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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brian M. Gibbons, Judge

Appellate Case No. 2014-002254

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This class action case involves Appellant's across-the-board, $20-per month cut of Adoption Assistance Subsidies (hereinafter referred to as "AAS") to approximately sixteen hundred (1,600) South Carolina families and the adopted children beneficiaries. This cut was implemented in 2002 to both the AAS and to Foster Care Board Maintenance Payments (hereinafter "Foster Payments"). In 2004, the Foster Payment was reinstated by that $20. The Adoption Assistance payment has proceeded after that cut untouched through the present time. The stated purpose of the contractual AAS agreements is to benefit the adopted children of South Carolina, such as Respondent BLH. Respondent and the members of the certified class allege Appellant's action constitutes a breach of contract for which there is no defense and accordingly the adopted children are entitled to recovery.

Initially brought in state court and removed by DSS to federal court, this case was brought in 2011 as a 42 U.S.C. Section 1983 action against the SCDSS Directors: Elizabeth Patterson, Kim Aydlette, Kathleen Hayes, and Lillian Koller. The Plaintiffs were initially listed as "Kenneth and Angela Hensley, as adoptive parents of BLH (dob 02-20-97)." (Case No. 2011-CP-42-3992) (Federal Case No. after removal - 7:11-cv-02827-GRA). The Defendants at the time moved to dismiss on the basis of the statute of limitations and Plaintiffs corrected the caption and amended the complaint to clarify that the intended true party in interest was the child BLH. Once the class certification was sought, again the caption was modified to reflect the class nature of the suit. At that time it was changed to "BLH (dob 2/20/97) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated."

Defendants filed a motion for summary judgment based on qualified immunity,

including various exhibits. Plaintiffs filed a cross motion for summary judgment and included exhibits. Included in the exhibits were documents reflecting the cut of benefits and affidavits from both sides. After a hearing on August 9, 2012, United States Federal District Court Judge G. Ross Anderson certified the class under FRCP 23 and denied Defendant's motion for summary judgment by order dated August 17, 2012. Defendants filed an appeal to 4th Circuit Court of Appeals.

On April 1, 2013, Plaintiff filed a breach of contract claim against the South Carolina Department of Social Services, which was not a defendant in the federal case. (R. pp. 46-53). The claims were based on state law only and were filed prior to any adjudication on the federal claims. On April 2, Plaintiffs withdrew the federal contracts clause cause of action in the federal case.

The remaining issue before the 4th Circuit was therefore only the claim under Section 673 (a)(3) of the Federal Adoption Assistance and Child Welfare Act ("AACWA"). On July 3, 2013, the Court issued an Order holding as a matter of law that Section 673 (a)(3) of the AACWA did give rise to a privately enforceable federal right. However, the Court granted Defendants qualified immunity on the basis of a limited federal exception in 673(a)(3), requiring adoption assistance subsidies to be less than foster care maintenance rates. As noted above, this limited exception was eliminated in 2004 when the foster care maintenance rate was reinstated.[1] The Fourth Circuit did not address any of the class certification issues as those were not part of Defendant's appeal.

Respondent served discovery requests on Appellant in the state court case (Case No.

[1] The Fourth Circuit held that the reinstatement of the foster care rate did not constitute a "readjustment" of the adoption rate under federal law but did not address any element of the state law claim for breach of contract that was pending in state court at the time.

2013-CP-42-1569) on July 26, 2013. (R. pp. 240-248). Respondent sent multiple emails and other correspondence but still no discovery responses were provided. (R. pp. 248-250). Respondent filed a motion to compel in October of 2013. (R. pp. 60-69). At the same time, Respondent filed its motion for class certification. (R. p. 70). Still DSS provided no responses. On March 10, 2014 Appellant filed its motion for summary judgment. (R. pp. 126-149). Still no discovery responses were provided. Near the end of March, a hearing on the motion for summary judgment was set for April 8th. Finally, late in the afternoon on April 3, 2014, just days before the hearing on April 7, 2014, DSS emailed its discovery responses to Respondent. No depositions had been taken due to the delay in Defendant's discovery responses.

