it applies or not.

25 But then they go on and they identify specific

1 statutes from 2002 in Title 20 at the time, which has now
2 been recodified in Title 65 -- excuse me -- 63 as well as
3 the regs that apply or provide for administrative remedies
4 in this context for issues dealing with supplemental
5 benefits and specifically adoption subsidy benefits.

6 That's the -- that's the point that was made about the
7 Supreme Court. They recognized that as an issue that they
8 weren't deciding at that point but that would need to be
9 decided on remand.

10 So, the main reason for raising that is to show it's
11 at least a legitimate question for this Court to grapple
12 with.

13 THE COURT: Do you agree with Mr. Thompson's assertion
14 as to the discretionary?

15 MR. LINDEMANN: I do not. I mean, it can be under
16 right circumstances, but it is a matter of law. And these
17 recent Supreme -- Court of Appeals decisions in the Holman
18 and -- incidentally, I've been calling it Patterson. I
19 noticed that when it got printed by West they actually used
20 the name Richardson as the first name.

21 So, I don't whether we should call it Richardson or
22 Patterson, but Patterson is the first name. Appellate
23 Richardson is the first named party. But to the extent for
24 the record either -- either plaintiff's counsel or I will
25 refer to Patterson. I think we're referring to the -- and

1 I might have said -- I meant Robinson, not Richardson. I
2 even said that wrong. It's the Robinson is the actual
3 first named plaintiff.

4 But the bottom line is, Your Honor, no, I don't
5 believe it's purely discretionary with the Court because,
6 ultimately, it does involve a legal question.

7 It's probably more aligned with a mixed, a mixed bag.
8 First, you've got to satisfy the elements of an exhaustion,
9 which I think is more of a legal issue that would be
10 probably subject to a de novo review, and then applying any
11 factual determinations. I think in fairness would be --
12 typically, would fall within an abuse of discretion
13 standard.

14 So, I don't -- I don't agree with that. And I think
15 if you look at Holman and Robinson, in both of those
16 cases -- well, in Holman, of course, it was -- I believe
17 that was an affirmance of the lower court dismissing the
18 class action.

19 And in Robinson, a/k/a, Patterson it is a reversal of
20 the trial court for certifying a class and for denying --
21 or, yeah, denying a motion for summary judgment based on
22 exhaustion of administrative remedies.

23 Let me touch on both of those cases because they're
24 key different from other cases that have been cited, Your
25 Honor. They're both class actions and they're both

1 extremely recent.

2 Holman came down in September of 2023 and Robinson
3 came down two days after our summary judgment briefs were
4 due in this, to this Court, under the scheduling order.
5 And that's why I raised it by filing a notice of the
6 supplemental citation on the day it came out on April 3rd.

7 But, ultimately, Your Honor, both of those cases
8 demonstrate that where parties have the ability to appeal
9 an administrative decision and fail to do so is fatal to
10 their claim.

11 In Holman the defendant was the South Carolina
12 Educational Lottery Committee, and the purported class in
13 that case was estimated to be at least a hundred thousand
14 individuals who received a winning ticket of a particular
15 game administered by the lottery commission that the
16 lottery commission was not paying out.

17 And the -- the trial judge in that particular case --
18 it was Judge Curtis -- granted a motion to dismiss for
19 failure to exhaust administrative remedies.

20 The case goes -- the Court of Appeals' decision goes
21 through the basic law on that, and the Court recognized
22 that the act -- meaning the act of creating the lottery, as
23 well as the regulations promulgated by the lottery
24 commission -- provided an administrative remedy to
25 determine whether a prize should be paid on a lottery

1 ticket. And the Court found that the -- found that
2 exhaustion of administrative remedies applied as a defense
3 in this particular case.

4 There were issues raised as far as whether it would be
5 futile or not. The Court explained futility must be
6 demonstrated by a showing comparable to the administrative
7 agency taking a hard and fast position that makes an
8 adverse ruling a certainty.

9 And in that particular case the Court does address it
10 as an abuse of discretion and says, "We hold the circuit
11 court did not abuse its discretion in finding appellants'
12 failure to exhaust their administrative remedies was not
13 excused by the futility exception."

14 And so there they were of course weighing the -- the
15 factual information that -- the trial judge in that
16 particular case weighed the factual information that was
17 before her on the futility question.

18 Court's indulgence.

19 (Pause.)

20 MR. LINDEMANN: So, anyway, so, the first step in this
21 process, Your Honor, is to identify whether or not there is
22 administrative procedures that are in place for the
23 Hensleys, the adoptive parents, to challenge any decision
24 regarding or implicating their adoption subsidy agreement,
25 and there are.

1 And, you know, I mentioned earlier that the Supreme
2 Court had already outlined what those were, and they're
3 exactly what the Supreme Court said.

4 At that particular time the children's code, which was
5 codified in the Title 20 at that point included 20-7-1960,
6 which is currently codified as section 63-9-1790, and it
7 says the following: It says, "A decision concerning
8 supplemental benefits by the department which the adoptive
9 parents consider adverse to the child is reviewable
10 according to department regulations."

11 Then the regulations also cited by the Supreme Court
12 in Hensley are at section 114-4380, Subsection G, and those
13 state in a section that's captioned Supplemental Benefits
14 Appeals, says, "The family has the right to appeal any
15 decision made by the department on supplemental benefits
16 both before and after finalization of the adoption,
17 according to the department's approved fair hearing appeal
18 process."

19 In addition, Your Honor, we cited some additional
20 regulations in our reply to plaintiff's motion for summary
21 judgment. Regulation 114 and 110, quote, "Allows an
22 individual to contest an adverse action taken by D.S.S. and
23 to have his or her objections to the adverse action heard
24 by an impartial hearing officer or committee."

25 Section 114-130 goes on to say -- it describes the

1 fair hearing process, and in subsection M(1) it says the
2 final decision rendered by the O.A.H" -- the hearing
3 officer -- "is subject to administrative or judicial review
4 as provided by law."

5 So, what that -- what that boiling -- all that
6 language down to, there is a process to challenge a
7 decision. It falls under the fair hearing provisions, fair
8 hearing regulations for the department of social services.
9 And there is judicial review from that. There would be an
10 appeal first to the administrative law clerk court and then
11 from there to the South Carolina appellate courts.

12 And so one of our issues of course -- Your Honor, we
13 cited this as well -- is that there's South Carolina case
14 law that talks about when there's an existing tribunal that
15 has already been created by the legislature to deal with a
16 particular issue courts -- you can't circumvent that by
17 bringing either a declaratory judgment action or a private
18 right of action.

19 And we've cited the Williams Furniture Corporation
20 case where the Supreme Court said, quote, "Ordinarily the
21 Court will refuse a declaration where a special statutory
22 remedy has been provided and where another remedy will
23 more -- will be more effective or appropriate under the
24 circumstances. Gratuitous interference with the orderly
25 processes of special statutory tribunals should be

1 avoided."

2 We also cited the Garris vs. Governing Board of South
3 Carolina Reinsurance Facility case for the proposition of
4 quote. This, again, is South Carolina court from 1995.

5 "The wholesome purpose of declaratory acts would be
6 aborted by its use as an instrument of procedural fencing
7 either to secure delay or to choose a forum."

8 Plaintiffs can't choose their forum, and that's clear
9 from Holman and that's very clear from Robinson a/k/a
10 Patterson.

11 You can't choose your forum when the general assembly
12 provides for an administrative process and an
13 administrative remedy. You gotta go through that remedy;
14 you gotta go through that process.

15 You ultimately can get to the South Carolina appellate
16 courts. You can ultimately get to the A.L.C., but you have
17 to go through the Administrative Procedures Act and you
18 have to use the administrative procedures as the first
19 step. And if you don't do that, you fail to exhaust your
20 administrative remedies.

21 Now, as I understand it, the plaintiff's argument in
22 contesting that is based on not language contained in any
23 statute that I've read or any regulation, but it's a
24 section at the very end of the adoption subsidy agreement,
25 subsection or section five called appeal. And it says,

1 "Adoptive parents may appeal D.S.S.'s decision to reduce,
2 change or terminate any adoption subsidy in accordance with
3 the rules and procedures of the state's fair hearing and
4 appeal process. Information may be requested from D.S.S."

5 And the plaintiff's launch on to this term may, so
6 suggesting that the use of the administrative process is
7 optional or/and not mandatory. Your Honor, I would submit
8 to the Court that that is absolutely not correct.

9 First of all, the agreement itself doesn't override
10 state law. The state statutes and state regs, which I've
11 already cited to Your Honor which the Supreme Court has in
12 its opinion, do not indicate or provide any basis
13 whatsoever for believing that it was optional.

14 Number two, Your Honor, the plaintiffs are asking this
15 Court to misinterpret the word may. The word may is very
16 often used in appeal context because when a party gets a
17 decision, it is not mandatory for them to file an appeal.
18 They can accept the decision.

19 So, very often appeal language includes the word may
20 because a party isn't required to appeal. They can accept
21 a decision, but they may appeal. And that's consistent
22 with the case law as well, Your Honor.

23 And let me point out to the Court. And I did a little
24 bit more digging for this than I did in writing the briefs.
25 So, I want to -- I want to make sure the Court is really,

1 really clear on this.

