THE STATE OF SOUTH CAROLINA
In The 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.

INITIAL BRIEF OF APPELLANT

Andrew F. Lindemann
Joel S. Hughes
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant

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STATEMENT OF ISSUES ON APPEAL

I. Does the certification of the class and the notification process put into place by the Circuit Court violate the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents?

II. Did the Circuit Court err in certifying the class when the class representative failed to prove the necessary element of commonality?

STATEMENT OF THE CASE

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 the Appellant South Carolina Department of Social Services ("DSS"). The Respondent 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.

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 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 Respondent 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, 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 United States 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 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.

On October 4, 2013, BLH filed an unsupported motion for class certification. The motion itself consists of two sentences. It was not accompanied by any affidavits, deposition testimony or other evidence to make a showing of the five class certification requirements on which BLH had the burden of proof. BLH requested merely that "the class identified in the Complaint be certified by this Court." In her Complaint, BLH sought to certify the following class: "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."[1]

The motion for class certification was heard by Circuit Judge Brian Gibbons on April 7, 2014. In a Form 4 Order filed April 8, 2014, Judge Gibbons granted BLH's motion for class certification. The Form 4 Order did not state that a formal order would follow, and included no analysis. The Form 4 Order 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,

[1] Note that the date of the motion for class certification is incorrectly stated. The motion was filed on October 4, 2013.

which was not allowed. Instead, Judge Gibbons asked for a written 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, was issued as to the Rule 59(e) motion – just the email. Judge Gibbons did issue 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 nor set forth any rulings on that motion. Judge Gibbons' September 9, 2014 email was not 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 this Court would consider the filing of the final Rule 59(e) motion as a successive motion, thereby impacting on the timeliness of the appeal. On December 2, 2014, this Court issued an Order staying the appeal and remanding for consideration of the pending 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 particular, Judge Gibbons concluded that "good cause" existed under Section 63-9-780(C) for the disclosure of the names and addresses of the adopted children who comprise the class. (April 30, 2015 Order, p. 9). Further, he directed 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." (April 30, 2015 Order, p. 10).

The Appellant DSS then filed a timely Amended Notice of Appeal.

ARGUMENTS

I. The certification of the class and the notification process put into place by the Circuit Court violates the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents.

In certifying the class action, Circuit Judge Brian 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.

(April 30, 2015 Order, p. 7). Consequently, the class members consist of the adoptive children, many of whom (if not most of whom) have reached the age of majority by the present time.[2] Importantly, the class members are *not the adoptive parents*; they are the adoptive children themselves. This was the Respondent's requested class definition which represents an attempt to avoid the bar of the statute of limitations for the adoptive parents, i.e., the actual contracting parties, who made

[2] The class action applies only to adoptive children who had been adopted by June 20, 2002, which is more than thirteen years ago, meaning that only those children that were less than five years of age at that time could even still be minors.

no claim within three years of the decrease in the adoption subsidies in 2002 or the increase in the foster care board rate in 2004.

Because the class members are the adoptive children, Judge Gibbons ordered that they be given notice of the class action and of their rights to opt-out. He ordered "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." (April 30, 2015 Order, p. 10). The Notice of Class Action is required to include the "facts of this case." The facts of this case will require class counsel to advise the class members that they are adopted children. That is a fact that cannot possibly be excluded or hidden from them. The class members are adoptive children, and it is not possible to explain to the class members that they are a member of the class of adoptive children without also conveying to them that they were adopted. It is unknown how many of the class members will be learning that information for the first time from the Notice of Class Action, but it is reasonable to conclude that there are a fair number of class members who will not know of their adoptive status prior to being informed of that very personal and private information by receipt of the Notice of Class Action. The Appellant DSS, therefore, submits that the certification of this class and the notification process put into place by Judge Gibbons violate the statutory and constitutional rights not only of the adoptive children but also the adoptive parents and even possibly the biological parents for the reasons discussed in more detail below.