On April 7, 2014 Respondent submitted its memorandum in support of the motion for class certification with exhibits. (R. pp. 71-84). Appellant submitted its memorandum in opposition to motion for class certification and a memorandum in support of summary judgment. (R. pp. 85-97). On April 8, 2014 Judge Gibbons issued a Form 4 Order granting the motion for class certification and denying the motion for summary judgment. (R. pp. 1-2).

On April 28, 2014 Appellant filed a 59(e) Motion requesting a formal order. (R. pp. 98-100). On April 29, 2014 Judge Gibbons requested that Respondent submit a proposed order. Respondent submitted the order on May 10, 2014. On May 12, 2014, counsel for Appellant requested "a few days to review it more thoroughly and get you my comments." The Court indicated this would be no problem. After more than two weeks without any correspondence from Appellant, the Court issued a formal order on May 29, 2014. (R. pp. 3-18). Plaintiff's counsel received written notice of the Order on or about June 7, 2014. On

July 31, 2014, over sixty (60) days after the entry of the Order, Defendant filed a Rule 59(e) Motion for Reconsideration. (R. pp. 101-120). In response to the 59(e) Motion, the lower court accepted Respondent's suggestion of amendments to the Order. The revised Order was filed September 16, 2014. (R. pp. 19-34).

On September 26, 2014, DSS again filed a Rule 59(e) motion. (R. pp. 121-125). On October 16, 2014, DSS filed a Notice of Appeal. On November 4, 2014, Respondent moved to dismiss the appeal on two grounds: 1) orders denying summary judgment and orders granting class certification are not immediately appealable; and 2) it was improper for DSS to appeal with the 59(e) motion still pending before the circuit court. This Court stayed the appeal until DSS's 59(e) Motion had been resolved.

On February 27, 2015 the Court held another hearing on the most-recent 59(e) Motion filed by DSS. DSS re-argued all class certification issues. The lower court found that the Respondent could not prepare the class notice without the information for the class members. DSS agreed to provide the information on the class members within 90 days of the date of the order. Counsel for Respondent's noted that the lower court may wish to consider a confidentiality order and counsel for DSS agreed that the parties could craft sufficient language for a confidentiality order at the appropriate time. (R. pp. 194-239).

On April 1, 2015, more than a month after the February 27, 2015 court hearing on this most recent 59(e) motion, counsel for DSS wrote the circuit court judge inquiring whether the trial court wished for him to submit an alternative proposed order. (R. p. 253). Later that same day, the trial court consented to Mr. Lindemann providing such an order. (R. p. 253). The cover letter to this proposed order, also sent on April 1, 2015, raised for the first time the issue that "many of those children may have no idea that they were adopted . . ."

Counsel for DSS posed the question: "I do not know whether the court wants to deal with these issues now or later when the notice of class action is subject to approval, but I do think that these issues will need to be addressed before a notice of class action is mailed to an adoptive child who may have no idea that he/she is adopted . . . but I want to make sure that neither DSS nor their counsel personally have any liability for sending these adopted children a class action notice that tells them that they were adopted." Counsel for DSS again raised the issue by email to Judge Gibbons on April 3, 2015. (R. p. 256).

On April 30, 2015 Judge Gibbons issued the formal order again granting the motion for class certification. (R. pp. 35-45). The Order notes that the court found "good cause" under S.C. Code 63-9-780© for production of the class member names to Plaintiff's counsel on a confidential basis. The Order did not address the particulars of the content of the class notice. It stated: "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 Defendant." (April 30, 2015 Order, p. 11). The Court did not address the confidentiality questions raised post-hearing by DSS' counsel's emails to the Court.

Appellant filed an Amended Notice of Appeal with this Court on June 8, 2015. Subsequent to that date, the parties had a phone conference with the Chief Administrative Judge of the 7th Judicial Circuit (Judge Keith Kelly) at which time all agreed that the Amended Notice of Appeal stayed the circuit court action. Based on the stay, no arguments have been heard on the details of the class notice and no class notice has been approved by the lower court.

ARGUMENTS

I. The certification of the class and notification process does not violate the statutory or constitutional rights of confidentiality, privacy or due process.