2 In the Robinson case, a/k/a, Patterson, Mr. Thompson
3 says this is apples and oranges because Robinson says it's
4 the sole and exclusive process.

5 what Robinson says in 41 -- section 41-35-690 is that
6 the appeal process is the sole and exclusive. In fact, it
7 describes the appeal process from 41-29-300(c)(1), and that
8 is the sole and exclusive appeal procedure. Doesn't say
9 anything more than that or anything less than that.

10 Now, what's interesting is if you go to 41-29-300(c),
11 that actually says, quote, "A party only may appeal from a
12 decision of the department directly to the panel. A party
13 only may appeal a decision of the panel to an
14 administrative law court in the manner provided in section
15 41-35-750."

16 So, the exact appeal statute being referred to in the
17 Robinson case goes back to 41-29-300, which on two
18 occasions in both sentences uses the word may appeal -- may
19 appeal.

20 Yet Robinson found that it was absolutely mandatory
21 and reversed the trial court finding that the trial court
22 failed to find that the plaintiff, the class
23 representative, failed to exhaust their administrative
24 remedies.

25 Another appeal statute that is part of the statutory

1 scheme dealing with the Department of Employment and work
2 Force, which is what was at issue in Robinson, is 41-35 --
3 I'm sorry. It's 41-35-660, and that's entitled appeals.

4 And the very first sentence says, "The claimant or any
5 other interested party may file an appeal from an initial
6 determination and redetermination or subsequent
7 determination not later than ten days after the
8 determination was mailed to his last known address."

9 Now, I highlight that again because it uses the word
10 may. That doesn't mean that you don't have to appeal and
11 you can file a private right of action in circuit court.

12 Clearly Robinson doesn't say that. It says absolutely
13 the opposite. No. You can't do that. You have to --
14 there are administrative remedies. You have to exhaust
15 them.

16 So, again, Your Honor, I would strongly suggest to the
17 Court not to get bogged down with the word may that was
18 used not in the statute, not in the regs, but was used in
19 the adoption subsidy agreement.

20 And of course there's no evidence before Your Honor.
21 There's no affidavit; there's no deposition testimony.
22 There's nothing in the record before Your Honor of
23 admissible evidence to show that the Mr. and Mrs. Hensley
24 intended to pursue this matter in either 2002 and 2004 but
25 thought it was optional.

1 In fact, lawsuit wasn't brought until many years later
2 after their statute of limitations had run. And, so, to
3 suggest that somehow this confused them should not carry
4 any weight with the Court, particularly in the absence of
5 any sworn testimony.

6 But I would also point out to the Court -- and, again,
7 not to -- not to move towards the decertification motion --
8 but if I don't mention this now I'll probably forget about
9 it.

10 But it seems to me that if the argument or the Court's
11 finding is that the use of the word may in the agreement
12 was somehow confusing or potentially confusing to the
13 parents, that right there shows an additional issue that
14 requires individualized inquiry, because we would have
15 to -- the Court would have to hear from every group of
16 parents as to whether or not they were confused by it or
17 that they had intended to pursue a matter but because of
18 the language in the adoption subsidy agreement they waited
19 multiple years, in fact, to bring the state court case. It
20 wasn't brought until 2013. They waited -- they waited 11
21 years in order to file a private right of action. That
22 just doesn't fly.

23 But, again, if the Court agrees with the plaintiffs
24 that may -- use of the word may in the agreement, which is
25 inconsistent with anything in the statute or the -- or the

1 regulations, which clearly don't say that it's optional.
2 And I would suggest, as I've already argued, that may
3 doesn't make it optional.

4 But even if the Court agrees with that argument, all
5 it does is show that this case isn't appropriate for class
6 certification because the Court's going to have to hear
7 from every single set of adoptive parents as to whether or
8 not, essentially whether or not, their delay was caused by
9 or their failure to exhaust administrative remedies was
10 caused by that language in the adoption subsidy agreement.

11 Court's indulgence.

12 (Pause.)

13 MR. LINDEMANN: To finish up the exhaustive
14 administrative remedies, the plaintiff does make the
15 alternative argument that it would have been futile in
16 order to -- to file any type of fair hearing appeal.
17 There's absolutely no evidence of that, Your Honor.

18 Again, plaintiffs have not put into evidence any, any
19 sworn testimony to that effect. I would, again, encourage
20 the Court to read the analysis from the Court of Appeals on
21 that particular issue in the Robinson, a/k/a, Patterson
22 case where they go through quite some detail in addressing
23 futility. And the Court indicated that there must be
24 evidence that the department took a, quote, hard and fast
25 position that makes an adverse ruling a certainty.

1 In this particular case, Your Honor, in 2004 the
2 Hensleys, just like every other adoptive parents of any
3 other putative claim member, had the ability under state
4 law that I've already read, as well as the terms of this
5 adoption subsidy agreement, to ask for a higher rate.

6 I've already read the quote to Your Honor from the
7 bottom of the first page. It says, "Adjustments in monthly
8 cash payments may be made with the concurrence of the
9 adoptive parents based upon changes in the needs of the
10 child, changes in the circumstances of the adoptive family
11 or changes in the maximum allowable subsidy payment.

12 So, in 2004 the maximum allowable subsidy payment went
13 up \$20. There was nothing that prevented the Hensleys or
14 any other set of adoptive parents from making a request to
15 D.S.S. to increase their subsidy rate by \$20 a month.

16 The evidence in this case, which is an answer to
17 interrogatory from the plaintiff -- and the plaintiffs
18 conceded in their -- their opposition memorandum -- that
19 they never pursued any type of administrative remedies to
20 D.S.S.

21 So, but they weren't prevented from doing so, and they
22 could have easily asked for an adjustment and they didn't
23 do so. And there's no evidence that it was a hard and fast
24 rule that they would have been turned down.

25 I mean, ultimately, and, obviously, the burden of

1 proof is on the plaintiffs. They're the ones that have to
2 show that, because this is futility argument which, on
3 which, they have the burden of proof.

4 And, so, even if the Hensleys had gone to D.S.S. and
5 made a request for an increase of \$20 a month or whatever
6 changes they wanted to the benefits that they were
7 receiving, and they were turned down, they were entitled
8 then to go through the administrative process. And that,
9 as I indicated, goes all the way to the A.L.C., to the
10 Court of Appeals, to the Supreme Court if they were
11 dissatisfied.

12 what they can't do is exactly what they did do, which
13 was file a lawsuit in circuit court. Circuit courts never
14 get involved in these things.

15 I mean, the appeal from the administrative proceeding
16 goes to the A.L.C. That's why we created the
17 administrative law courts. And from there it doesn't go to
18 the circuit court. It goes to the Court of Appeals and
19 Supreme Court. As I said, circuit court never gets
20 involved in these and they are not supposed to get involved
21 in these.

22 I'm sure Your Honor's never heard an adoption subsidy
23 challenge or any type of challenge to any type of benefits
24 that are doled out by the department of social services or
25 any other state agency. It doesn't come to this Court and

1 it's not supposed to.

2 But the bottom line is, Your Honor, they have not
3 carried their burden of proof to show a hard and fast
4 position, not when the contract allows for adjustments to
5 be made. You have to ask for them. You've got to be able
6 to show you're entitled to them. And, obviously, if you're
7 unhappy with that result, you got appeal rights.

8 So, in addition to the fact that they haven't proven a
9 breach of the contract, they also haven't shown futility,
10 and we would submit, Your Honor, for all of the reasons
11 just stated that exhaustion of the administrative remedies
12 applies in this case, just as it did in Holman, just as it
13 did in Richardson, which are both class action lawsuits and
14 should be entitled to great weight, I would submit. Well,
15 they're precedents, so, they should certainly be entitled
16 to great weight with the Court.

17 And, again, I would stress the Court not to get
18 carried away or get misled by this term may in the
19 agreement itself. And I think we've cited to the Court
20 numerous statutes as I indicated. I'm sure there are lots
21 more that in the appeal context that talk about may.

22 Not saying that an appeal is optional but saying that
23 parties don't have to appeal it. They're not forced to
24 appeal. They can accept the decision and choose not to
25 appeal. But if you do -- don't accept that decision, you

1 got to go through the administrative process.

2 All right. A couple of other points, Your Honor. I
3 know this is -- I know Your Honor laid out a good bit of
4 time, but I will go through these a little quicker.

5 We've also raised as an additional defense, Your
6 Honor, that the plaintiff does not qualify as a third-party
7 beneficiary.

8 Again, the plaintiff in this case is the adoptive
9 child. She was five years old when the adoption subsidy
10 agreement was signed. And this goes -- this goes hand in
11 hand with our argument about what is the proper measure of
12 damages, because it is a third-party-beneficiary claim.

13 But, ultimately, Your Honor, the law on third-party
14 beneficiaries, as Your Honor is well aware, requires that
15 generally only the signatories, the parties to a contract,
16 can sue for its breach.

17 There is a limited exception allowing third-party
18 beneficiaries to a contract to be able to sue for a breach
19 as it impacts them, not as it impacts the parties to the
20 contract but as it impacts them.