South Carolina has been at the forefront of protecting the privacy rights of adopted children, the adoptive parents, and the biological parents. As early as 1964, the South Carolina Supreme Court addressed these interests in the case of *McDonald v. Berry*, 243 S.C. 453, 134 S.E.2d 392 (1964), wherein biological parents filed suit to obtain the names and address of the adoptive parents of their biological child. In reversing the Circuit Court which had required disclosure of that information, the Supreme Court explained that "[t]he courts and public agencies of this state have customarily and diligently endeavored to protect not only the identity of an adopted child, but to protect both the child and the adoptive parents from any undue harassment by natural parents or other persons." 134 S.E.2d at 393. The Supreme Court recognized that the confidential information could be used "for the purpose of interfering with and harassing both the child and the adoptive parents." *Id.* The Supreme Court further recognized the significant harm that could result:

> The obvious problems, emotional and otherwise, which would likely result from such interference to the detriment of the child, and efforts of the adoptive parents to properly rear the same, are too basic and numerous to here require any elucidation or enumeration. Should the court, without any showing of good cause, order the invasion of the privacy of the adopted child and adoptive parents, such judicial conduct could well have a most damaging effect in making prospective adoptive parents reluctant to proceed with adoptions. Hundreds of married couples every year adopt unwarranted [sic] children and give them the finest homes, rearing and education, and these adoptive parents, as well as the adopted children, are entitled to the cooperation of the court in the fine work being accomplished, and they are

> certainly entitled to the protection of their privacy in the absence of good cause for invading the same being fully and clearly shown.

Id.

Later, in 1981, the Supreme Court decided the seminal case of *Bradley v. Children's Bureau of South Carolina*, 275 S.C. 622, 274 S.E.2d 418 (1981), wherein an adopted child commenced an action to compel the identification of his biological parents. In a thorough and well-reasoned opinion, the Supreme Court initially addressed the importance of the adoption process:

> Adoption is a creation of statutory law in this State. Recognizing that children are at times born into circumstances wherein their natural parents cannot or will not care for them, the State in its role as parens patriae developed the adoption process to assure stable homes for these children.

274 S.E.2d at 420. (Citation omitted). The Supreme Court then explained that the adoption statutes, including the confidentiality statute which is the predecessor to Section 63-9-780(C), "are designed to promote policies and procedures necessary for the protection of all parties involved in the adoption." *Id.*[3] More specifically, the Court cited the confidentiality statute as "serv[ing] all the parties in the adoption process: the adoptee, the adoptive parents, the natural parents and society

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[3] The current confidentiality statute as applied by Judge Gibbons is codified as Section 63-9-780(C) which provides as follows: "All files and records pertaining to the adoption proceedings in the State Department of Social Services, or in any authorized agency, or maintained by any person certified by the department under the provisions of Section 63-9-360, are confidential and must be withheld from inspection except upon court order for good cause shown." S.C. Code Ann. § 63-9-780(C).

at large." *Id.* Further, the Court stressed that, in contemplating any release of confidential information in the adoption process, "due consideration must be given to the impact that each case may have on the viability of the adoption process." 274 S.E.2d at 421. In addressing the "rationale for confidentiality in the adoption process," the Supreme explained that an "expectation of confidentiality arising from the statute is constitutionally protected as a right of privacy." *Id.*[4] The Supreme Court thus concluded that "the State's primary concern is in maintaining an effective adoption procedure which serves the best interests of adoptees generally" and that disclosure of confidential information should occur only "in extraordinary circumstances." 274 S.E.2d at 421-422.