With no evidentiary support, DSS makes the bald assertion that "many of the adoptive children who qualify as class members are likely not aware that they were adopted."[2] DSS alleges that the notice of the class action will inevitably require class counsel to advise the class members that they are adopted children, and because it "is unknown how many of these class members will be learning that information for the first time . . .," this information will "violate the statutory and constitutional rights not only of the adoptive children but also the adoptive parents and even possibly the biological parents . . ."[3]

To support this claim, DSS points to a long line of South Carolina appellate cases which, DSS correctly notes, has "been at the forefront of protecting the privacy rights of adopted children, adoptive parents, and biological parents."[4] What DSS misapprehends, however, is that none of the cases cited by DSS for this alleged right to privacy involves the right for a child's adoptive status to be forever shrouded in secrecy. Instead, the cases cited by DSS protect the *identities* of the parties, especially the privacy of the birth parents.[5] In

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[2] Appellant Brief, p. 13.

[3] Appellant Brief, p. 8.

[4] Appellant Brief, p. 9.

[5] *See* McDonald v. Berry, 243 S.C. 453, 134 S.E.2d 392 (1964) (involving the biological parents' suit to obtain the names and addresses of the adoptive parents of their biological child); *See also* Bradey v. Children's Bureau of South Carolina, 275 S.C. 622, 274 S.E.2d 418 (1981) (involving an adopted child's action to compel the identification of his biological parents); *See also* Doe v. Ward Law Firm, 353 S.C. 509, 579 S.E.2d 303 (2013) (involving adoptive parents' action to gain access to adoption records, potentially violating the biological parents' privacy); *See also* Gardner v. Baby Edward, 288 S.C. 332, 342 S.E.2d 601 (1986) (reversing the family court order requiring the disclosure of the identity of the natural parents to determine voluntariness of consent); *See also* Jones v. South Carolina Department of Social Services, 341 S.C. 550, 534 S.E.2d 713 (Ct. App. 2000) (reversing a family court's order requiring the disclosure of a biological mother's name for the purposes of a notice of publication to putative fathers); *See also* Evans v. South Carolina Department of Social Services, 303 S.C. 108, 399

our present case, the class action will implicate only the adoptive parents and the child, and in no way threatens the confidentiality of the birth family. DSS seeks to extrapolate from an established constitutionally protected privacy right (protecting the identity of the parties), a never-before-known constitutional right (the right for an adult adoptee[6] to be shielded from his/her adoptive status). As will be described below, there is no such right, either expressed or implied, by statute or common law. Further, the Appellant's impulse to hide that a child joined a family through adoption is contrary to DSS policy.

As to the South Carolina Adoption Act, the confidentiality protections afforded by the statute go to prohibitions on the disclosure of identity of the biological parents, adoptee and child, not to their status as having been adopted, or having adopted.[7] The adoption statute requires the adoption hearing, and papers and records of the adoption, including DSS files, remain confidential from public inspection.[8] While protecting the identities of the birth and adoptive family, the statute allows for non-identifying information of the adoption to be disseminated,[9] and allows the identity of the parties to be given with the consent of all.[10] There is no statutory or common law mandate for secrecy to follow the child and his adoptive family in perpetuity. In fact, the statute envisions the child to be an active and fully aware participant in the adoption process.[11]

S.E.2d 156 (1990) (ordering that DSS could not be compelled to divulge the name and address of an unwed birth mother for purposes of ascertaining the identity of a natural father).

[6] Presumably, adoptees who are minors will be served notice of the class action through the adopting parents.

[7] *See* S.C. Code § 63-9-710(D) (allowing the petitioner to employee the use of fictitious names where necessary to avoid disclosure of identities of parties or persons); *See* S.C. Code § 63-9-520(A)(c) (requiring that background information investigation and report of this investigation may not disclose the identity of the biological parents of the adoptee).

[8] *See* S.C. Code § 63-9-780(a), (b), (c).