21 And what the Supreme Court said -- and I'm citing the
22 Beverly case from 2022 -- that when the parties
23 intentionally provide in the terms of the contract a direct
24 benefit to a third party, the third party may enforce the
25 contract. If the contract is made for the benefit of the

1 third party that person may enforce the contract if the
2 contracting parties intended to create a direct rather than
3 an incidental or consequential benefit to such third
4 persons.

5 I would submit to Your Honor that it just defeats all
6 legal logic to suggest that the intentions of the parties
7 in 2002 were to make B.L.H. who was five years old and no
8 rights contract whatsoever as a five-year-old, to make her
9 a direct beneficiary of that contract such that she could
10 sue to enforce it.

11 It just defies absolute logic to make minors, in
12 essence, third-party -- third parties to a contract with
13 enforcement power. They don't have the right to sue until
14 they reach majority. But, so, our first argument is that
15 there's simply inconsequential or, I mean, incidental or
16 consequential beneficiaries and not --

17 THE COURT: You can make that argument, but I disagree
18 with it. So, you might want to move on to your next one.

19 MR. LINDEMANN: All right. I will.

20 Your Honor, so, ultimately, then if they are -- if
21 they do qualify as third-party beneficiaries, the primary
22 question then becomes what is their measure of damages.
23 And we have cited the case law to the Court that talks
24 about that a third-party beneficiary may sue. And, again,
25 not for the damages of the parties to the contract. B.L.H.

1 may not sue for the damages to her parents. She may sue
2 for her own damages.

3 And we've cited on page 13 of our memorandum to a
4 recent case called Beverly vs. Grand Strand Regional
5 Medical Center that lays out the law very well on
6 third-party beneficiaries.

7 And what the court said there is, quote, "The
8 third-party-beneficiary question arises from a situation in
9 which a person who is not a party to the contract attempts
10 to bring a civil action against a party to the contract."
11 And here's the key point. "For damages allegedly caused to
12 the nonparty by the party's breach."

13 The Court then went on to give numerous examples where
14 third-party beneficiaries don't sue for the damages of a
15 party but they sue for, quote, "Their own resulting harm
16 and damages." And that's our argument in this case.

17 The plaintiff's theory -- and this also ducktails into
18 the whole notion of whether or not individualized inquiry
19 is needed to make this appropriate for a class action.

20 THE COURT: Don't ducktail it. Stay with the
21 substantive arguments.

22 MR. LINDEMANN: All right. The -- the plaintiff's
23 theory in this case, Your Honor, is that each of these
24 adoptive children, including B.L.H. as the class
25 representative are entitled to \$20 a month that their

1 parents lost in adoption subsidies.

2 The flaw among many of that argument is that the
3 federal statutory scheme, the state statutory scheme does
4 not provide for these -- the adoption subsidies to be paid
5 to the child. They're to be paid to the parents to help
6 care for the child.

7 And so what the plaintiffs are asking this Court to do
8 is to award \$20 a month, not to the parents, because it was
9 the parents who were allegedly deprived of those subsidies,
10 but to pay them directly to the child, and that's not a
11 proper measure of damages. That would be inconsistent with
12 the federal statutory law; that would be inconsistent with
13 the state statutory law and the entire statutory scheme.

14 Parents did not receive \$655 a month. The Hensleys
15 did not receive \$655 a month in order to turn around and
16 give it to be B.L.H.

17 THE COURT: Why did they receive it if it wasn't but
18 for B.L.H.?

19 MR. LINDEMANN: Well, they received it in order to pay
20 rent, to pay for clothes, to pay for utilities.

21 THE COURT: They would not have received it but for
22 B.L.H.

23 MR. LINDEMANN: Well, it didn't go into B.L.H.'s and
24 was not supposed to, and certainly there's no evidence of
25 that, to go into her bank account.

1 THE COURT: You -- I don't believe that those would
2 have been paid to have to go into her bank account. By
3 your own argument, she's a minor. She can't even have a
4 bank account.

5 MR. LINDEMANN: Well, I agree.

6 THE COURT: Okay.

7 MR. LINDEMANN: That makes my point.

8 THE COURT: It makes mine as well. That's why I think
9 you -- I'm disagreeing with your -- with a lot of your
10 premises, factual premises, of what you say and what you're
11 presenting to me that claim that this is not a
12 third-party-beneficiary case. Okay.

13 MR. LINDEMANN: I understand.

14 THE COURT: All right. Because the very essence of
15 why the parents or anybody is receiving this money or the
16 federal government is paying to the state, or the state's
17 paying it out to parents, is because these families are
18 adopting children.

19 The payments are made to incentivize if I understand
20 it correctly, is to pay to incentivize, to promote the
21 adoption of the child. But for the child's existence,
22 there would be no payments being made, period. Do I -- am
23 I missing something?

24 MR. LINDEMANN: No, you're not missing anything on
25 that.

1 THE COURT: Okay.

2 MR. LINDEMANN: But as far as the measure of damages,
3 I don't believe that you're -- what you just said justifies
4 or explains why the damages that are being sought in this
5 case of \$20 per month should be paid as a proper measure of
6 damages to be paid to the adopted child.

7 THE COURT: Okay. And we're dealing with the
8 substantive issues and not the certification issues.

9 MR. LINDEMANN: Right. And I am. Measure of damages
10 in this case is an issue that was raised by both parties at
11 summary judgment.

12 THE COURT: Okay.

13 MR. LINDEMANN: And in addition to that, Your Honor, I
14 would point out that the South Carolina Supreme Court again
15 in -- in what I call the -- the road map, the -- the Court
16 also recognized that particular issue would be one that
17 this Court would need to grapple with.

18 And, in fact, on page 515 of that decision, this is a
19 quote from the Supreme Court. It says, "D.S.S. raises the
20 additional question of whether the calculation of damages
21 requires significant individual treatment, or, as the
22 Hensleys contend, the damages can be calculated by a simple
23 formula."

24 All of these questions relate directly to whether the
25 circuit court will ultimately permit this lawsuit to be

1 maintained as a class action. But it's also the measure of
2 damages which is an appropriate issue to be decided on
3 summary judgment.

4 Yes. It will implicate. However Your Honor rules
5 there will implicate perhaps some impact on the class
6 certification question, but it is a question. Obviously, a
7 breach of contract requires proof of a contract, a breach
8 and damages that proximately resulted from that breach.

9 So, what I'm focusing on right now is the third
10 element of the cause of action for a breach of contract.

11 The plaintiffs contend that the damages are solely
12 proven by the number of months that the adoptive parents
13 were denied an additional \$20 of adoption subsidy benefits
14 and that that should be paid as damages to the adoptive
15 child, in this case B.L.H.

16 THE COURT: But --

17 MR. LINDEMANN: Our argument is that is not -- that
18 does not satisfy the three elements of a breach of contract
19 because it doesn't satisfy the third element that requires
20 there to be damages that are proximately resulting from the
21 breach.

22 The damages, I would submit, would be any type of
23 damage that an adoptive child can point to that they were
24 deprived of something. The example I used at the Supreme
25 Court, I believe, was if because they -- the parents were

1 receiving \$20 less a month the child was deprived of being
2 able to play little league baseball or was deprived of
3 dance lessons or, as I think Justice Few put it in their
4 oral argument if I remember correctly -- I might not -- he
5 was talking about getting a Happy Meal from MacDonald's,
6 that their argument would be, well, they were deprived of a
7 Happy Meal once or twice a month. But it would be the --
8 the loss to the child.

9 It goes back to what I just read from the Beverly
10 case. It's the loss allegedly caused to the nonparty. The
11 nonparty in this particular case, B.L.H. and the adoptive
12 children, didn't get that \$20 from their parents and stick
13 in their pocket or put in their piggy bank or their
14 account.

15 THE COURT: Let me -- let me tell you where I'm having
16 problems with your argument.

17 And we are -- because you're not -- you have passed
18 beyond the arguments where we are addressing whether or not
19 it's a breach or not and whether there's a statutory
20 application or a contractual application, whether it's
21 federal law or state law, whether someone has exhausted
22 their administrative remedies.

23 We're now at the damages issue, and you're arguing
24 that -- and I guess maybe I'm making an assumption based
25 upon the fact that it is \$20.

1 The fact that I interpret it being \$20 is that this is
2 \$20 that were being used by families that were adopting
3 children that probably the families there is an economic
4 assumption being made that these were families that were
5 already economically challenged when they went to the
6 department needing money, and that when they asked for
7 \$20 -- and you want them to now prove that somehow this
8 particular child has suffered a damage when I made the
9 assumption and the entire nature of this case is that these
10 families and these children -- these children -- were
11 already in economic need.

12 And, so, in order to have access to the judicial
13 process and to receive this \$20, it's the department of
14 social services' position that now these -- what I assumed
15 would be economically challenged families and children --
16 to have to come and prove how that \$20 affected their
17 lives? Is that what I'm hearing your argument to be?

18 MR. LINDEMANN: No. Absolutely not. And first of
19 all, Your Honor, just with all due respect to the Court,
20 you're making assumptions that are not in evidence. And
21 the program is not designed to deal with economically
22 challenged persons. It's not that type of program.

