

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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In the Original Jurisdiction

S.C. SUPREME COURT

Appellate Case No. 2025-000689

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.

REPLY BRIEF OF PETITIONERS

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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.

The Petitioners South Carolina Department of Corrections (“SCDC”) and South Carolina Department of Juvenile Justice (“SCDJJ”) contend that South Carolina law governing class actions 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 and which must be done at the outset and before the class is even notified so as to protect mandatory opt-out rights. To that end, Rule 23, SCRPC, should likewise be interpreted as containing an implicit threshold requirement that the members of a proposed class be readily identifiable or ascertainable by means of objective criteria.

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

Accordingly, in order to determine whether a particular SCDC inmate or SCDJJ juvenile meets the class definition, the trial court will be required to engage in hundreds of mini-trials or evidentiary hearings. That is highly unusual and unprecedented – certainly as far as South Carolina jurisprudence is concerned. The trial court has created “fail-safe” classes, which are classes “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). Clearly, the class definitions as adopted by the trial court are not crafted in such a way that the putative class members may be readily identifiable or ascertainable by objective criteria. Instead, the putative class member must show that he/she was the victim of a “sexual battery” to which he/she did not consent. The class member is not readily identifiable nor ascertainable *by objective criteria*, and he/she will only be identified by the court, or more likely the jury, by engaging in fact-finding in a mini-trial or evidentiary hearing to determine if he/she was the victim of a “sexual battery” that was nonconsensual.

A. The Petitioners’ issues raised on certiorari are properly preserved for appellate review.

As an initial point, the Respondents assert a preservation argument that has no merit. As our appellate courts have stated, issue preservation “is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants.” *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012). This Court has explained: “While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved.” *Id.* (Emphasis added). “[W]here the question of issue preservation is subject to

multiple interpretations, any doubt should be resolved in favor of preservation." 730 S.E.2d at 287. (Toal, C.J., concurring in result in part and dissenting in part).

In their response brief, the Respondents assert that "Petitioners did not raise the ascertainability requirement to the circuit court." *See*, Respondents' Brief, p. 4. That is clearly not the case. In their memoranda filed in opposition to the Motion to Certify Class, both Petitioners addressed the need for "individualized fact finding to determine the threshold issue of whether [putative class members] are part of the proposed ascertainable class." (Supp. App. 185, 201). Moreover, in their initial comments to the trial court regarding a proposed order submitted by the Respondents, the Petitioners wrote as follows:

As pointed out in Defendants' memos opposing class certification, even determining who is a class member will almost certainly require hundreds (if not thousands as Plaintiffs suggest) of individualized discovery investigations followed by an equal number of "mini-trials" to determine who is and who is not a member of the proposed class. As pointed out on Page 5 of the proposed Order, the statistical data relied upon by Plaintiffs to support their "numerosity" argument provides multiple categories of "sexual assault" for which they delineate between "reported" and "substantiated." In other words, is a current or former inmate to be a class member simply because he or she claimed they were the victim of a sexual assault? What about those who now claim they were assaulted, but did not report it at the time? As SCDC pointed out at the hearing on the class certification motion, at least half of the named Plaintiffs' (Robinson and Henson) claims of sexual assault were determined not to be credible ("unsubstantiated"). While this fact alone severely undermines Plaintiffs' argument that these individuals have claims "typical" of the proposed class, or that they "fairly and adequately protect the interests of the class," it most assuredly forecasts an inefficient process for determining who is and who is not a proper member of the class. *Each and every putative class member's case will require a judicial finding as to whether they meet the defined class membership requirement. In other words, the class definition will require an individualized trial to determine who even is a class member: who was a victim of rape and/or sexual assault versus those who claimed they were. The procedural hoops that come*

with certification of this just to be able to potentially identify class members defeats the efficiency of a typical Rule 23 class action.

(App. 104-105). (Emphasis added). Later, after the trial court issued its original Order Granting Plaintiffs' Motion to Certify, the Petitioners responded to the trial court's class definitions with the following concerns in a Rule 59(e) motion:

Therefore, whether a particular SCDC inmate or SCDJJ juvenile meets the class definition, the Court will be required to engage in hundreds of mini-trials or evidentiary hearings. Each potential class member will need to prove that he/she was a victim of a "sexual battery" and, moreover, that the sexual battery was nonconsensual before being deemed a member of the class. The Court has not identified any South Carolina case where the inclusion of a person in the class required individualized inquiry.

* * * * *

[T]his Court will be required to conduct individual 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 is certain and does not require individualized factfinding. That alone demonstrates why these cases are not appropriate for class certification.

(App. 95-96). (Emphasis in original).