[9] *See* S.C. Code § 63-9-780(d)

[10] *See* S.C. Code § 63-9-780(e)

[11] *See* S.C. Code § 63-9-520(A)(2)(a)(iii) (requiring any post-placement investigation and report to include whether the adoptee, if of appropriate age and mental capacity, desires to be

DSS seems to conflate the concepts of privacy and secrecy – two very different concepts in the adoption context. Privacy denotes appropriate boundaries being placed on one's confidential adoption story. Conversely, secrecy implies one's adoptive status is shameful, a concept and label eschewed by DSS policy (as will be described below) and by nearly all adoptive parents.[12] There are many important and justifiable reasons why the intimate details of one's adoption story (such as child's physical abuse or a birth parent's substance abuse) should remain confidential within the adoptive family and protected from public scrutiny, and the stigma that may follow. And yet, DSS policy recognizes the pernicious impact of concealing a child's adoption, or secreting away an adoptee's family story. For decades now, best practice (which DSS has both followed and helped to establish) embraces and affirms a child's adoptive status.[13] For instance, the *Department of Social Services Human Services Policy and Procedural Manual for Adoption and Birth Parent Services* is replete with references to a "life book." This life book is a collection of

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adopted); *See slso* S.C. Code § 63-9-720 and S.C. Code § 63-7-2560(B) (requiring that a Guardian ad Litem be appointed for the minor child.) See *South Carolina Bar, Guidelines for Guardians ad litem in Family Court*, at IV Process and Duties (describing the guardian's duty to meet with the child and to describe the guardian's role) http://www.scbar.org/public/files/docs/galbrochure.pdf; *See also Department of Social Services Human Services Policy and Procedures Manual* which is replete with requirements of face-to-face visits with the minor child throughout the foster care and adoption process.

[12] The United States Department of Health and Human Services reports that almost all adopted children ages five and older (97%) know they were adopted. This statistic is based on a nationally representative survey of adoptive families across all adoption types, private infant adoption as well as foster care adoption. The percentage of foster care children who know about their adoption is certainly higher than this 97%, given the fact that foster children are older at the time of their placement than children placed through private infant adoption. As is described in this section of the Respondent's brief, DSS is fully committed in policy and procedure to providing foster care adoptees with their birth history. Adoption USA Chart Book on 2007 National Survey Adoptive Parents as found at aspe.hhs.gov, a report of the U.S. Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation (describing a 2007 National Survey of Adoptive Parents)

[13] *See* Talking with Kids About Adoption, https://creatingafamily.org/adoption/resources/talking-kids-adoption/

mementos, such as photographs of the adoptee's birth family and foster parents. The life book seeks to answer for the child why he or she entered foster care, describe the out-of-home placements, including photographs and names of caregivers. The life book includes photographs of the child and his or her birth family, beginning as young as possible.[14] DSS policy directs that adoption specialists, at a minimum, address a variety of issues during monthly meetings with the child, including the development of the child's life book.[15] Even for infants, DSS policy directs that a life book be initiated for the child regarding the child's relationship to birth family and his/her stay in foster care.[16]

The preparation of this life book is a DSS policy directive, a policy that carries the weight of law[17] and firmly embraces the right of children to know of their adoptive status and birth history. Collecting birth family information and documentation of the child's stay in foster care prior to adoption for inclusion in the child's life book is a central tenant of adoption practice, as reflected in DSS policies and procedures. This policy of openly discussing adoption with a child includes not only the adoption social workers as referenced above, but also foster care workers, from the time the child first comes into care.[18]

To sum up, at the time of a child's adoption, DSS not only contracts with the adoptive family, but they also entrusted them with the life of one of our state's most vulnerable citizens. Now, in this appeal, based on nothing more than conjecture, the Appellant espouses

[14] *See* Chapter 4, Adoption and Birth Parent Services, 415.02, Life Book. *See also* 415(2).
[15] *See* 415(6)(e)
[16] *See* 416 Background Summary for Infant Birth to Twelve Months; *See also* 416(8) (requiring the child to be able to show his or her life book to the prospective adoptive family).
[17] *See* S.C. Code § 63-7-900(D)
[18] *See South Carolina Department of Social Services Human Services Policy and Procedure Manual*, Chapter 8, Foster Care, 810.01(13) Entry Into Foster Care (directing that a life book be begun prior to the removal hearing); See also 819.01.01(5) Permanency: Continuity of Relationship and Parent/Child Visitation (directing that a life book be created to help promote family connections.)

a paternalistic and anachronistic desire to protect the adoptive family from itself. The duplicity of the DSS position – usurping millions of dollars from the very families they claim to now protect – is readily apparent. Allowing DSS to unilaterally alter the terms of contracts involving these special-needs children undermines these families and the adoption process generally, and will, in turn, give DSS *carte blanche* in the future to slash benefits, protected all the while by the knowledge that the "confidentiality of the adoption process" will deprive these families of redress.