23 If you -- the program, which is, as Your Honor
24 previously indicated, gets it entities [sic] from -- from
25 the federal government, is to provide subsidies for parents

1 who adopt children with special needs. Doesn't mean that
2 they're economically challenged, that Your Honor's making
3 that assumption.

4 There's no evidence in this case as to any of the
5 families being economically challenged. There's no
6 evidence that's been presented that the actual Hensleys,
7 the one-class representative, that their family was
8 economically challenged or how the lack of \$20 impacted
9 that family.

10 But the measure of damages is not how it impacted the
11 family. It's not how it impacted the adoptive parents.
12 It's how the issue should be, Your Honor, because the
13 proper plaintiff in these cases should have been the
14 adoptive parents, but the adoptive parents didn't bring
15 this case. The child brought the case. That's the way the
16 plaintiffs brought it.

17 THE COURT: Okay. And that's your standing argument.
18 Okay.

19 MR. LINDEMANN: Right.

20 THE COURT: I am looking at the damages, and you're
21 arguing lack of damages. They have presented to me a very
22 rational and logical way of calculating damages if, in
23 fact -- if, in fact, there has been liability established.

24 MR. LINDEMANN: And all I'm saying --

25 THE COURT: And I'm asking. I guess I'm asking, I'm

1 digging. Then what it is that you want these children to
2 prove?

3 MR. LINDEMANN: The children would have -- if the
4 children -- if it's a proper third-party-beneficiary claim,
5 Your Honor, the children would have to be able to prove how
6 the loss of \$20 per month proximately caused them harm.

7 THE COURT: Okay.

8 MR. LINDEMANN: Because it's the damage to the
9 nonparty. They can't come -- a third-party beneficiary. I
10 think the law is real clear on this, Your Honor, I would
11 submit. The third-party beneficiary can't come in and
12 claim the loss in this case to the parents, to the parties
13 who contracted, and that's what the plaintiff is doing.

14 THE COURT: I hear your legal argument. Okay. I'm
15 struggling because even if they're not economically
16 challenged, which I dare say that if we did discovery in
17 this case there might be some economically challenged
18 families, but that families that desire to adopt special
19 needs children? And now the department's position is that,
20 okay, in order to receive this \$20 that if it is a
21 established that they're entitled to it, that now you've
22 got to come to court and prove to a court how this \$20
23 affected you?

24 MR. LINDEMANN: Again, Your Honor, with all due
25 respect.

1 THE COURT: Again, with all due respect, and this is
2 the department of social services' legal position that I'm
3 trying to understand why you want to take -- say that --
4 say to a Court that this plaintiff can establish their
5 case, can establish their right to recover and that yet
6 you're not going to pay them this \$20.

7 MR. LINDEMANN: Your Honor, the money, if this
8 Court --

9 THE COURT: I'm wanting to understand the department
10 of social services' position that they're saying to this
11 Court.

12 I understand the law as you are presenting it to me,
13 and my question to you is that if they establish all of the
14 other elements, then you're going to deny or the department
15 of social services' position is that these families who
16 entered the adoption process and adopted these special
17 needs children, that they're not going to recover this \$20
18 because they cannot prove how \$20 affected the child or
19 have the child come and say how this \$20 affected them,
20 when by their probably very definition these children,
21 these special needs children, probably are going to need
22 guardians.

23 Maybe they're -- maybe they're physically handicapped
24 and they won't need -- I mean, just physically handicapped
25 and won't need the mental guardian. But maybe some of

1 these children are special needs children because of a
2 mental challenge that they have.

3 MR. LINDEMANN: May I answer?

4 THE COURT: Yes, sir.

5 MR. LINDEMANN: Okay. Your Honor --

6 THE COURT: Keep it on the damages though.

7 MR. LINDEMANN: I will. I'll go back to my original
8 point that there are three elements to be able to prove a
9 breach of contract.

10 THE COURT: We've got two of them already.

11 MR. LINDEMANN: And what I'm understanding Your Honor
12 is suggesting is that if the plaintiffs successfully prove
13 the existence of a contract and a breach that the
14 department shouldn't defend on the third prong, and I'm not
15 in a position where I can say that, Your Honor.

16 THE COURT: I'm not saying you cannot defend, but I'm
17 asking you. You are challenging the method of proof --

18 MR. LINDEMANN: Yeah.

19 THE COURT: -- over \$20.

20 MR. LINDEMANN: Because I don't believe -- they're the
21 ones who chose a third-party beneficiary theory, Your
22 Honor. The adoptive parents could have sued over this.

23 THE COURT: And I am saying we've gotten past that.

24 MR. LINDEMANN: Okay.

25 THE COURT: We've gotten past the standing; we've

1 gotten past the existence of a contract; we've gotten past
2 the breach. I'm talking about the damages.

3 MR. LINDEMANN: Right. And our position is a
4 third-party beneficiary --

5 THE COURT: Your position is, talk about this case,
6 that these parents or this child who is a special needs
7 child that entered the adoption program has to come to
8 court and has to prove specifically how this \$20 affected
9 them. Is that the department's position?

10 MR. LINDEMANN: Yes, Your Honor. That would be --

11 THE COURT: Okay. I understand.

12 MR. LINDEMANN: -- what would be required for the
13 third element of a third beneficiary,
14 third-party-beneficiary claim.

15 THE COURT: Okay. I understand.

16 MR. LINDEMANN: The Court's indulgence. I think I am
17 through with the third-party-beneficiary argument.

18 (Pause.)

19 MR. LINDEMANN: I believe, unless the Court has any
20 further questions for me, I think I have covered all of the
21 issues that were asserted both in our motion for summary
22 judgment, as well as the plaintiff's motion for summary
23 judgment.

24 To the extent that any points were overlooked, you
25 know, I certainly am not intending to waive anything. We

1 would rely on our memorandum that has been submitted to the
2 Court.

3 THE COURT: Okay.

4 MR. LINDEMANN: We would ask the Court to grant
5 summary judgment to the department. Obviously, there are
6 several separate and distinct grounds.

7 THE COURT: Okay. You don't have to go back over your
8 argument.

9 MR. LINDEMANN: I'm not. I'm not going to.

10 THE COURT: All right.

11 MR. LINDEMANN: And, obviously, you just have to agree
12 with us on one of these grounds and we would be entitled to
13 summary judgment.

14 THE COURT: Any reply on the issues that relate to the
15 substantive claims, not to the class claims, or not to the
16 class decertification issues.

17 MR. LANGLEY: Just a couple on my part. Would you
18 prefer to hear the exhaustion of administrative remedies
19 since that seemed to be the majority of his time?

20 THE COURT: Y'all are the ones who are arguing. I
21 don't care.

22 MR. LANGLEY: I'll go quickly, Your Honor.

23 THE COURT: All right.

24 MR. LANGLEY: He mentioned, Mr. Lindemann mentioned
25 that -- all of this argument about collateral estoppel and

1 seemed to limit it to the 2002 to 2004 time period, which
2 we've stipulated is not part of our damages calculation.
3 So, there is nothing inconsistent between our claims and
4 the federal law claims.

5 So, to -- if that's the limit of his collateral
6 estoppel claim, then I don't think we have any
7 disagreement.

8 If you actually look at the transcript, it sort of
9 goes back to the -- it depends on what the definition of is
10 is except for here it's it.

11 Mr. Lindemann kept saying it depends on or if it is
12 going to be filed in state court, and that it is a big it,
13 because there was a very specific it at the Fourth Circuit.
14 And it was a contracts claim under the United States
15 Constitution under section 1983. And I'm happy to provide
16 the entirety of the transcript so Your Honor can read it,
17 but it's very specific in just the parts that we've cited
18 on page five of our brief.

19 Just as Mr. Lindemann argued a moment ago, the
20 discussion was about the withdrawal of the contracts-claim
21 argument because we did recognize that there would be an
22 issue and at the state-court level of collateral estoppel
23 if that were ruled on at the Court of Appeals.

24 We didn't feel like there was a sufficient basis to
25 maintain it, and so it was withdrawn. And then there's a

1 discussion are you going to make a 1983 action in state
2 court on this contract's-clause claim. And I said yes. I
3 can make a representation I'm not going to bring a 1983
4 action. That's the definition of it.

5 Mr. Lindemann left that out. That's very important it
6 or what is it going to be brought in the state-court claim,
7 and then I said and stipulate that there's not a bar to
8 this state court contract claim in state court.

9 Page 57 of the transcript, 19 and 20.

10 "Yes." And I said, "Yes, ma'am, Your Honor."

11 And she says, "Well, we're not deciding whether
12 there's a bar or not. We're just dismissing without
13 prejudice."

14 And I said, "Well, on the grounds of res judicata or
15 collateral estoppel, very specific, by virtue of some
16 dismissal with prejudice."

17 And Mr. Lindemann did intervene, didn't allow the
18 Court to respond, and said, "If it's without prejudice."
19 Again, it's important what the it is. Then there would be
20 no such argument. And the it in that context is a state
21 court contract claim in state court.

22 That's where I wanted to be very careful we were not
23 stipulating we would not bring.

24 And then Mr. Lindemann said, "Okay. You're not going
25 to bring that. You are -- we are going to bring a

1 state-court claim."

