

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**S.C. SUPREME COURT**

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In the Original Jurisdiction  
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Appellate Case No. 2025-000689  
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Calvin Henson, Daniel James Collins, Jason Robinson,  
Russell Taylor, and All Those Similarly Situated, ..... Respondents,

v.

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

\_\_\_\_\_  
**BRIEF OF PETITIONERS**  
\_\_\_\_\_

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## **QUESTIONS PRESENTED**

- I. Does South Carolina law allow for “fail-safe” class definitions that require the trial court to conduct mini-trials or evidentiary hearings just to determine class membership, and if so, are the mini-trials or evidentiary hearings conducted with a jury as the fact finder?
- II. Does South Carolina law recognize an “ascertainability requirement” under Rule 23, SCRCP?
- II. Are the class definitions as adopted by the trial court proper under South Carolina law and do they allow for the manageability and efficiencies required of a class action?

## STATEMENT OF THE CASE

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

On August 31, 2023, after the case had been pending for numerous years, the Respondents filed their Motion to Certify Class. (App. 128-129). That motion was heard by Judge Heath P. Taylor, who issued an Order Granting Plaintiffs’ Motion to Certify on May 22, 2024. (App. 76-91). The Petitioners SCDC and SCDJJ thereafter filed a Motion to Alter or Amend Order and/or Motion to Reconsider. (App. 92-110). As a result of that motion, Judge Taylor issued an Amended Order Granting Plaintiffs’ Motion to Certify filed September 13, 2024. (App. 60-75).

The Petitioners thereafter filed a timely appeal to the South Carolina Supreme Court. Specifically, the Petitioners filed a Notice of Appeal, or in the Alternative, Petition for Writ of Certiorari. (App. 7-20). By Order filed October 17, 2024, the Supreme Court transferred the

appeal to the South Carolina Court of Appeals. (App. 5-6).

In the Court of Appeals, the Respondents filed a Motion to Dismiss Appeal (App. 21-28), which the Petitioners opposed. (App. 29-42). On January 3, 2025, the Court of Appeals issued an Order dismissing this appeal as not being immediately appealable. (App. 1-2). The Petitioners filed a Petition for Rehearing (App. 49-59) which was summarily denied by the Court of Appeals by Order issued March 11, 2025. (App. 3-4).

The Petitioners filed a petition writ of certiorari both as to the direct appeal and in this Court's original jurisdiction. By Order filed August 13, 2025, this Court granted the writ of certiorari in its original jurisdiction.

## **STANDARD OF REVIEW**

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id.* Thus, the trial court's rulings as a matter of law are reviewed under a *de novo* standard.

## ARGUMENTS

- I. **South Carolina law does not allow for “fail-safe” class definitions that would otherwise require the trial court to conduct mini-trials or evidentiary hearings just to determine class membership, which must be done at the outset and before the class is even notified so as to protect mandatory opt-out rights.**

In its Amended Order Granting Plaintiffs’ Motion to Certify, the trial court adopted two class definitions, one for each Petitioner. For the Petitioner SCDC, the class definition is “[a]ll individuals that have been under the custody and care of the South Carolina Department of Corrections (“SCDC”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.” (App. 73). Similarly, for the Petitioner SCDJJ, the class definition is “[a]ll individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice (“SCDJJ”) in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.” (App. 73).

Notably, as to both classes, the trial court adopted class definitions that use the language “who were victims of a nonconsensual sexual battery,” which in turn incorporates the statutory definition of “sexual battery” from S.C. Code Ann. § 16-3-651(h). (App. 73). Critically, before being deemed a member of either class, each putative class member will need to prove both (1) that he/she was a victim of a “sexual battery” based on that statutory definition and (2) that the sexual battery was nonconsensual.

Although the trial court declined to address procedures for notification of the defined classes in its Amended Order Granting Plaintiffs’ Motion to Certify, it is well established in *Salmonsens* that South Carolina law recognizes only one type of class action in a monetary relief case – a class action with “opt-out” procedures. As this Court held in *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), “an ‘opt-out’ notification procedure is the proper method to

be offered to putative class members in the instant case and *future class action cases*.” 661 S.E.2d at 91. (Emphasis added). The Respondents do not deny that the classes, as certified by the trial court, are opt-out classes.