In 1986, the Supreme Court decided the case of *Gardner v. Baby Edward*, 288 S.C. 332, 342 S.E.2d 601 (1986), where the Court explained that it "has jealously guarded the sanctity of the adoption process." 342 S.E.2d at 603. More specifically, the Supreme Court described confidentiality as "imperative to the adoption process." *Id.*

Then, in 2000, this Court addressed these issues of confidentiality in the adoption process in the case of *South Carolina Department of Social Services v.*

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[4] The United States Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment provides substantive protections in "matters relating to marriage, procreation, contraception, family relationships and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713 (1976). The Supreme Court has also recognized that persons enjoy a constitutionally protected privacy right in "avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

Doe, 338 S.C. 618, 527 S.E.2d 771 (Ct. App. 2000). This Court reaffirmed that "a party must demonstrate a compelling need for the identifying information which outweighs the need for confidentiality" and "[d]isclosure follows in extraordinary cases." 527 S.E.2d at 773. This Court recognized "the expectation that confidentiality will be maintained in adoption proceedings except under the most extraordinary circumstances." *Id.* Consistent with earlier authority, this Court also stressed the requirement that courts "weigh[] the respective interests of the parties to the adoption action, including those of the adoptee, the adoptive parents, and the biological parents." *Id.* Citing *Bradley*, this Court also explained that "the court must give due consideration to the impact that each case may have on the viability of the adoption process." *Id. See also, Jones v. South Carolina Department of Social Services*, 341 S.C. 550, 534 S.E.2d 713 (Ct. App. 2000).

Finally, in 2003, the Supreme Court decided the case of *Doe v. Ward Law Firm*, 353 S.C. 509, 579 S.E.2d 303 (2003), wherein the Court addressed whether the adoptive parents should be able to access the adoption records to learn the biological parents' medical history to assist with the provision of medical and psychiatric care to the adoptive child. The Supreme Court noted that the adoption law had changed but the rationale supporting confidentiality, as discussed in *Bradley*, remained good law and that "confidentiality should be maintained absent an extraordinary, compelling need." 579 S.E.2d at 305. However, based upon statutory changes, the Supreme Court explained that "when balancing the privacy

rights of each party with the interests of the child ... the Legislature has determined the best interests of the child should prevail." *Id.* The Supreme Court did conclude in the *Ward Law Firm* case that the adoptive parents were entitled to obtain the confidential records because they "demonstrated the need to obtain the information for Child's mental health." 579 S.E.2d at 306. The *Ward Law Firm* case provides a standard of what is required to overcome the strict confidentiality that has been the hallmark of South Carolina jurisprudence on this issue since 1964.

That standard has not been met in the present case. Admittedly, this case presents a unique circumstance. The person who seeks the confidential information -- consisting of the identities of all adopted children who meet the class definition – is not the adoptive child, the adoptive parents or the biological parents. It is a purported class representative seeking to bring the claims for all other similarly situated adoptive children. The concern, however, for the Appellant DSS and one that was not adequately considered by Judge Gibbons is the likely breach of confidentiality and privacy rights for the adoptive children, the adoptive parents and even perhaps the biological parents.

As discussed above, many of the adoptive children who qualify as class members are likely not aware that they were adopted. The children could have been adopted as infants or very young children and have no memory of being part of prior families or being in foster care. Their adoptive parents may have made a conscious, family-based and constitutionally-protected child-rearing decision not

to advise the child that he/she was adopted. The disclosure of their status as adopted children could result in the types of problems, emotional and otherwise, that the Supreme Court recognized in *McDonald*. That disclosure could result in the adoptive children questioning their identities or even perhaps learning of pre-adoption instances of abuse which the adoptive parents had chosen to shield from them. Similarly, the disclosure could cause the adoptive children to question their rejection by their biological parents, thereby causing or exacerbating emotional issues. Most certainly, the disclosure could impair the relationships between the children and their adoptive parents in a myriad of ways. For instance, the children may question and even resent that their adoptive parents kept such information from them, thereby causing irreparable harm to those relationships which could be impactful for years or more. The children may also attempt to seek out the biological parents, thereby infringing on the biological parents' expectations of confidentiality, which should only be breached in the most compelling and extraordinary circumstances such as what was described in the *Ward Law Firm* case.