2 we'd actually already brought it, and to ensure there
3 would be no collateral estoppel Mr. Lindemann conceded, "If
4 it's without prejudice, there would be no such argument."

5 Judge Motz says, "Right".

6 And Mr. Lindemann, "It was not my intent to make that
7 argument, I can represent to the Court."

8 So -- so, it's clear if you actually look at the
9 specifics and don't gloss over the language. It was not a
10 1983 contracts-clause claim to be brought in state court.
11 It was a state-court contract claim. And there's nothing
12 inconsistent about the state court contract claim and the
13 ruling of the federal court on the Adoption Assistance and
14 Child Welfare Act which concluded that that 2002 to 2004
15 time period was not recoverable.

16 So, that said, nicely into the breach of contract
17 claim where he says there is no breach of contract because
18 there was nothing requiring them to pay the adoption
19 subsidy.

20 well, the contract required them to pay the adoption
21 subsidy. The sole basis, a general preemption argument
22 that federal law prohibited the adoption subsidy from
23 exceeding -- or excuse me -- the foster care subsidy from
24 exceeding the adoption subsidy. That was the only basis
25 for the reduction of the adoption subsidy. And once that

1 basis is gone, they have to go back to adhering to the
2 terms of the contract.

3 The -- the only excuse for not paying the subsidy was
4 for that federal law. And then when they withdrew it --
5 they created it by reducing the foster care subsidy and
6 allowing it. And then they withdrew it by reinstating the
7 foster care subsidy. And they eliminated their ability to
8 use that preemption, that federal law, as a defense because
9 it was no longer applicable once the foster care subsidy
10 was reinstated, and then the adoption subsidy must be paid
11 at the contract amount. So, that's the restructuring
12 claim.

13 On the third-party-beneficiary side, there's lots to
14 say about that. The adoption subsidy agreement -- I'm
15 sorry -- well, let me just point out two things.

16 Mr. Thompson said you don't need to go there and I --
17 and I think that's right. But just two things because I
18 think the Court made it clear about why there's no
19 obligation to prove the actual damages.

20 But I wasn't sure if the Court had made a conclusion
21 on the nature of the third-party standing, so two things on
22 that just briefly.

23 The first page of the contract says the purpose of the
24 agreement is to provide care for this child. That's about
25 a third of the way down on the right inside. It's Exhibit

1 A to our memo. And then about -- and that's -- that's
2 right after. It says the purpose is to facilitate the
3 legal adoption.

4 And then further down the amount of the monthly cash
5 payment is based on the needs of the child. So, it's
6 solely for the purpose of the child in two different places
7 on a contract that was an adhesion contract drafted by the
8 department, not subject to negotiation.

9 There's no evidence that any contract other than this
10 form was ever used for any of those 4,000 kids. And, so,
11 solely based on the needs of the child.

12 And children can bring claims in this state long
13 before they turn 18. In fact, they have to under certain
14 statutes of limitations against the state. And they do it
15 through a parent and guardian. So, I just point that out
16 in the contract.

17 Mr. Thompson will address the exhaustion of
18 administrative remedies.

19 MR. THOMPSON: Well, just to finish, meaning your
20 assumptions were accurate. The contract, the adhesion
21 contract, talks about need. Need is financial need.

22 Your assumption is right on. You don't enter into
23 help for a child you're adopting if you don't need it. And
24 half way down under the word amount it says the amount of
25 the monthly benefits based on the needs of the child, the

1 circumstances of the adoptive parents. What else could
2 that be besides their financial circumstances if it's right
3 under the monthly amount? So, it's because they need it.

4 And 20 bucks may not be a lot for some folks, but for
5 some folks, especially if it's a sibling group, it's the
6 difference between doing something really good or just
7 getting by. And it does really strain fragility for the
8 department who is supposed to be advocating for these very
9 people to hide behind the language of this. It is -- we do
10 believe it is offensive. And every contract has a duty of
11 good faith and fair dealing, and that's not fair dealing.

12 In conclusion, it's said that we don't have any
13 evidence that we have brought, but we brought Exhibit B.
14 Exhibit B is the highest authority of the department. It's
15 saying why they entered into these cuts. She spelled it
16 out. She said she wasn't changing her mind, in effect, and
17 we rely on Exhibit B. Thank you.

18 MR. LINDEMANN: May I reply briefly to their reply?

19 THE COURT: Briefly.

20 MR. LINDEMANN: Your Honor, I definitely encourage you
21 to take a look. I mean, again, whether the Court applies
22 collateral estoppel or not, I believe the Court should
23 apply the federal -- the decisions on federal law by the
24 Fourth Circuit.

25 But, ultimately, what Mr. Langley just read to you,

1 some of it he read verbatim and some he summarized. And
2 then to suggest that it, the meaning of it, is what it is
3 at stake here, I mean, when he was responding to Judge
4 Motz, I don't think it came into play. But, anyway, let me
5 just explain. I'm reading on page 57 of the transcript.

6 Judge Motz says, "Are you ready to make that
7 representation?"

8 And she had slightly interrupted me. So, I -- it says
9 I finish by saying withdrawing the claim because -- from my
10 previous statement.

11 And Mr. Langley says, "I didn't understand it clearly,
12 Your Honor."

13 And Judge Motz said, "Can you make a representation
14 that you're not going to bring a 1983 action in state
15 court?"

16 There's no word it there.

17 And he said, "Yes, ma'am."

18 And then she said, "Okay."

19 And he says, "And stipulate there's not a bar to the
20 state court contract claim in state court."

21 And then over on the next page where there is an it
22 Mr. Langley before -- before it came into play, he says,
23 "Well, on the grounds of res judicata."

24 Anyway. First of all I should probably back up.

25 The top of page 58, Judge Motz says, "Well, we're not

1 deciding whether there's a bar or not. We're just
2 dismissing without prejudice."

3 Again, referring to the -- the -- not a contract
4 claim, a contracts clause claim under the U.S.
5 Constitution.

6 Mr. Langley said, "well, on the grounds of res
7 judicata or collateral estoppel by virtue of some dismissal
8 with prejudice."

9 And I said, "If it's without prejudice, there would be
10 no such argument."

11 And judge Motz said, "Right."

12 So, the it I was referring to is the dismissal.

13 Mr. Langley, as I understood his argument, was
14 suggesting that I was saying that the it is the state
15 contracts claim. That's not a play here at all. It's -- I
16 was saying if it's -- meaning the dismissal of the federal
17 contracts clause claim -- is without prejudice, there is no
18 such argument.

19 Same argument I made to Your Honor. I'm not arguing
20 collateral estoppel based on the dismissal of the federal
21 contracts clause claim. That was dismissed without
22 prejudice. It doesn't have a preclusive effect.

23 But what does have preclusive effect is the other
24 claim, the statutory claim under the Adoption Subsidy and
25 Civil welfare Act.

1 That claim did get litigated to the Fourth Circuit.
2 The Fourth Circuit found that there was no violation of
3 federal law. And those interpretations of the federal law
4 and that decision is very much subject to collateral
5 estoppel. And if not collateral estoppel, should carry
6 great weight for this Court.

7 I was not withdrawing, and I don't think any
8 reasonable reading of this transcript is that I was waiving
9 my right to argue collateral estoppel based on a Fourth
10 Circuit opinion that had yet to be issued. It wasn't
11 issued. This was oral argument.

12 All I was doing was representing that if he
13 dismissed -- if the Court dismissed the contract clause
14 claim without prejudice with the representation that was
15 negotiated by Judge Motz that they would not refile it in
16 state court, that the contracts claim dismissal -- the
17 contracts clause claim dismissal would have no bearing on
18 this case, and it doesn't, and I've never argued that it
19 did. Thank you, Your Honor.

20 THE COURT: I think I understand y'all's position.

21 All right. Let's take a short recess, and we're going
22 to come back. Remember, we've got to stop about 4:30. So,
23 if we don't get finished we'll have to reconvene unless
24 y'all want to stop now and reconvene. Y'all talk about it.
25 We are going to step down.

1 (Whereupon, a recess was taken.)

2 THE COURT: Okay. We will move to the motion to
3 decertify, and that would be a motion Mr. Lindemann will
4 lead on.

5 MR. LINDEMANN: That's correct, Your Honor.

6 And, Your Honor, I do think there is a, as Your Honor
7 recognized earlier there's a, substantial overlap between
8 the summary judgment arguments and the motion to decertify.
9 So, I know Your Honor will want me not to replot old
10 ground, and I'll do my best, and I won't but --

11 THE COURT: You know me well.

12 MR. LINDEMANN: But with the understanding, I would
13 say that they ducktail together. So, I think we can deal
14 with the decertification fairly quickly.

15 I would start by simply pointing out again that the
16 Supreme Court did lay a roadmap for the Court on this
17 particular issue.

18 I think the Supreme Court in the last three paragraphs
19 or so of their opinion -- or four paragraphs -- recognized
20 that a number of these issues that would require
21 individualized inquiry essentially in many evidentiary
22 trials or evidentiary hearings were raised, and we raised
23 those to the Court of Appeals, and the Court of Appeals
24 actually agreed with us.

