

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

NOV 13 2014

**SC Court of Appeals**

APPEAL FROM SPARTANBURG COUNTY  
Brian M. Gibbons, Circuit Court Judge

Case No. 2013-CP-42-1569

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

v.

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

**APPELLANTS' RETURN TO  
MOTION TO DISMISS APPEAL**

The Appellant South Carolina Department of Social Services ("DSS") has filed an appeal from the Amended Order on Plaintiff's Motion for Class Certification, which was issued by Circuit Judge Brian Gibbons and filed September 16, 2014. The Respondent has now filed a motion to dismiss that appeal arguing (1) that the appeal is from an order that is not immediately appealable, and (2) a Rule 59(e) motion is still pending in the Circuit Court. DSS opposes the motion.

By way of background, the Respondent BLH, a minor, brings this action by and through her adoptive parents, Kenneth and Angela Hensley, as a purported class action alleging a third-party beneficiary breach of contract cause of action against DSS. BLH contends that DSS

breached an Adoption Subsidy Agreement entered March 22, 1999, when DSS implemented an across the board decrease of \$20.00 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.

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 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. 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 former DSS Directors including Lillian Koller, Elizabeth Patterson, Kim Aydlette, and Kathleen Hayes (hereafter referred to as "DSS Directors").

After several pleading amendments, 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. 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 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 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, 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.

BLH later filed a motion for class certification, which consisted of two sentences, did not even describe the proposed class, and was not accompanied by any affidavits, deposition testimony or other evidence to make a showing of the five requirements on which a party moving for class certification has the burden of proof. In addition, DSS filed a motion for summary judgment. Those motions were heard by Circuit Judge Brian Gibbons on April 7, 2014.

In a Form 4 Order filed April 8, 2014, Judge Gibbons denied DSS's motion for summary judgment and granted BLH's motion for class certification. The Form 4 did not state that a formal order would follow, and included no analysis. The Form 4 did not even identify the purported class. Before ten days elapsed, DSS filed a Rule 59(e) motion asking that a formal order be issued. In response, Judge Gibbons issued a formal order, that being the Order on Plaintiff's Motion for Class Certification, filed May 29, 2014. DSS then filed a Rule 59(e) motion as to the formal order and requested oral argument, which was not allowed. Instead, Judge Gibbons asked for a response from BLH's counsel, who submitted a proposed Amended Order, together with affidavits. On September 9, 2014, the parties received an email from Judge Gibbons stating that he was denying DSS's Rule 59(e) motion and that he would be signing the Amended Order received from BLH's counsel. No form order or formal order, however, has been issued as to the Rule 59(e) motion – just the email. The parties have now received the Amended Order on Plaintiff's Motion for Class Certification, but that Amended Order does not mention the

Defendant's Rule 59(e) Motion to Reconsider or set forth the Court's rulings on that motion. The Court's September 9, 2014 email has not been filed nor is it a proper court order per the South Carolina Rules of Civil Procedure or the South Carolina Uniform Electronic Transactions Act, which governs the use of electronic documents. DSS therefore filed another Rule 59(e) motion to specifically request that a formal order adjudicating the prior Rule 59(e) motion be issued.

When no such order was received, and given the thirty day deadline for filing a Notice of Appeal from the Amended Order, DSS filed its Notice of Appeal on October 16, 2014. DSS did not want to take the chance that the Court would consider the filing of the final Rule 59(e) motion as a successive motion, thereby impacting on the timeliness of the appeal. The procedural irregularities that have plagued this case thus far have not been created or caused by DSS, and DSS's appeal should not be dismissed because of the lack of compliance with the Rules of Civil Procedure.

The Appellant DSS submits that the Amended Order on Plaintiff's Motion for Class Certification is properly appealable.<sup>1</sup> In that Amended Order, the lower court erred in its rulings regarding the notification procedures per Rule 23(d), SCRPC, in several particulars. First, the lower court has not given DSS an opportunity to be heard on this issue. BLH did not propose any notification procedures in her class certification motion – the motion consisted of two sentences -- or at the motion hearing. The issue was not raised or addressed. The issue was first mentioned in the DSS's initial Rule 59(e) motion that was directed at the Form 4 Order filed April 8, 2014. DSS requested oral argument in that motion to address class notification procedures, but the Court proceeded to issue rulings on the notification procedures without holding any hearing or giving DSS any opportunity to be heard.

---

<sup>1</sup> The Appellant DSS is not appealing the denial of its motion for summary judgment, as is claimed in BLH's motion. Until initial briefs are filed, neither the Court nor the parties are advised of the issues on appeal, and hence, any argument that an appeal is raising issues that are not immediately appealable is actually premature.