Importantly, what makes this case so different and so troublesome is that *none of the participants in the adoption process are seeking this confidential information.* It is a single class representative – BLH – who presumably is aware of her adopted status and the Plaintiff class counsel who seek this information. It is also critical that this Court consider what is truly at stake for the class members

in this class action litigation. The confidential information is not sought because of any extraordinary or compelling need as was the case in the *Ward Law Firm* case. There is no need for confidential information to address any significant medical or emotional issue. Indeed, this litigation is purely economic in nature, and the damages at issue for each class member are minimal.[5] Based upon BLH's theory, the maximum that any class member may recover is $240 per year for the number of years since 2004 that the adoptive parents were receiving an adoption assistance subsidy from DSS. So, at this point, the maximum recovery for any one class member is less than $3,000. Significantly, the adoptive parents have had the ability to pursue a claim since 2004; yet, no one other than the adoptive parents of BLH have. Nonetheless, BLH has asked the courts to find that "good cause" exists for the discovery of this confidential information so that class action litigation could be pursued for adoptive children who have never sought to make the claim themselves and whose parents never sought to make the claim themselves. DSS submits that the risk is too great that the revelation by the courts and class counsel will breach the statutory and constitutional rights of confidentiality, privacy, and due process of adoptive children who have no knowledge that they were adopted. Such a revelation to persons who are entirely disassociated with this litigation – other than the fact that they meet the class definition – has the likelihood of

[5] While the potential recovery for each class member is minimal, given the number of class members, the potential liability for DSS is significant.

creating great harm. It is that likelihood of harm – particularly when weighed against the minimal economic gain at issue for each class member – that should convince this Court that "good cause" does not exist for the disclosure of the adoptive children's identities and for this case to proceed as a class action.

In sum, the Appellant DSS has grave concerns that the class action process is being applied in this case to violate the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents. It is not those participants in the adoption process that are seeking confidential information for their own purposes or to disclose that information to adopted children who may currently be unaware of their status as such. It is the class representative and class counsel that seek that information, and for reasons that are not compelling nor extraordinary under current precedent in South Carolina. The Circuit Court's class certification order and its notification process should be reversed.[6]

[6] The Appellant DSS has filed this interlocutory appeal because the disclosure of the adoptive status of many of the class members will violate their statutory and constitutional rights of confidentiality, privacy and due process and may cause real harm. DSS is cognizant that, once such disclosures are made, that cannot be undone. Thus, at a minimum, DSS wishes to demonstrate that it took all available steps to try to prevent any breach of those rights so that -- if DSS's efforts are unsuccessful -- any liability for the resulting harm will ultimately rest on BLH's parents and the Plaintiff class counsel, and not on DSS.

II. The critical issues of confidentiality, privacy and due process as discussed herein are immediately appealable under existing precedent.

To the extent the Court questions whether the foregoing issue is proper for an interlocutory appeal, the Appellant DSS relies specifically on the cases of *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (2004), and *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006).

In *Howe*, the South Carolina Supreme Court allowed for an interlocutory appeal to be pursued by a sexual abuse victim whose motion to proceed anonymously had been denied by the Circuit Court. The Supreme Court applied a three-factor test adopted from the federal courts that required a showing that the order on appeal "(1) conclusively determines the question, (2) resolves an important question independent of the merits, and (3) is effectively unreviewable on appeal from a final judgment." *Howe*, 362 S.E.2d at 216. The Supreme Court determined that "the denial of Doe's motion to proceed anonymously meets the criteria for appellate review [because] [t]he decision conclusively determines the question, is a question independent of the merits of the litigation and would be effectively unreviewable on final appeal once Doe's true identity was revealed." 362 S.E.2d at 217. In ruling that the order was immediately appealable, the Supreme Court further recognized that "[t]he order denying Doe's motion to proceed anonymously prior to trial has the effect of revealing his identity, the very thing he was seeking to keep confidential." *Id.*