II. This appeal is premature.

DSS admits that the general rule is that class certification orders, like the one on appeal, are typically not immediately appealable.[19] The Appellant acknowledges that "only in certain circumstances" are such orders appealable, unless there is a "substantial or essential legal right" involved.[20] In the previous section of this brief, Respondent argues that there is no such substantial or essential legal right. One must, however, peel back this appeal to understand the substantial or essential legal right DSS claims to have been violated. DSS is apparently not objecting to providing the names of the class members to class counsel. After all, confidentiality concerns are addressed by the protective order issued by the trial court. Rather, it is the notification of the class to which DSS objects, the content of which has yet to be ordered. The appealed-from order requires the notice of class action to be approved by the chief administrative judge for the Seventh Judicial Circuit[21] and orders class counsel to submit a draft notice to the trial court and DSS counsel for approval. The

[19] Appellant Brief, p. 18.
[20] Appellant Brief, p. 19, citing Knowles v. Standard Savings and Loan Association, 274 S.C. 58, 261 S.E.2d 49 (1979).
[21] See Order, p. 9.

language of the notice and the procedure for the dissemination of this notice is yet to be resolved. For instance, for adoptees who are still minors, perhaps the trial court will order that the notices be sent to the adoptive parents, thereby alleviating DSS' confidentiality concerns. For adult adoptees, the Court has yet to consider DSS' confidentiality argument, appearing in full voice for the first time on this appeal. For these reasons, this appeal is premature.

DSS describes the "critical issues of confidentiality, privacy and due process."[22] And yet, nowhere in their pleadings or various Rule 59 motions, did DSS raise these "critical issues." Instead, this confidentiality issue is but briefly mentioned in emails from DSS' counsel following the February 27, 2015 motion hearing. Whether or not this Court will deem the confidentiality issue having been raised by emails more than a month after the hearing, we leave to the Court. What is patently clear, however, is that the trial court never ruled on this confidentiality issue. For these reasons, this issue is not preserved for review.[23]

In fact, as the following transcript excerpt demonstrates, DSS consented to the full listing of potential class members to be provided to class counsel. DSS further agreed for notification to be given to the potential class, so long as that notification was done at the expense of the class counsel, and not DSS.

> THE COURT: All right. So you're saying that if I were to grant your motion, your Rule 59E motion -- and Mr. Langley, I'm going to let you talk in a second -- to require that they do the preparation of the notice, that they provide notification to the potential class, they bare that expense then since

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[22] Appellant Brief, p. 20, footnote 7.

[23] *See* Wilder Corp. v. Wilkie, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review").

this is a case dealing with adoptions and y'all have all that information, y'all will agree to an order giving them that stuff?

MR. LINDEMANN: That's correct, Your Honor.

THE COURT: Okay.

MR. LINDEMANN: And I think there probably would need to be some sort of confidentiality provisions with that.

THE COURT: Sure. I don't mind signing an order on that.

MR. LINDEMANN: And just for the record, obviously we very much disagree with that fact that this case -- that you certified it a class action --

THE COURT: I understand.

MR. LINDEMANN: -- that it meets the five requirements of it, that's also part of our Rule 59 motion, the second one. And certainly my representations on this are not a waiver.

THE COURT: Sure. Assuming arguendo, however, that I deny your motion to reconsider certifying the class in the first place, the procedure of how that's going to happen, then this will be the way to handle it according to you.

MR. LINDEMANN: That's correct.

(Tr. p. 15, line 3-p. 16, line 4) (R. p. 208, line 3- p. 209, line 4).

DSS may not concede the issue at the trial court and object to it, now for the first time on appeal.[24]

In this interlocutory appeal, DSS cites Doe v. Howe [25] which sets forth a three-part test which must be met for an order to be appealable. The order on appeal must, 1) conclusively determine the question, 2) resolve an important question independent of the

[24] Tucker v. John Doe, Opinion No. 5338 S.C. Court of Appeals, heard June 3, 2015 - filed August 5, 2015. *See also* City of Greer v. Humble, 402 S.C. 609, 614 742 S.E.2d 15, 18 (Ct. App. 2013) (stating that an issue conceded in the trial court cannot be argued on appeal.)