25 And, obviously, the Supreme Court in their opinion

1 indicated that the Court of Appeals jumped the gun a little
2 bit and they vacated the opinion of the Court of Appeals
3 and dismissed the appeal.

4 But in doing so the Supreme Court not only identified
5 some of these issues as part of the roadmap, but what they
6 also did, which I think is very important, towards the end
7 of the opinion when they addressed specifically Rule 23
8 under the federal rules, as well as the state rules, the
9 Supreme Court said this. And I think this is very
10 important.

11 And, obviously, this was not before the -- this Court
12 did not have -- and by this court I'm referring to Judge
13 Gibbons -- did not have the benefit of the Supreme Court's
14 decision in Hensley when he decided the class certification
15 motion.

16 I don't even remember what year it was. I think it
17 was 2014 or '15.

18 But, anyway, the Supreme Court said, "Though our Rule
19 23 does not specifically require the common issues
20 predominate, there must be a proper balance between common
21 and individualized issues in order to achieve the
22 efficiencies the class procedure was designed to promote.
23 The Court of Appeals' recognition of this requirement has
24 support in academic sources and in our precedent."

25 The Court then went on to cite Lighthsey and Flanagan,

1 which you don't see cited as much these days as when I
2 first started practicing law. Lightsey and Flanigan
3 addressed the commonality requirement, and they have a
4 block quote from them.

5 And what's important is the last sentence. It says,
6 "The Court should first determine the existence of common
7 questions and then whether they are sufficiently central to
8 justify class action."

9 In addition to that, Your Honor, and I don't know what
10 I did with my class cert brief. In addition that, Your
11 Honor, I think one of the leading cases that is also cited
12 in the Hensley decision is Gardner vs. the Department --
13 South Carolina Department of Revenue.

14 And it was in that case that a class action was
15 brought to challenge the notice procedures under the debt
16 setoff collection act. And, ultimately, the trial court
17 did certify both the plaintiff's class and the defendant's
18 class.

19 And the Supreme Court in that decision in 2003 also
20 addressed the commonality requirement and found that
21 commonality was not achieved because of the need for an
22 individualized inquiry as to every punitive class member
23 within the plaintiff's class, that there was an issue as to
24 prejudice and that a showing of prejudice would be required
25 and that an individualized examination of every class

1 member's claim would be required.

2 In fact, this is a direct quote from Gardner. It
3 says, "A representative class cannot exist where the Court
4 must investigate each plaintiff's prejudice claim.
5 Requiring individualized examination negates the benefits
6 of a class action suit."

7 So, with that backdrop of Gardner and what the Supreme
8 Court has already indicated in Hensley regarding the need
9 for the common questions to predominate -- and it's not
10 just common questions, Your Honor. I think this is a
11 point, with all due respect to Judge Gibbons, that he
12 overlooked, is that the common -- the common issues of law
13 and fact have to be determinative.

14 And in this particular case the underlying facts are
15 not in dispute, the fact that in 2002 there was a reduction
16 of the foster care labor payment by \$20 a month, and,
17 hence, there was also a reduction of the adoption subsidy.

18 That is -- while that's a common question for all of
19 the different plaintiffs, it's not determinative because
20 it's not in dispute. It is a fact that is not in dispute.
21 And those are the sorts of things that if you look at Judge
22 Gibbons' order that he focused on but they were not
23 determinative.

24 So, in this particular case the determinative issues,
25 Your Honor, are individualized. Ultimately, Your Honor,

1 they boil down to several different things, one of which I
2 won't belabor the point, but I will state it to preserve my
3 record on it.

4 Your Honor has indicated he don't agree with my
5 argument or theory, but the measure of damages we would
6 contend would be --

7 THE COURT: I didn't say I didn't agree with it.

8 I think for the department to take that position is
9 just -- it's shocking.

10 I can understand the legally, why they do it. I just
11 think it's shocking that a child or a parent of a child
12 that's adopted with special needs to make an application to
13 receive twenty -- that was denied \$20 has to come to court
14 to actually prove how that \$20 affected them. Okay.

15 MR. LINDEMANN: All right.

16 THE COURT: That's my position, so we can move on.

17 MR. LINDEMANN: All right. And, Your Honor, again,
18 I'm not going to reargue all of that, but, obviously, one
19 of the points that we believe requires individualized
20 inquiry is --

21 THE COURT: You need to move on then.

22 MR. LINDEMANN: I will --

23 THE COURT: Okay. Because you're asking me to accept
24 a position of the department of social services that on its
25 face is so burdensome, is so offensive. Okay.

1 MR. LINDEMANN: All right. And, Your Honor, again,
2 I'm preserving it for the record.

3 THE COURT: That's fine. We need to move on to
4 another issue.

5 MR. LINDEMANN: We are.

6 Your Honor, there -- there are also individualized
7 inquiry that will potentially -- and I've already touched
8 on that earlier, which is in adjudicating the exhaustive
9 administrative remedies if this Court finds that based upon
10 the argument that the plaintiff has put forward that the
11 language of may in the -- in the adoption subsidy
12 agreement, whether that was confusing or caused adoptive
13 parents not to pursue a timely claim through the
14 administrative process, that, obviously, would be an
15 individualized inquiry.

16 Additionally, Your Honor, the issue of termination, as
17 we've raised in our motion and raised previously to the
18 Court of Appeals and the Supreme Court --

19 THE COURT: The issue of termination.

20 MR. LINDEMANN: Termination -- termination. If you
21 look at the -- if you look at the adoption subsidy
22 agreement, Your Honor, there are -- there are eight
23 different ways that an agreement terminates. It's
24 Subsection IV, Roman Numeral IV, on the last page.

25 I mean, I can go through them all. Obviously, some of

1 those require individualized inquiry as to whether or not
2 they apply.

3 On the conclusion of the terms of this agreement, that
4 one does not. But whether the adoptive parents -- whether
5 it was terminated with written consent upon a child's
6 death, the death of a parent, cessation of the parents'
7 legal responsibility for the child, failure to complete the
8 renewal process, those are all bases for the determine --
9 the termination of the adoptive subsidy agreement, and that
10 will require individualized inquiry for each. For not just
11 B.L.H., obviously, but for each of the punitive class
12 members to determine if the contract, number one, had
13 terminated at any point and when it terminated and for what
14 reason it terminated. And that is, obviously, an issue of
15 fact that would require fact-finding by the fact-finder,
16 whether it's this Court or whether it's a jury.

17 So, again, there are a number of different areas that
18 have been identified as requiring an individualized
19 inquiry, including, as I said, to a certain point the
20 administrative exhaustion of administrative remedies
21 depending on how Your Honor rules.

22 But, ultimately, Your Honor, that provides for or
23 makes relevant for the Court's determination together with
24 the cross motions for summary judgment as to whether it's
25 appropriate to decertify the class.

1 In the Robinson case which is -- which I know I've
2 been referring by the wrong name. It's Patterson, but in
3 the Robinson case, ultimately the trial court in that case
4 addressed the summary judgment or the -- and the Court of
5 Appeals addressed it as well -- before the notice of class
6 certification was ever sent out.

7 We are now actually still in that posture as Your
8 Honor -- as was discussed with Your Honor at the last
9 status conference.

10 So, ultimately, this is an appropriate time for the
11 question of decertification to take place in conjunction
12 with the legal issues that this Court's been asked to
13 address in the cross motions for summary judgment.

14 I would note that in the Supreme Court's opinion in
15 this case, in Hensley, the Supreme Court recognized that
16 there would come a time for the Court to have to explore
17 whether or not decertification is appropriate.

18 In fact, last sentence of the body of the opinion
19 prior to the conclusion says all of these questions relate
20 directly to whether the circuit court will ultimately
21 permit this lawsuit to be maintained as a class action.
22 And then it cites the Salmonsens case, and the specific
23 quote from Salmonsens, quote, "Class certification may be
24 altered at any time prior to a decision on the merits."

25 So, again, with that roadmap, I would suggest to Your

1 Honor that the Supreme Court recognized that there would
2 come a time for this Court to entertain a decertification
3 motion in conjunction with these legal issues including the
4 exhaustion issue as well as a number of the other issues
5 that I've already articulated and the Supreme Court
6 identified as well.

7 The Court's indulgence.

8 (Pause.)

9 MR. LINDEMANN: I believe, obviously, for any point
10 that I have not argued directly, I would rely on the motion
11 and the memorandum for that. Well, the memorandum is part
12 of the motion.

13 But based on -- based on those arguments and, again,
14 which take into account the summary judgment arguments, the
15 department would request that the Court grant our motion
16 for summary judgment, as well as decertify the class.

17 And even if the Court does not grant our motion for
18 summary judgment in total, we would ask the Court to
19 decertify the class based upon a lack of proof of the
20 commonality element, again, focusing on the determinative
21 issues as the Gardner case instructs and find that it would
22 be -- this case would not be appropriate for class
23 certification moving forward. Thank you, Your Honor.

24 THE COURT: Thank you.

25 MR. LANGLEY: No individualized inquiry is required

1 under the exhaustion of the administrative remedies, and
2 nobody did it.