Similarly, in *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), the Supreme Court addressed whether an order unsealing court records in a divorce proceeding was immediately appealable. In allowing that interlocutory appeal to proceed, the Supreme Court noted its agreement "with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure." 630 S.E.2d at 468. As the Supreme Court further recognized, "[c]ompelling a party that disputes an unsealing order to forgo an appeal until the conclusion of the underlying litigation would let the cat out of the bag, without any effective way of recapturing it if the district court's directive was ultimately found to be erroneous." *Id.*

The same is true in the present case where the proverbial "cat will be out of bag" if class counsel does as directed by the Circuit Court and informs the class of adoptive children that they were indeed adopted. The resulting harm and violation of privacy rights cannot be corrected or undone after final judgment. That ruling would become essentially unreviewable after final judgment consistent with the decisions in *Howe* and *Ex Parte Capital U-Drive-It.*

On the issue of appealability, the Appellant DSS also relies on the case of *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008). Admittedly, in *Salmonsen*, the Supreme Court reiterated the general rule that class certification orders are typically not immediately appealable. However, the Supreme Court also

cited to the case of *Eldridge v. City of Greenwood*, 308 S.C. 125, 417 S.E.2d 532 (1992), where the Court explained that "[o]rders under Rule 23, SCRCP are interlocutory and thus, immediately appealable *only in certain circumstances*." 417 S.E.2d at 534. (Emphasis added). Likewise, the Supreme Court cited to the case of *Knowles v. Standard Savings & Loan Association*, 274 S.C. 58, 261 S.E.2d 49 (1979), where a class certification order was dismissed as interlocutory on the grounds that "[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment." 261 S.E.2d at 49. Yet, where there are "substantial or essential legal rights" at issue, an immediate appeal is authorized. In the case at bar, the class certification order on appeal, for the reasons discussed above, involves substantial and essential legal rights, namely the rights to confidentiality, privacy and due process enjoyed by all of the participants in the adoption process. Moreover, in *Salmonsen*, the Supreme Court agreed to review the aspect of the class certification order which established the "opt-in" notification procedure. Here, DSS is also appealing an aspect of the notification process as ordered by the Circuit Court.

Based on the foregoing authorities, the Court is respectfully requested to determine that this important issue is immediately reviewable by interlocutory appeal.[7]

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[7] In footnote five of the *Salmonsen* opinion, the Supreme Court noted that it remains possible to challenge class certification issues by means of a discretionary writ of

III. The Circuit Court erred in certifying the class when the class representative failed to prove the necessary element of commonality.

As discussed above, the Supreme Court explained in *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), that the Court "has reviewed interlocutory orders involving class certification when they contain other appealable issues." 661 S.E.2d at 85. That rule is not unique to class certification orders. For instance, this Court has recognized that it "may review an interlocutory order when the order is coupled with an appealable issue." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 670 S.E.2d 680, 688, n.14 (Ct. App. 2008). The Supreme Court has likewise agreed in other contexts. In *Edge v. State Farm Mut. Automobile Ins. Co.*, 366 S.C. 511, 623 S.E.2d 387 (2005), the trial court granted in part and denied in part Rule 12(b) motions to dismiss. The plaintiff appealed the partial grant of those motions, and the defendant then cross-appealed seeking review of the portions of the order denying its motion to dismiss. The Supreme Court unanimously allowed the defendant's appeal of the denial of its motion to dismiss to proceed "because of judicial economy." 623 S.E.2d at 390. The Supreme Court acknowledged that "[a]n order that is not directly appealable may be considered if

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certiorari where a direct appeal is not available. Because DSS believes that a direct appeal is available for the reasons already discussed, it has not petitioned for a writ of certiorari. However, in the event this Court were to conclude that an interlocutory appeal is unavailable, DSS reserves its right to pursue these critical issues of confidentiality, privacy and due process by means of a petition for writ of certiorari filed in the Supreme Court's original jurisdiction.

there is an appealable issue before the court." *Id.*, *citing Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979); *Cox v. Woodmen of Word Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001). The Supreme Court explained:

> Here, an order in this case which is appealable is before the Court and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), we will consider State Farm's cross-appeal.