[25] 362 S.C. 212, 607 S.E.2d 354 (2004).

merits, 3) and is effectively unreviewable from a final judgment.[26] None of these three factors are met in our present case. The trial court order does not conclusively determine the question of notice to class members, as this notice has yet to be prepared, has yet to be critiqued by opposing counsel, and has yet to be ordered. This order does not resolve an important question independent of the merits because, as argued in the previous section of this brief, DSS seeks to protect a right that does not exist. Finally, the lower court order is not effectively unreviewable, as no order specifying the form, content and procedure of the notice has yet to be issued. In short, DSS has conjured up a purported right of confidentiality which they are now attempting to bootstrap to allow review of an otherwise unreviewable class certification order.

III. The Circuit Court did not abuse its discretion in certifying the class because the class representative proved the element of commonality.

a. Introduction

The issue of class certification is not properly reviewable for all the reasons cited in the foregoing. However, even if the Court were to find that this issue is currently reviewable, the following illustrates why the lower court did not abuse its discretion in finding the element of commonality was met.

Circuit courts enjoy discretion in deciding whether or not to certify a class action under Rule of Civil Procedure 23(d).[27] South Carolina Appellate Courts "generally defer to the trial court's discretion in granting class certification absent an error of law."[28] Rule 23(d) requires the court to determine whether a class action is to be maintained as soon as

[26] Howe, 362 S.E. 2d at 216.

[27] Tilley v. Pacesetter Corp., 333 S.C. 33, 42-43, 508 S.E.2d 16, 21 (1998).

[28] Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003); *See also* Waller v. Seabrook Island Property Owners Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990) (Finding that South Carolina Appellate Courts generally defer to the trial court's discretion in granting class certification absent an error of law).

practical after the commencement of an action.[29] The court need not consider the merits of the action for the purpose of issuing an order under S.C. Rule 23.[30]

In a case analogous to the case at bar, our Supreme Court found that the lower court abused its discretion in denying class certification where the common claim was the misapplication of a statute by a state agency.[31] In that case, the Court held that class treatment is especially appropriate where the number of potential plaintiffs is large, there was one main issue of law identical for all plaintiffs, all injuries resulted from the same act, and calculation of damages would not be difficult.[32] These factors are all present in the case at bar and accordingly this Littlefield decision is most instructive.

While not binding on this Court, it is worth noting that the U.S. District Court previously certified this same class based on a nearly identical class definition under a much stricter Federal Rule 23.[33] (R. pp. 76-84). The drafters of South Carolina's Rule 23 intentionally omitted from our state rule the additional requirements found in Federal Rule 23. By omitting the additional requirements, South Carolina Rule 23 endorses a more expansive view of class action availability than its federal counterpart.[34] For example, contrary to the federal rule, South Carolina has no requirement that the class issues predominate or that class status is the superior method of adjudication.[35] In fact, the South

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[29] Rule 23(d), SCRCP.
[30] Rule 23, SCRCP.
[31] Littlefield v. S.C. Forestry Comm'n., 337 S.C. 348, 355, 523 S.E.2d 781, 784 (1999).
[32] Id.
[33] BLH (dob 2/20/97), by parents Kenneth and Angela Hensley, AND on behalf of all other similarly situated v. Lillian Koller, et al 7:11-cv-02827-GRA (2012).
[34] Id, at 354–55, 523 S.E.2d at 784.
[35] Melton ex rel. Dutton v. Carolina Power & Light Co., 283 F.R.D. 280, 297-298 (D.S.C. 2012) (citing Rule 23, SCRCP).

Carolina Rule requires only that the "court find" that the above five elements are met.[36] The following illustrates why the lower court did not abuse its discretion in doing so.

b. 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."[37] Plaintiffs meet this test when their claims and the claims of absent class members share a determinative issue.[38] "Not every issue in the case must be common to all class members."[39] "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. 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."[40]

In this case, the common claim is that Defendant unilaterally breached the form contract it had with approximately four thousand (4,000) recipients of adoption subsidy benefits. The undisputed[41] facts of the case are that this alleged breach of contract for these four thousand contracting parties took place at precisely the same time (2002), in precisely the same manner (letter sent to all families), and in precisely the same amount (twenty dollars ($20) per month). There are undoubtedly multiple common questions of fact as each

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[36] Rule 23(a), SCRCP.