As the Petitioners have argued, it logically follows that in order to comply with “opt-out” procedures, the members of the class must be identified *before* notification of the class can be made. Hence, before class notices are prepared and mailed, the trial court will be required to determine which SCDC inmates and which SCDJJ juveniles meet the class definitions. Only once those class members are identified may notification of the classes even commence.

Importantly, both the Petitioners and the Respondents have demanded a jury trial in their operative pleadings. However, the mode of trial is significantly intertwined with and implicated by the class definitions adopted by the trial court. To reiterate, for both the SCDC and the SCDJJ classes, using the class definitions as adopted, the trial court will need to determine (1) whether each putative class member was a victim of a “sexual battery” using the statutory definition of “sexual battery” from S.C. Code Ann. § 16-3-651(h), and (2) whether any sexual battery as found was nonconsensual. The two-part findings that will need to be made by the factfinder to determine *each* class member are also a significant part of the merits of each putative class member’s cause of action, and those findings will need to be determined before class notification even occurs. As the Petitioners have explained, that is unprecedented. That determination will need to be made by the jury per the jury trial demand made by all parties. Moreover, before there can be a full hearing on liability – again by the jury – the qualifying class members would need to be notified and given the opportunity to “opt-out” per *Salmonsens*. Thus, in order to provide the jury trial requested by all parties, the jury trial would need to be

bifurcated, with the second phase of the trial on liability issues held months later after the “opt-out” period has expired.

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

Of further significance, as the foregoing discussion reflects, the class definitions adopted by the trial court create what are commonly referred to as “fail-safe” classes. A fail-safe class is one that “is defined so that whether a person qualifies as a member [of the class] depends on whether the person has a valid claim.” *EQT Production Co. v. Adair*, 764 F.3d 347, 360, n.9 (4th Cir. 2014), citing *Messner v. Northshore University Health Systems*, 669 F.3d 802, 825 (7th Cir. 2012). See also, *McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794, 799 (7th Cir. 2017) (“A case can't proceed as a class action if the plaintiff seeks to represent a so-called fail-safe class -- that is, a class that is defined so that whether a person qualifies as a member depends on whether

the person has a valid claim”). Fail-safe classes are considered improper for two principal reasons. First, in a fail-safe class, “a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.” *Messner*, 669 F.3d at 825; *McCaster*, 845 F.3d at 799. Second, as discussed below, fail-safe classes do not comply with the “ascertainability” requirement under Rule 23.

In *Melton ex rel. Dutton v. Carolina Power & Light Co.*, 283 F.R.D. 280 (D.S.C. 2012), the federal district court rejected a class definition premised on a finding of liability as impermissibly creating a fail-safe class. The court explained:

A fail safe class definition is one in which the putative class is defined by reference to the merits of the claim. It requires a court to rule on the merits of the claim at the class certification stage in order to tell who was included in the class. Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.

283 F.R.D. at 288. As the district court explained, “Plaintiff’s proposed class includes those who own property encumbered by Defendant’s transmission line easements, where Defendant has installed fiber optic cable which it has then used for general telecommunications purposes ‘without the right to do so.’” 283 F.R.D. at 288-89. The district court determined that the “proposed class definition depends upon the merits of the case as it seems no class members may be ascertained until after this Court makes a decision on the validity of Defendant’s easements.” 283 F.R.D. at 289.

The case of *Intratex Gas Co. v. Beeson*, 43 Tex. Sup. Ct. J. 489, 22 S.W.3d 398 (2000), is also instructive. In *Intratex*, the Texas Supreme Court rejected a fail-safe class definition. The court explained:

A proposed class definition that rests on the paramount liability question cannot be objective, nor can the class members be

presently ascertained; when the class definition is framed as a legal conclusion, the trial court has no way of ascertaining whether a given person is a member of the class until a determination of ultimate liability as to that person is made.