This Court has repeatedly explained "[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593, 595-96 (2010). While the Petitioners may not have used the exact name of the legal principles, i.e., "ascertainability" requirement or "fail-safe" class, in the trial court, they have certainly raised those particular principles to the trial court. The fact that the class members are not ascertainable or identifiable by objective criteria but instead will require individualized fact-finding has been

the crux of the Petitioners' argument in the trial court and on certiorari to this Court. Thus, these issues asserted on certiorari are properly preserved for review and guidance by this Court.

B. The class definitions do not allow for class members to be readily identifiable or ascertainable by objective criteria but instead require individualized fact-finding and mini-trial or evidentiary hearings to determine class membership.

In many respects, the Respondents seem to largely ignore the core issues raised on certiorari. Of particular note, the Respondents do not address how the identification of the putative class members will be accomplished given that both sides have requested a jury trial. In fact, the Respondents seem to approach this case as if it will be adjudicated by a single jurist or possibly a special master and that there will not even need to be a determination of liability made for each of the putative class members. They make a reference to a use of a “damages matrix,” which is certainly incompatible with a jury determining damages. But most critically, the Respondents seem to merely gloss over the fact that the court (and presumably the jury) will first need to adjudicate specifically whether each putative class member was even a victim of a nonconsensual sexual battery as a threshold and class-determining issue.

To that point, the Respondents baldly declare that “the need for individualized fact-finding trials is unnecessary and unwarranted.” *See*, Respondent’s Brief, p. 8. In an attempt to support that assertion, the Respondents argue a “portion of the class” is identifiable from agency records alone. There is no logic to that argument. Importantly, based on the class definition, there will need to be *proof* – not just evidence but proof – that each putative class member was a victim of a sexual battery and that the sexual battery was nonconsensual. The Respondents seem to think that agency records of *reports* or *allegations* by an inmate or juvenile of a sexual battery is sufficient proof that it occurred. However, as was pointed out in the trial court, many of the

reports of alleged assaults were found by SCDC or SCDJJ upon investigation to be unfounded or unsubstantiated, including assaults alleged by the class representatives. Thus, regardless of the existence of agency records of *reports* or *allegations* of sexual misconduct, the putative class members will be required to prove in a jury trial that indeed they were the victim of a nonconsensual sexual battery. What makes this case unusual and ultimately inappropriate for adjudication as a class action is that each putative class member will be required to make that showing to a jury not just to prevail on their gross negligence claims but also just to meet the class definition.

Moreover, it is not enough for the Respondents to identify merely a “portion of the class” or the “bare minimum” as they explain. *See*, Respondent’s Brief, p. 8 (“At the bare minimum, the class consists of inmates or residents who reported sexual assaults and Petitioners created records of those incidents”). The class definitions are much broader than the “bare minimum.” Yet, the Respondents argue that the “other” putative class members can wait to be determined during “the claims process” after a determination of liability. Not surprisingly, they cite no South Carolina authority for this premise that the class membership can be determined post-trial and not before the class notification is accomplished.

The Respondents’ position, in effect, misses the entire point of an opt-out class. Everyone is in agreement that the opportunity to “opt-out” is mandated by South Carolina law per *Salmonsens* and that the classes in this litigation are intended to be “opt-out” classes. What the Respondents dispute, however, is whether the putative class members must be provided proper notice so that they even have the appropriate and meaningful opportunity to “opt-out.” The answer, however, is obvious. Notice needs to be given so that a putative class member can

exercise his/her right to “opt-out.” And logically, a court cannot give notice of the right to “opt-out” to a putative class member who has not been identified.

In other words, it is simply impossible for the court to give a putative class member notice of his/her right to opt-out if the court has not first identified the members of the class. The Respondents counter by pointing out that class notice may often be accomplished by publication or other forms of mass media. That is true, but such forms of notice satisfy due process for classes where the class definition is crafted in such a way to be 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 the case at bar, the putative class member must show that he/she was the victim of a “nonconsensual sexual battery.” Those class members are not readily identifiable or ascertainable *by objective criteria*, and they will only be identified by the court (or a jury) engaging in fact-finding in a mini-trial or evidentiary hearing to determine if there was a “sexual battery” that was nonconsensual.

As mentioned, one key question is whether that fact-finding will be done by the court or by a jury – and hence, the mode of trial is implicated. The parties have all requested a jury trial, and accordingly, this fact-finding for each putative class member would need to be performed by a jury. But, 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, there should be no doubt that such fact-finding is required before the putative class members are provided notice; otherwise, those putative class members will be denied notice of

their right to opt-out of the class action. In short, contrary to the Respondents' assertion, the need for individualized fact-finding trial is necessary and warranted.

