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JUN 10 2015

**SC Court of Appeals
IN THE COURT OF COMMON PLEAS**

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

BLH (dob 2/20/97) by parents/general)
guardians Kenneth and Angela Hensley,)
and on behalf of all others)
similarly situated,)

Plaintiff,)

v.)

South Carolina Department)
of Social Services,)

Defendant.)
_____)


Civil Action No. 2013-CP-42-1569

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

CLERK OF COURT
2015 APR 30 PM 1:38
M. HUGHES

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



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.

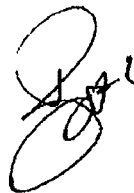
Adequacy and Class Definition

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.

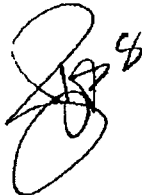
Defendant's argument against adequacy on the issue of Plaintiff's position as a Third-Party beneficiary is without merit because third party beneficiaries (BLH and the putative class members) have the right to enforce the terms of the contract under South Carolina law.

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 SCRCP 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



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

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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), SCRCP, 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

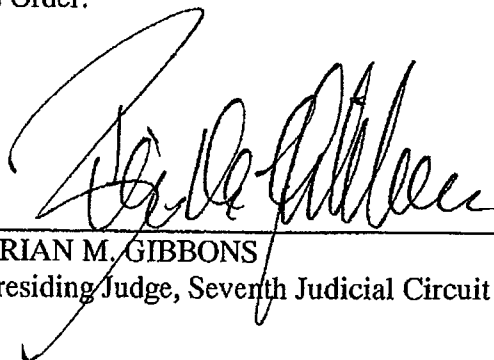
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within thirty (30) days if they choose not to participate in the class action. The Plaintiff class counsel shall submit the draft notice to the Court and opposing counsel for approval within thirty (30) days of receiving the class member contact information 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

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 APR 30 PM 1:23
M. HOPE BLAOKLEY