[37] Rule 23(a)(2), SCRCP.

[38] Gardner, at 21-22, 577 S.E.2d at 200-01.

[39] Id.

[40] McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) ("Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.").

[41] Defense counsel has stipulated in lower court proceedings 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." (R. p. 216. lines 6-8, 11-12).

named Plaintiff and each putative class member is subject to the same action by Defendants.

There are also common questions of law. Just like in Littlefield, Respondents in this case claim that a Defendant state agency misapplied a statute in applying across-the-board cut of contractually guaranteed benefits. More specifically, the questions are:

1. whether the cut of benefits to adopted children breached the form contract and/or violated the 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 form contract and/or violated the duty of good faith and fair dealing;

These legal claims are the same for all class members and are particularly appropriate for class certification because of the form contract used for all class members. Courts across the country have found that "claims arising out of form contracts are particularly appropriate for class action treatment."[42] Another such case is La Sala v. American Sav. & Loan Ass'n. In that case, the California Supreme Court held that "[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication: the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party."[43]

There are common questions of law and the common determinative facts have been stipulated to. This is a classic case for class certification.

[42] Hoban v. USLIFE Credit Life Ins. Co., 163 F.R.D. 509, 513 (N.D. Ill. 1995).
[43] La Sala v. American Sav. & Loan Ass'n., 5 Cal. 3d 864, 877, 489 P.2d 1113, 1121 (1971).

c. Appellant's attempted analogy to the Gardner case is without merit.

Appellant partially quotes Gardner v. South Carolina Dep't of Revenue as holding that "a representative class cannot exist where the court must investigate each plaintiff's prejudice claim . . ."[44] First, Appellant's citation is incomplete. The complete quote is "a representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case."[45] This additional language is important as it further clarifies that the Court is addressing the elements of Plaintiff's claim for relief, not a purported defense as Appellant suggests. Appellant's attempted analogy of Gardner to this case therefore misses the mark because prejudice is not an element of a claim for breach of contract. Indeed, Plaintiff and the Class are seeking relief under basic breach of contract principles as follows:

1. "The necessary elements of a contract are an offer, acceptance, and valuable consideration."[46]

2. The South Carolina General Assembly requires the Department of Social Services to execute a written agreement with adoptive parents whenever it determines that a child is eligible for supplemental benefits. S.C. Code Ann. § 63-9-1770 (A)(formerly § 20-7-1950).

3. When a state agency or commission is statutorily required or authorized to contract, the contract, by necessary implication, carries with it the authority to enforce the contract by an action at law.[47]

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[44] Appellant's Initial Brief, p. 23.
[45] Gardner, at 22, 577 S.E.2d at 201.
[46] Sauner v. Pub. Serv. Auth. of S. Carolina, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).
[47] Chesterfield County v. State Highway Dept. of South Carolina, 181 S.C. 323, 187 S.E. 548, 550-551 (1936). (The Court in Chesterfield noted that a contract would otherwise be one-sided, where

4. When there are conflicts in a contract's interpretation "a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."[48] This is especially so for adhesion contracts.[49]

5. There exists in every South Carolina contract an implied covenant of good faith and fair dealing.[50] This covenant requires that neither party will do anything which will injure the right of the other to receive benefits of the agreement.[51]

No showing of prejudice is required in order for Plaintiff Class members to prevail on their breach of contract claims and accordingly Gardner is inapposite on this issue.

d. The individual defenses raised by appellant lack merit.

Appellant's arguments against commonality essentially ask the court to accept the merit of the various defenses Appellant has plead, which is generally inappropriate at this stage. Further, the mere existence of individual issues does not defeat class action status."[52]

Finally, Appellant's argument lacks merit because the defenses it raises are just that: defenses. Nothing in the class certification cases cited by Appellant, including Gardner, says that certification requires analysis of purported defenses. All that is required is that the

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the State could enforce it against parties it contracts with by the parties could not enforce the same contract against the State).

[48] Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010).

[49] Southern Atlantic Fin. Serv., Inc. v. Middleton, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct.App. 2002)("It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion.").