3 The letter from the director didn't provide any basis
4 for it. It made it clear it would have been futile, and so
5 nobody did it. There's no individualized inquiry. In 13
6 years of this case been no evidence of any administrative
7 remedy ever being pursued.

8 In looking at the Robinson-Patterson case, whichever
9 we're going to go with, 16 to 30 percent of the department
10 of employment work force appeals were successful, a huge
11 part of that case to show that it was not futile to pursue
12 an administrative remedy.

13 Here the success is zero percent. The attempt is zero
14 percent as far as we know. Based on the language of the
15 letter, that it was unavoidable, inescapable, all of the
16 things that the director said, and futile, to resist, just
17 like it often is to fight against the state. In the last
18 13 years we've been fighting the challenge of a notion of
19 futility. But yet we remain.

20 On the termination and the issue of really the damages
21 argument, whether it terminates based on the age of the
22 child, terminates based on the death of the child, the
23 death of the parent, whatever it may be, all of those go to
24 damages.

25 The Mungo case and a whole bunch of other cases that

1 began the Mungo, I believe it is, we briefed that ad
2 nauseam over the years. Be happy to provide that to the
3 Court.

4 This memo was just filed to decertify Friday. We're
5 actually focused on our other memo that was -- the Court
6 had requested by that same date, which was on the notice to
7 the issue -- notice to the children who are under the age
8 of four, and which we provided to the Court.

9 But in the -- to the extent that the Court needs a
10 response to this issue on decertification, I'll be happy to
11 provide those cases. But they all say that individualized
12 inquiry on damages is not a basis to find a lack of
13 commonality or to decertify a class.

14 And, in fact, there can always be differences and
15 there almost always are differences in damages for
16 individualized class members, and that's not a requirement
17 under South Carolina law for commonality to be made.

18 And that's really the arguments, because every one of
19 these contracts will terminate. Every one of the payments
20 will terminate at some point, and then that goes to the
21 measure of damages, whether it's because of the facts or
22 because of the law. I am through at this time, Your Honor.

23 THE COURT: Any reply to what he argued?

24 MR. LINDEMANN: I think he went outside the record.
25 I'll leave it at that. I would ask the Court, obviously,

1 to stay within the record like Mr. -- and I know Your Honor
2 is aware of this. Arguments of counsel is not evidence.

3 Ultimately, to simply say nobody attempted to exhaust
4 their administrative remedies, I don't think there's
5 evidence to support or refute that. There's -- that's
6 simply a statement by Mr. -- Mr. Langley.

7 And then he tries make the point that ducktail back
8 into the summary judgment that there's no evidence that
9 anybody attempting what the -- what the success rate was
10 because he contends that nobody tried. Well, if nobody
11 tried, you can't say that there wouldn't have been any
12 success. I mean, it just defies logic.

13 So, again, I believe that the arguments before the
14 Court need to be focused on what has been submitted into
15 this Court's record and not -- and arguments of counsel
16 should not be taken as evidence. Thank you.

17 THE COURT: Give me just a second. Anything in
18 closing? Give me just a second.

19 (Pause.)

20 THE COURT: On the decertification motion the -- my
21 understanding is that under Rule 23 a decertification
22 motion can be filed at any time to the proceeding.

23 MR. LINDEMANN: That's correct, Your Honor.

24 THE COURT: Okay. So, I appreciate very much the
25 reference to the -- what are y'all calling it, the

1 Patterson case or the Robinson case?

2 MR. LINDEMANN: Right.

3 THE COURT: I appreciate that. I don't view that as
4 anything new other than just a re-articulation of what I
5 understood the rules were already.

6 So, I just want to be clear on the way that I'm
7 viewing those. I frequently in my experience with class
8 actions, there's not a -- the standard is not perfection
9 for commonality, and, so, I'm struggling as to is that what
10 the department is asking me to do when the facts are so --
11 as counsel stated, is undisputed, and the facts that are
12 undisputed almost by the standard of perfection fit into a
13 class action.

14 I have reviewed more than once the Supreme Court's
15 guidance that they gave when y'all argued it to them, so I
16 will take a look at it again. But I am struggling with
17 that, with those issues right now.

18 Okay. They filed, plaintiff filed, a motion to
19 provide notice to the other class members under the age of
20 four. Do y'all want to do that now?

21 MR. LANGLEY: Sure.

22 THE COURT: Okay.

23 MR. LANGLEY: I think it's basically, Your Honor, that
24 Rule 23 and most of the law that we cited in support is
25 from the statute and then federal interpretation of the

1 federal Rule 23, which is similar to South Carolina. It's
2 not identical. I submit there are differences on some of
3 the substantive points like commonality and predominance.

4 But in terms of the procedural application and the
5 authority of the Court to manage the class and to, as
6 justice requires, govern the class, we think that that Rule
7 23 gives more than enough authority and, arguably, an
8 obligation of this Court to do a notice that would reach
9 the members who are under, were under, the age of four at
10 the time that they entered into adoption.

11 And, basically, there's no prejudice to the defendants
12 for doing a general notice for that. Were the plaintiffs
13 to prevail on their merits claims and notice was not given
14 to these individuals, then the department would have an
15 unfair windfall because they will have caused a loss to a
16 significant number, hundreds, of children that meet the
17 definition for the class definition when they came into
18 adoption under the age of four. I think it's somewhere
19 around five or six hundred in that range. Maybe four to
20 five hundred. Mr. Thompson has done those calculations.

21 But, in any event, the number is significant, and that
22 would be an unfair result if the department were to
23 determine to breach the contract but that group was
24 excluded without any type of notice or opportunity.

25 And then there's a whole opt-out issue. It's are they

1 entitled to a notice for the opportunity to opt out.
2 Typically, notice is given to parties who are not otherwise
3 available through publication.

4 I think we could draft a notice that would meet the
5 requirement of giving sufficient information in order to
6 provide or to pursue a claim and/or opt out of a claim. I
7 mean, that's really the purpose of the notice for any
8 individual that wanted to do so.

9 And if they don't know they're adopted, then they
10 obviously will gloss right over that. That notice is not
11 applicable to them. If they do know they're adopted, then
12 they will have the opportunity to respond, opt out,
13 participate, however that wish to in the -- in the
14 litigation.

15 THE COURT: Let me ask you about that opt-out
16 provision.

17 All right. If we -- I thank y'all very much for
18 taking a look at this. It was generated after y'all had
19 asked me to make the decision about what would be the age
20 cutoff.

21 And in my analysis I was approaching it and realized
22 that what I was doing was automatically excluding people
23 that would be, normally be, part of the class but for the
24 decision I made on the proper notice as far as the age was
25 concerned, that they would be part of the class except for

1 my decision.

2 And under Rule 23 I have a separate obligation to try
3 not to -- to try to be mindful that there are those people
4 that do not appear in front of me in this courtroom that
5 I'm actually -- what y'all do and what I do, we affect
6 their rights even though they are not in front of us. And
7 that's where the concept of this notice came. I understand
8 under South Carolina class action law people are entitled
9 to opt out.

10 If they don't opt out in such a notice that then the
11 reach or the purpose of the class action then brings them
12 all in so that at some future date they have participated
13 in a class action and have not opted out of that class
14 action, then their rights have been terminated because of
15 the class action. That's where I'm approaching with this
16 question.

17 We are going to be able -- you feel comfortable
18 that -- confident that if we do this notice that we can
19 deal with the opt-out provision appropriately?

20 MR. LANGLEY: Yes. I think the notice deals with it.
21 It gives the opportunity to opt out for any person that's
22 under the age of four at the time they come into adoption.

23 THE COURT: If somebody's going to opt out, maybe
24 they've seen the notice the same way that -- okay.

25 MR. LANGLEY: Correct.

1 THE COURT: Okay. Yes, sir.

2 MR. LINDEMANN: Your Honor, and I recognize that this
3 issue was presented by Your Honor as part of the form order
4 you issued back, I guess, back the first part of March.

5 THE COURT: Uh-huh.

6 MR. LINDEMANN: From what I can tell from what the
7 plaintiffs filed on Friday, in essence, I think it requires
8 a little bit more information for both the Court and for us
9 to be able to look at, because what I understand them to be
10 proposing is to create two different subclasses, one age
11 four and above and one under the age of four, and that
12 there would be, as I understood it -- maybe I missed it --
13 but as I understood it the sole notice -- the notice for
14 the class of age four and above would be consistent with
15 Your Honor's previous rulings, which would require mail of
16 the class notice essentially the conventional way with an
17 opt-out form that the -- that the class member could
18 return.

19 I wasn't as clear from what they filed on Friday as to
20 what exactly would be undertaken in order to provide the
21 class notice.

22 I know at one time the argument was made, well, we can
23 send it to the parents. Seems like they've abandoned that,
24 and rightly so, because I don't think third parties can opt
25 out for a class member.

1 It is certainly possible that a publication if done
2 correctly, at least based on my knowledge of Rule 23 and
3 class action law, if done appropriately may be able to
4 satisfy due process.

5 But one of the -- one of the tricky points for South
6 Carolina is what Your Honor just touched on. In a case
7 where you're seeking money damages it is -- due process
8 implications are particularly significant because the class
9 member has to have the opportunity to opt out.