Id. Thus, the Supreme Court in *Salmonsen* and *Edge* and this Court in *Southeastern Housing Foundation* (in addition to other cases) recognize that where judicial economy is best served the Court may exercise appellate jurisdiction over an interlocutory order that would not otherwise be immediately appealable.

In the preceding section, DSS has demonstrated that the issues of confidentiality, privacy and due process raised by the notification process ordered by Judge Gibbons are immediately appealable. Thus, there is an appealable issue before the Court. Accordingly, the Appellant DSS also requests that this Court review the class certification order on one limited and distinct issue of law, that is, whether the Respondent BLH has satisfied the element of commonality. Judge Gibbons erred in his analysis of the commonality element and specifically disregarded the binding precedent established by the Supreme Court's decision in *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003).

By way of background, Rule 23, SCRCP, is modeled on but is slightly different from Rule 23 of the Federal Rules of Civil Procedure. As under the

Federal Rule, class certification under South Carolina law requires a showing of numerosity, commonality, typicality, and adequacy of representation. Rule 23(a), SCRCP. In addition, South Carolina has the unique requirement that for a class to be certified, the amount in controversy must exceed $100.00 for each member of the class. Rule 23(a)(5), SCRCP.

The plaintiff bears the burden of establishing that each of the elements of Rule 23(a) has been met in this case. *Waller v. Seabrook Island Property Owners Assoc.*, 300 S.C. 465, 388 S.E.2d 799 (1990). In assessing whether the plaintiff has met its burden, a court is required to apply a rigorous analysis to assure that the prerequisites of Rule 23(a) have been satisfied. *Waller*, 388 S.E.2d at 801, *citing General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).

The Appellant DSS submits that the Respondent cannot and has not satisfied the requirement of commonality. The South Carolina Supreme Court has 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." *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190, 200 (2003). (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.*

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.

The same individualized inquiry is necessary in the present case. Admittedly, there are common factual questions including the decision in June 2002 by then DSS Director Elizabeth Patterson to reduce by $20.00 monthly foster care maintenance payments and adoption assistance subsidies because of the

significant budgetary cuts faced by DSS at the time. However, there is not a common legal question as to whether the $20.00 reduction constitutes a breach of contract. Likewise, there is not a common factual or legal question as to the calculation of damages because of varying factual circumstances.[8]

Whether the $20.00 reduction constitutes an actionable breach of the Adoption Subsidy Agreements entered by DSS with adoptive parents other than the Hensleys will require an individualized factual inquiry in several particulars, all of which were argued to Judge Gibbons but he failed to consider them despite several attempts at reconsideration.

First, South Carolina law will require an individualized determination as to whether the adoptive parents accepted or acquiesced and impliedly consented to the $20.00 reduction in subsidy payments. *See, Facelli v. Southeast Marketing Co.*, 284 S.C. 449, 327 S.E.2d 338 (1985) (plaintiff estopped to seek damages for change in commission rate for which plaintiff was given notice and impliedly

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[8] In his latest Order, Judge Gibbons writes as follows: "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." (April 30, 2015 Order, p. 6). Those are statements made by DSS's counsel at the February 27, 2015 hearing. (Tr. 23). However, contrary to Judge Gibbons' understanding, DSS was pointing out that while there are common issues of fact, none of those issue are "determinative" as required under *Gardner* because quite frankly they are not disputed facts. That was the very point made by DSS's counsel when he stated: "What's interesting in this case, that's why class certification in my opinion is totally inappropriate, the only common issues in this case are issues that are agreed upon." (Tr. 23). In essence, insignificant factual issues that are not in dispute are hardly the type of "determinative" or "dispositive" issue that is required to meet the commonality element. Judge Gibbons erred as a matter of law in ruling otherwise.

consented to); *Cooksey v. Beaumont Mfg. Co.*, 194 S.C. 395, 9 S.E.2d 790 (1940) (reduction in wages from 34¢ to 32¢ per hour was change in contract of employment that was impliedly consented to). This will require an individualized inquiry of each potential class member's claim.