Moreover, as to the merits, the lower court has committed error in placing the duty to notify the purported class on DSS, the defendant in the class action. The lower court not only requires DSS to serve a "Notice of Class Action" on the purported class members but also requires DSS to prepare the Notice and to determine who the class members may be. These procedures which place the burden and expense associated with prosecuting the class action on DSS are unsupported by South Carolina case law and, in fact, are contrary to the very language of Rule 23(d)(2), SCRPC. Rule 23(d)(2) provides that a court "may order that notice be given in such a manner as it may direct of the action *by the party seeking to maintain the action on behalf of the class.*" Rule 23(d)(2), SCRPC. (Emphasis added). The lower court's Amended Order is also contrary to the Notes to Rule 23, which state that "[t]his Rule requires those seeking to maintain an action on behalf of a class to notify the members of the class of the pendency of the action." DSS contends that the "Notice of Class Action" shall be approved by the Court and the expense and resources of notifying the purported class members should fall on BLH, the class representative, as is required by Rule 23(d)(2), SCRPC. DSS cannot and should not be required to do the work required of the class representative.

As indicated, DSS submits that the Amended Order is immediately appealable. In *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), the Supreme Court allowed for an immediate appeal under Section 14-3-330(2) from an interlocutory order establishing the "opt-in" or "opt-out" process and notification procedures for a class action. In *Salmonsens*, the Supreme Court proceeded to address the merits of the issues on appeal pertaining to procedures under Rule 23(d)(2), SCRPC. DSS has filed this appeal raising issues related to the procedures under Rule 23(d)(2), as ordered by Judge Gibbons. In accordance with the decision in *Salmonsens*, DSS's current appeal is properly before this Court and should not be dismissed.

The Respondent BHL also argues that the appeal is premature because DSS still has a Rule 59(e) motion pending in the Circuit Court. DSS could not take the chance that the latest Rule 59(e) motion, which simply seeks to obtain a written order rather than an email denying a prior motion, would be deemed successive and not stay the time for appeal. That motion also raises an objection to BLH's submission of affidavits not previously in the record when it submitted its proposed Amended Order, which is the Amended Order that Judge Gibbons then signed which relies on and cites to those affidavits. DSS's appeal should not be dismissed given the myriad of procedural irregularities in the Circuit Court not of its own making.

Instead of dismissing the appeal, the Court is respectfully requested to stay the appeal and remand with direction for Judge Gibbons to issue a written order rather than an email and to hear DSS's objection to his consideration of affidavits that were never submitted with BLH's motion for class certification or at the hearing. Due process dictates that DSS should be able to object to and be heard regarding new evidence submitted without leave of court or proper procedures followed by BLH's counsel.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN  
JOEL S. HUGHES  
1611 Devonshire Drive  
Post Office Box 8568  
Columbia, South Carolina 29202  
(803) 806-8222

*Counsel for Appellant South Carolina  
Department of Social Services*

Columbia, South Carolina

November 10, 2014

---

**CERTIFICATE OF SERVICE**

---

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant South Carolina Department of Social Services, does hereby certify that service of the **Appellant's Return to Motion to Dismiss Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 10th day of November 2014:

T. Ryan Langley, Esquire  
Hodge & Langley Law Firm, P.C.  
Post Office Box 2765  
Spartanburg, South Carolina 29304-2765

James Fletcher Thompson, Esquire  
Law Offices of James Fletcher Thompson, LLC  
Post Office Box 1853  
Spartanburg, South Carolina 29304

**RECEIVED**

NOV 13 2014

**SC Court of Appeals**



---

# DAVIDSON & LINDEMANN, P.A.

---

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II  
Andrew F. Lindemann\*  
James M. Davis, Jr.†  
Robert D. Garfield  
Michael B. Wren

1611 Devonshire Drive, Second Floor  
Post Office Box 8568  
Columbia, South Carolina 29202-8568  
Telephone: (803) 806-8222  
Facsimile: (803) 806-8855  
www.dml-law.com

Daniel C. Plyler  
Joel S. Hughes  
Justin T. Bagwell  
David A. DeMasters  
Steven R. Spreeuwiers  
Todd R. Flippin

\*Also Admitted In North Carolina  
†Certified Mediator

November 10, 2014

---

Of Counsel  
Kenneth P. Woodington

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: BLH (dob 2/20/97) by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated v. South Carolina Department of Social Services  
Civil Action Number: 2013-CP-42-1569  
Our File Number: 103.8851

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Appellant's Return to Motion to Dismiss Appeal** with regard to the above referenced matter. Please file the original and return a clocked-in copy to me in the enclosed envelope.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL\  
Enclosures

**RECEIVED**

NOV 13 2014

**SC Court of Appeals**

The Honorable Jenny Abbott Kitchings  
November 10, 2014  
Page Two

---

cc: (w/Enclosure)

T. Ryan Langley, Esquire  
Hodge & Langley Law Firm, P.C.  
Post Office Box 2765  
Spartanburg, South Carolina 29304-2765

James Fletcher Thompson, Esquire  
Law Offices of James Fletcher Thompson, LLC  
Post Office Box 1853  
Spartanburg, South Carolina 29304

COLUMBIA SC 29211

THU 13 NOV 2014 AM

in, P.A.

lina 29202-8568

|||||

able Jenny Abbott Kitchings  
Clerk of Court  
Carolina Court of Appeals  
st Office Box 11629  
a, South Carolina 29211

**RECEIVED**

NOV 13 2014

**SC Court of Appeals**