10 And I didn't quite see that that was taken care of in
11 their memorandum. As I said, there was no proposed new
12 class notice and, obviously, that's something we can deal
13 with down the road. But I don't want to waive my rights to
14 be able to look at that class notice and see how they
15 proposed to effectuate the class.

16 I know during a -- I think one of our status
17 conferences, and I don't recall whether those are recorded
18 or not -- but there was a suggestion of filing, putting a
19 notice in a publication in every county of the state. If I
20 remember it correctly, Mr. Langley made that or at least
21 expressed that thought.

22 I didn't see anything definitively as to how this
23 would be carried out in what they submitted to the Court on
24 Friday. And I guess the main thing is -- I want to make
25 certain I'm not waiving anything. I'm reserving my rights

1 to see how they intend to satisfy due process, but, most
2 importantly, how they intend to carry out the very specific
3 requirement in South Carolina law that a class member had
4 the ability to opt out.

5 And of course that leaves totally the issue aside,
6 which would be down the road depending on how Your Honor
7 rules on the dispositive motions as to how class members
8 are to make claims or notify them of any claims process,
9 not just a notice of the class but notice of a claims
10 process should we get to that point. I don't want to --
11 anything I say here today to waive our position as far as
12 the claims process is concerned.

13 So, I can't really say anything definitively, Your
14 Honor, and, obviously, this is up to Your Honor, but I
15 think it would probably help to see how the subclasses are
16 laid out, what a class notice would say and how it's
17 intending to be published. And my understanding is what
18 they're asking the Court to do is allow that to be done by
19 publication.

20 Unless Your Honor has any questions, that's the extent
21 of the position I can state at this point.

22 THE COURT: The only other thing that I will add is
23 that the reason that we have explored -- we being this
24 Court -- has explored this is because -- and I'm not saying
25 unjustly raised, but because the department and the lawyers

1 have raised the issue of privacy under the constitution.

2 And so while -- so, in respecting the issue of privacy
3 that has been presented to this Court, I also wanted to be
4 aware that there -- wanted to explore this possibility,
5 because if there is liability, there are those people who
6 by the prior notice that was sent out we were excluding
7 without any concern or consideration.

8 And, so, it is -- and when it comes to the opt-out
9 provision, I think in the analysis that's done of the opt
10 out by anybody that takes a look at what we've done, they
11 have to -- those people have to factor in what we're trying
12 to accomplish is also to protect the privacy interest of
13 the individuals as articulated by the department
14 previously.

15 Okay. Anything else?

16 MR. LANGLEY: Yeah. I don't think there's any mystery
17 about the way we do it. It would be by publication in the
18 same process that's set out for service of a summons and
19 complaint, which is certainly consistent with the limits of
20 due process.

21 You can be bound to millions of dollars in a complaint
22 if you fail to answer through a publication process. That,
23 of course, requires some showing of attempts or some basis
24 to file by publication, which Your Honor's just addressed.
25 The privacy issues raised by D.S.S. are the sole reason for

1 this.

2 And I think given all of the -- the service by
3 publication rules that we have for a summons and complaint
4 would be easy for us to follow those same rules in serving
5 the notice in 46 counties.

6 It'd be easy but it will be time consuming, but the
7 plaintiff will, will do that, to make sure the class is
8 protected in the paper of most common circulation for each
9 county, which we can identify I think pretty easily based
10 on past history of what is a statutory rule for notice by
11 publication of a summons and complaint.

12 I think that's it. It may not be exact language, but
13 it's the paper of widest circulation or most likely to give
14 notice in the county. I think whatever the statute says on
15 service by publication is what we would propose to be the
16 process in this case.

17 THE COURT: All right. I'll take a look at it, and
18 then y'all can get back in touch with me. I want to close
19 with a couple of comments on this issue of damages. I am
20 just struck on the issue of damages, the way it has been
21 presented. I want to make this clear.

22 I will take and analyze the issues that have been
23 presented to me the way -- the best that I can do. But
24 there are some -- the way this case has been presented to
25 me there is just some, like, if you want to prove -- if

1 somebody walks in that door and is wet and they're wet and
2 it's raining outside, there is a very logical conclusion,
3 is that that person got rained on.

4 Okay. The facts that have been presented to me in
5 this matter has been dealing with this \$20 and has been
6 dealing with individuals who have made application for
7 these \$20, that whether they be economically challenged or
8 whether they be challenged due to the fact that these
9 families have stepped forward and want to adopt special
10 needs children, I believe that it is sufficient for me to
11 say that there is a good -- that there's a record that is
12 sufficient before this Court to support that these
13 individuals will be able to establish their damages as has
14 been offered by the plaintiffs throughout in today's
15 hearing.

16 If -- I'm just -- you know, \$20. I am just -- and the
17 department is more than happy at any subsequent motion to
18 try to file something with me to disprove the assumptions
19 I've made about the needs of these families and the needs
20 of these children, but I'm confident that my assumptions
21 are such that absent a better showing by the department I
22 would not grant the department's motion based on the
23 damages aspects.

24 Okay. So, with that being said, I'll take a look at
25 it and let y'all know. Okay.

1 MR. LANGLEY: Thank you, Your Honor.
2 MR. THOMPSON: Thank you, sir.
3 MR. LINDEMANN: Thank you, Your Honor.
4 END OF REQUESTED TRANSCRIPT OF RECORD
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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

BLH [REDACTED] by parents/general)
guardians Kenneth and Angela Hensley,)
and on behalf of all others)
similarly situated,)

Civil Action No. 2013-CP-42-1569

Plaintiff,)

v.)

RESPONSES TO PLAINTIFF'S THIRD
SET OF INTERROGATORIES

South Carolina Department)
of Social Services,)
)
Defendant.)

TO: CHARLES J. HODGE, T. RYAN LANGLEY, AND JAMES F. THOMPSON,
COUNSEL FOR PLAINTIFF

Pursuant to Rule 33, SCRCP, the Defendant South Carolina Department of Social Services responds to the Plaintiff's Third Set of Interrogatories as follows:

35. Please describe in detail all calculations performed by Defendant to get to the 1,686 names on the spreadsheet produced May 26, 2022.

RESPONSE #35:

There were no calculations per se that were performed. The spreadsheet is based on the criteria described in the class definition. By Order filed September 16, 2014, the class was certified as follows: "All children, age 19 or younger on the date the filing of the first state court Complaint (September 16, 2011), who are current and former beneficiaries of existing adoption assistance subsidy agreement between their adoptive parents and the South Carolina Department of Social Services, executed on or before June 20, 2002 and had at least five (5) months of lost benefits due to the cut in the assistance agreement beginning on the date of the foster care reinstatement in 2004." As the spreadsheet describes at the top of the first page, the list represents "Children Receiving an Adoption Subsidy on July 1, 2002 whose Adoption Subsidy was authorized on or before June 20, 2002 who were less than 20 years old on September 16, 2011 and continued to receive an adoption subsidy on November 30, 2004." Thus, the data reflected in the spreadsheet takes into account these limiting criteria. The list was created by creating a flag to specify if

children were receiving a subsidy on both July 1, 2002 and November 30, 2004 (all other children were filtered out), then the children whose adoption subsidy was authorized after June 20, 2002 were filtered out, and finally the age of the child as of September 16, 2011 was determined, and only those under 20 years of age as that date remained on the list.

36. Please describe in detail and provide all calculations showing how Defendant concluded that of the 4,148 adoption subsidy recipients at the end of fiscal year 2002-03, only 1,686 such recipients qualified as class members meeting the class definition in this case.

RESPONSE #36:

The spreadsheet is based on the criteria described in the class definition. By Order filed September 16, 2014, the class was certified as follows: “All children, age 19 or younger on the date the filing of the first state court Complaint (September 16, 2011), who are current and former beneficiaries of existing adoption assistance subsidy agreement between their adoptive parents and the South Carolina Department of Social Services, executed on or before June 20, 2002 and had at least five (5) months of lost benefits due to the cut in the assistance agreement beginning on the date of the foster care reinstatement in 2004.” As the spreadsheet describes at the top of the first page, the list represents “Children Receiving an Adoption Subsidy on July 1, 2002 whose Adoption Subsidy was authorized on or before June 20, 2002 who were less than 20 years old on September 16, 2011 and continued to receive an adoption subsidy on November 30, 2004.” Thus, the data reflected in the spreadsheet takes into account these limiting criteria. Those criteria are reflected in the spreadsheet. The list was created by creating a flag to specify if children were receiving a subsidy on both July 1, 2002 and November 30, 2004 (all other children were filtered out), then the children whose adoption subsidy was authorized after June 20, 2002 were filtered out, and finally the age of the child as of September 16, 2011 was determined, and only those under 20 years of age as that date remained on the list.

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August 22, 2022

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Jul 08 2025

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Record on Appeal contains all material proposed to be included by all parties and not any other material.

LINDEMANN LAW FIRM, P.A.

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*Counsel for Appellant South Carolina
Department of Social Services*

June 18, 2025

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SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant South Carolina Department of Social Services certifies that the Record on Appeal complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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June 18, 2025