The Respondents also try to negate the need for individualized fact-finding and mini-trials or evidentiary hearings by arguing that the trial court's requirement that each putative class member's sexual battery be nonconsensual is unnecessary. To that point, the Respondents cite to S.C. Code Ann. § 44-23-1150 to argue that inmates and juveniles lack the capacity to consent to sexual acts committed by SCDC and SCDJJ employees. The Petitioners agree with that. However, that argument is entirely immaterial to this case. Notably, there are no allegations in this litigation of employee-on-inmate or employee-on-juvenile sexual misconduct. Consistent with the allegations of the Amended Complaint, each SCDC class representative was allegedly assaulted by other inmates, and Russell Taylor, the sole SCDJJ class representative, was allegedly assaulted by other juveniles. (App. 113-120). Thus, the Respondents' argument is inconsequential to this litigation.

Nonetheless, the Respondents do go farther and claim that inmates and juveniles also cannot legally consent to having sexual contact with each other. That is incorrect. Simply because there may be agency policies forbidding such behavior does not render all sexual contact between inmates or juveniles to be nonconsensual. Otherwise, if the Respondents are correct, an inmate can engage in a voluntary and consensual sexual act with another inmate and then turn around and sue SCDC for his own voluntary and consensual behavior. That is obviously untenable and flies in the face of basic tort principles.

Nonetheless, even if the "nonconsensual" element is removed from the class definitions, as the Respondents seem to propose, that still does not make the putative class members readily identifiable to satisfy an "ascertainability" requirement nor does that prevent the class from being

deemed a “fail-safe” class. It will still take individualized fact-finding and mini-trials or evidentiary hearings to determine whether each putative class member is a “victim of a sexual battery.”

C. The class definitions as adopted by the trial court create impermissible “fail-safe” classes.

The Petitioners have also argued that the class definitions adopted by the trial court create what are commonly referred to as “fail-safe” classes, which are generally deemed impermissible for reasons that are particularly evident in this case. To recap, 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 v. Northshore University Health Systems*, 669 F.3d 802, 825 (7th Cir. 2012). Hence, a “fail-safe” class “fail[s] to provide the resolution of the claims of all class members that is envisioned in class action litigation.” *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012).

In the case at bar, to qualify as a class member, an inmate or juvenile would need to show that they were a victim of a nonconsensual sexual battery. Thus, the class definitions turn on whether the inmate or juvenile has a valid claim, and “[t]hat is a classic fail-safe class.” *McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794, 799 (7th Cir 2017). To illustrate, if the inmate or juvenile fails to prove a nonconsensual sexual battery, then SCDC or SCDJJ would be entitled to a judgment in its favor against that inmate or juvenile. However, the court could not enter a judgment against the inmate or juvenile because he/she would not fit the class definitions and would be excluded from the class for that reason. Hence, the claims against that putative class member would not be adjudicated with finality, thereby defeating the principal purpose of the class action mechanism.

In response, the Respondents argue that South Carolina law does not recognize a prohibition against “fail-safe” classes. While that may be true, there has been no South Carolina appellate decision that has addressed and approved a “fail-safe” class. Certainly, the Respondents have not identified such a decision. Instead, the Respondents focus on their contention that the various federal circuits appear not to be in complete agreement on the efficacy or permissibility of “fail-safe” classes. However, a review of the case law from the various federal circuits reflects some trends, primary of which is that a “fail-safe” class is, at the very least, problematic and should be avoided. Some circuits have an absolute prohibition on “fail-safe” classes, and some have not gone that far. Obviously, this Court is not bound by any particular federal circuit’s jurisprudence. Nonetheless, the case at bar provides a fitting test case for the principles of a “fail-safe” class under South Carolina law.

Notably, the Respondents have not shown that the class definitions in this case do not create a “fail-safe” class; they primarily argue that South Carolina law should not find a “fail-safe” class is impermissible. To be fair, they do state that the class definitions do not create a “fail-safe” class, but they then argue that “you can tell by objective criteria who is in the class.” *See*, Respondent’s Brief, p. 16. As discussed at length above, that is not the case – whether an inmate or juvenile is a victim of a nonconsensual sexual battery cannot be determined by objective criteria. They also resort back to their contention that all sexual conduct between inmates or juveniles is nonconsensual. That is not true for the reasons discussed. Then they conclude that “[t]he class definition cannot be a fail-safe class because every inmate who suffered sexual battery must be a member of the class.” *See*, Respondent’s Brief, p. 16. That is also not true because the determination as to whether an inmate or juvenile is a victim of a sexual battery is not made by objective criteria and must be determined only by anecdotal evidence

presented and/or refuted in a mini-trial or evidentiary hearing. For the reasons already explained, the class definitions adopted by the trial court make them classic “fail-safe” classes where an adjudication on the merits also determines class membership.

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.