Second, the Adoption Subsidy Agreement may have been the subject of a novation which requires a showing that the parties intended a new obligation to replace the existing one. *See*, *Wellman, Inc. v. Square D. Company*, 366 S.C. 61, 620 S.E.2d 86 (Ct. App. 2005). Thus, an individualized inquiry must be made regarding each class member's adoptive parents' intentions in continuing to accept the adoption subsidy amount after the $20.00 reduction and whether that was done under objection or with the intent to create a novation.

Third, the Adoption Subsidy Agreement provides a process for the entry of renewal agreements. Thus, an individualized inquiry must be made regarding whether each class member's adoptive parents entered into a renewal agreement since 2004 containing an agreed upon monthly subsidy amount or other new or different terms or benefits.

Fourth, the Adoption Subsidy Agreement provides that "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." (R. ___). Thus, an individualized inquiry must be made whether each class member's adoptive parents appealed the $20.00 reduction at any point from

2002 to present and, if so, what was the result of that appeal, whether the decision was appealed, and whether the administrative process is dispositive of any breach of contract claim.

Fifth, the Adoption Subsidy Agreement provides that "adjustments in monthly cash payments may be made ... based upon changes in the needs of [the child] [or] changes in circumstances of the adoptive family." (R. ___). Thus, an individualized inquiry must be made whether each class member's adoptive parents received any adjustment, upward or downward, from 2004 to present because of changed circumstances in the child's needs or in the family's ability to provide that would affect or even moot any claim for $20.00 reduction since 2004.

Sixth, 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. BLH 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.

Seventh, and finally, the named Plaintiff and proposed class representative is BLH, who is the adoptive child and a minor. 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 but 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 action. DSS disputes that the minor adoptive child may sue under a third-party beneficiary theory. Nonetheless, a breach of contract claim by the adoptive child raises significant damages issues which will need to be addressed and resolved by the trial court on an individualized basis. 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." (R. ___). The proper measure of damages for BLH and the proposed class members consisting of other adoptive children is not the reduction of $20.00 per month but 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 subsidy – presumably the change in his/her care or support – rather than the monetary figure due to his/her parents. A third-party beneficiary is not an assignee and may claim his/her damages proximately caused by the breach, but a third-party beneficiary cannot claim the damages sustained by the contracting party. The adoptive parents lost

the $20.00 per month, 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 parents. Thus, the damages sustained by the adoptive children, who are the proposed class members, will differ from person to person and will require an individualized inquiry. *See, Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) ("[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury").

As in *Gardner*, the trial court will be required to make individualized inquiries into each potential class member's particular claim before being able to rule that DSS breached an Adoption Subsidy Agreement with that child's adoptive parents and before any award of damages may be made. While there may be common issues of fact, particularly given the across-the-board cut in benefits in 2002, there are numerous *determinative* facts and issues that are not common to all proposed class members. The breach of the Adoption Subsidy Agreement is contingent on numerous factual inquiries as noted above, and those factual inquiries must be examined on an individualized basis. Likewise, an award of damages to the proposed class members will need to be determined on a class-by-class basis. Thus, as was the case in *Gardner*, BLH has not demonstrated the requirement of commonality because, quite simply, BLH has not shown that there is a "determinative issue" common to all proposed class members. As the Supreme

Court recognized in *Gardner*, the necessity of individualized examination "negates the benefits of a class action suit." *Gardner*, 577 S.E.2d at 201.

On this additional basis, the Appellant DSS contends that the class certification order was issued in error and should be reversed.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Social Services respectfully requests that this Court reverse the class certification orders issued by Judge Brian Gibbons, including the notification process which will necessarily inform class members that they are adopted children and which is in violation of the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and even the biological parents.

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

December 17, 2015

THE STATE OF SOUTH CAROLINA
In The 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.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant, does hereby certify that service of the **Motion to File Out of Time, Initial Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on 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 17th day of December 2015:

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

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