22 S.W.3d at 404. Accordingly, “[a] fail-safe class that is based on resolving the ultimate liability issue is bound only by a judgment favorable to plaintiffs but not by a judgment favorable to defendants.” 22 S.W.3d at 404-05. Finding that the trial court abused its discretion in certifying a fail-safe class, the Texas Supreme Court ruled as follows:

The trial court's class definition -- those producers “whose natural gas was taken by the defendant in quantities less than their ratable proportions” -- turns on the issue certified by the trial court -- whether Intratex took nonratably from the class members. Class membership is not presently ascertainable because the certified issue of whether Intratex took ratably has yet to be decided. Under the trial court's definition, the parties will have to await the outcome of the litigation to determine who, if anyone, is in the class because whether Intratex took nonratably is the central issue to be determined at trial. If judgment is rendered for Plaintiffs, the various producers' ability to exercise their right to opt out of the class action will have been compromised because the judgment will bind those producers who were taken from nonratably. But if Intratex wins at trial, there is no class because its existence is dependent on a finding that Plaintiffs were taken from nonratably. Plaintiffs cannot be bound by such a judgment because without a class, there is no way to ascertain class membership. Certification of the class under these circumstances is clearly impermissible.

22 S.W.3d at 405.

The same is true in the present case. The trial court has certified two fail-safe class definitions, and as the Texas Supreme Court aptly observed, the putative class members' right to opt-out of the class is “compromised” where the class membership cannot be determined without first determining the validity of each putative class member's claim.

Finally, it is also necessary for this Court to address whether South Carolina class action law includes an “ascertainability” requirement. Where there is an absence of governing law on a

rule of civil procedure, this Court directs that courts seek guidance from case law interpreting and applying the equivalent federal rule. In *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991), this Court stated: “Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.” 404 S.E.2d at 201. Under the Federal Rule 23, there is an “ascertainability” requirement whereby the members of a proposed class must be readily identifiable. See, *EQT*, 764 F.3d at 358 (“Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable”). In accordance with this “ascertainability” requirement, “[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria.” *Id.* Importantly, “if class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.” *Id.* As the federal district court has further explained, “[t]he proposed class definition must not depend on subjective criteria or the merits of the case or require an extensive factual inquiry to determine who is a class member.” *Cuming v. South Carolina Lottery Commission*, 2008 WL 906705, \*1 (D.S.C. 2008). “Where the practical issue of identifying class members is overly problematic, the court should consider that the administrative burdens of certification may outweigh the efficiencies expected in a class action.” *Id.*

The Petitioners submit that the SCRCF Rule 23 should also be interpreted as containing an implicit threshold requirement that the members of a proposed class be readily identifiable. This case demonstrates precisely why that is necessary. A class definition must be crafted in such a way that the putative class members are readily identifiable or ascertainable *by objective criteria*, such as the purchasers of a particular product (as in *Salmonsens*) or the customer of a

utility (as in the recently settled Town of Denmark water class action) or the adopted children whose parents received an adoption subsidy (as in *Hensley*). In sharp contrast, in the case at bar, each class member must show that he/she was the victim of a “sexual battery” to which he/she did not consent. Those class members are not readily identifiable or ascertainable *by objective criteria*, and they will only be identified after the court (and presumably the jury) engages in fact-finding in literally hundreds of mini-trials or evidentiary hearings just to determine if there was a “sexual battery” that was nonconsensual committed against each putative class member. This case thus clearly demonstrates that an “ascertainability” requirement is necessary for class actions to be manageable and efficient, which otherwise defeats the purpose of a class action process in the first place.

In sum, based on the impermissible “fail-safe” class definitions adopted by the trial court, the putative class members are not readily identifiable by objective criteria. Instead, their inclusion in the two classes will require significant fact-finding that must be done at the outset and before the class is even notified so as to protect mandatory opt-out rights. Because a fail-safe class requires a court to engage in individualized fact-finding or mini-trials just to identify the members of the class, fail-safe class definitions should not be permitted under South Carolina law. Accordingly, the Court is respectfully requested to rule that the trial court abused its discretion in certifying two fail-safe class definitions.

**II. The class definitions as adopted by the trial court are not only improper for the certification of a class action under South Carolina law, but they also do not allow for the manageability and efficiencies required of a class action.**

As discussed above, if the Court allows these fact-intensive and fail-safe class definitions to proceed on remand, the trial court will be required to engage in hundreds of mini-trials or

evidentiary hearings in order just to determine whether particular SCDC inmates and SCDJJ juveniles meet the class definitions. That will render the classes unmanageable for the trial court and, more importantly, defeat the efficiencies at the heart of the class action process.

In issuing its Amended Order Granting Plaintiffs' Motion to Certify, the trial court failed to consider such seminal Supreme Court cases as *Hensley v. South Carolina Department of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020), and *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), both of which contain useful analysis regarding the pitfalls of classes which require individualized inquiry and decision-making with respect to each putative class member.<sup>1</sup>

Of note, in *Hensley, supra*, this Court 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.” *Hensley*, 838 S.E.2d at 514. This Court further spoke 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.* This Court also cited a well-respected treatise on South Carolina civil procedure for the following:

The commonality requirement [of Rule 23(a), SCRCPP] is a condition of class action status, but the existence of common questions alone is not sufficient .... [T]he class action must be a better procedural mechanism for resolving the litigation than

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<sup>1</sup> The trial court also gave no consideration to the decision in *Robinson v. South Carolina Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024). *Robinson* is another example where class certification was found not to be appropriate due to the need to separately adjudicate the exhaustion of administrative remedies defense which required individualized inquiry and decision-making with respect to each putative class member. In *Robinson*, the Court of Appeals reversed all orders on appeal, including the Circuit Court's orders certifying a class action. The Court of Appeals specifically ruled that “the circuit court erred by finding Claimants were not required to exhaust their administrative remedies.” 902 S.E.2d at 50. This Court subsequently denied certiorari.

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

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

As indicated, the reason *Hensley* is so critical here is that, based on the class definitions adopted by the trial court, it will be required to conduct mini-trials or evidentiary hearings *just to determine who qualifies as a class member* and that must occur before the “opt-out” notification procedure can begin. That is not typical of proper class actions where the class membership may be determined by objective criteria which do not require individualized fact-finding. That further demonstrates why these cases are not appropriate for class certification.<sup>2</sup>

Similarly, the trial court gave no consideration to the importance and impact of *Gardner*, *supra*. While the trial court mentions *Gardner* in its Amended Order, it never distinguishes *Gardner* nor explains why it is not controlling. In *Gardner*, this 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.

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<sup>2</sup> Of note, one of the foremost experts on class actions, Professor Newberg cautions that “[i]n a money-damages class action, common issues must predominate over individual ones so as make a class trial ‘manageable,’ thereby rendering it a superior form of adjudication. If a case is likely to devolve into thousands of individual mini-trials concerning each class member’s damages, that process may threaten the efficiency gains of class treatment and render a class 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”).

(Emphasis added). Moreover, "[c]ommonality is met only where the class shares an issue." 577 S.E.2d at 200-201. Relying on federal jurisprudence, this Court in *Gardner* explained that "questions that are in no way dispositive and which simply propel the action into a posture where judicial scrutiny is necessary for just adjudication are insufficient to establish commonality." 577 S.E.2d at 201. Most importantly, this Court held that "a representative plaintiff cannot establish commonality if the court must investigate each plaintiff's individual claim." *Id.*

The *Gardner* case is instructive in addressing not only the commonality prong, but in the present case, it is instructive on the propriety and utility of the class definitions as well. In *Gardner*, a proposed plaintiff class of taxpayers sued the Department of Revenue and numerous governmental entities who attempted to use the Setoff Debt Collection Act to recover monies owed by taxpayers from their tax refunds. This Court reversed the certification of a plaintiff class for a lack of commonality. This 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. This 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.

In sum, *Hensley* and *Gardner* are slightly different from the case at bar in that the determination of class membership in those cases did not require individualized inquiry; only a determination of commonality required individualized inquiry. However, those cases explain that individualized inquiry and the need for mini-trials or evidentiary hearings negate the benefits of a class action. It certainly is much more problematic where, as here, the individualized

inquiry is needed on the front-end to determine whether each putative class member even meets the two-prong definition of the class itself.

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

In sum, there has not been a class certified – certainly not in South Carolina – that requires a jury trial to determine if a putative class member even qualifies as a class member so that notification procedures can take place and ultimately each class member can make an opt-out decision. Yet, that is the posture of this class action given the fact-intensive and fail-safe class definitions adopted by the trial court. Quite clearly, the class definitions as adopted by the trial court are not only improper for the certification of a class action under South Carolina law, but they also do they allow for the manageability and efficiencies required of a class action. For these reasons, the Court is respectfully asked to reverse the Amended Order Granting Plaintiffs’ Motion to Certify.