[50] Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995), reh'g denied, (Dec. 19, 1995).

[51] Shiftlet v. Allstate Ins. Co., 451 F. Supp. 2d 763 (D.S.C. 2006).

[52] McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) ("Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event.").

Plaintiff's claims have a single common issue.[53] The historical "purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action."[54] The single common issue, much like the Littlefield case, is; did the state agency misinterpret the law in cutting contractually guaranteed benefits to the Plaintiff's Class? Appellant is trying to bootstrap an individualized inquiry by adding an affirmative defense that requires proof that the claimant intended to decrease the amount of money they received from the state. This approach has never been accepted by any South Carolina court and should not be accepted in this case. If Appellant's interpretation of the law were accepted then all that would be required to defeat class certification in any breach of contract or consumer fraud case would be pleading an affirmative defense, which purportedly required individual evaluation of each case. This is not the law in South Carolina and Appellant's arguments regarding individual inquiry should be rejected.

i. Implied consent is not a proper defense.

Even assuming it would be proper for the Court to evaluate alleged defenses for purposes of class certification, implied consent is not a proper defense to the Class breach of contract claim. The only cases cited by Appellant in support of this defense involve oral employment contracts. The implied consent defense in those cases is limited to employment wage cases. Specifically, the law on which both those decisions are based is: "the same scale of wages is held to continue from one term to the next, until the employee has had actual notice of a reduction either directly from his employer, or indirectly through his fellow employees."[55] This is not a wage case and accordingly implied consent is not

[53] Id.
[54] O'Quinn v. Beach Associates, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978) (emphasis added).
[55] Cooksey v. Beaumont Mfg. Co., 194 S.C. 385, 9 S.E.2d 790, 792 (1940) (citing 39 C.J. 175).

a proper defense. Appellant does not even attempt to explain how the defense would be proven in this case or what the elements of the defense would be. Further, Appellant would carry the burden of proof in showing a defense of implied consent. For all the reasons outlined above, it is the elements of the class claim, not affirmative defenses, that are the proper inquiry for a determination of commonality. Implied consent is not a proper defense and even assuming it was, it is not relevant to an analysis of commonality.

ii. Novation

The burden of proving novation is on the party asserting it.[56] The party asserting novation must prove "the intention to substitute a new obligation in place of the existing one."[57] The holding in Gardner was that class certification is improper if an element of Plaintiff's claim would require individual inquiry. Specifically, the Court stated: "Plaintiffs cannot prevail unless they establish they were prejudiced . . . A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case."[58] As noted above, the class certification analysis is conducted on the elements of Plaintiff's claim, not on concocted defenses. Accordingly, Appellant's argument on novation is without merit.

iii. Renewal agreement , appeal, early termination

Appellant's arguments that the claims require individual inquiry on the issues of renewal, appeal, and early termination are all relevant only to the amount of damages suffered by each class member. Again, there is no requirement under South Carolina law that each class member has suffered the exact same amount of damages. South Carolina

[56] Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct.App.1990) (citation omitted).
[57] Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 262, 199 S.E.2d 719, 722 (1973).
[58] Gardner, at 22, 577 S.E.2d at 201.

courts have repeatedly acknowledged that class certification is appropriate in cases in which the damages were different for each class member.[59]

In McGann v Mungo, hundreds of residents and owners of improved residential properties in Cold Stream (a subdivision near Columbia) filed a class action concerning negligent design and construction of streets and drainage systems. The defense in that case argued that each class member's individualized damages prevented the Court from certifying the case as a class action. In rendering its decision, the South Carolina Court of Appeals attached no significance to the undisputed fact that each class member had different damages: The mere fact that the Plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action.[60]

McGann has been cited consistently by the Courts of this state and no less than eleven times by the South Carolina Supreme Court in ruling on class certification cases, which is consistent with the historical "purpose of a class action [which] is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action."[61]

Furthermore, the question of damages is easily answered given the specifically identifiable nature of this class. By the very nature of this suit, Appellant has documentation of everyone in the class showing precisely the name, age, and benefits each class member would be entitled to if in fact Appellant's actions are determined to violate

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[59] Littlefield, 337 S.C. at 355, 523 S.E.2d at 784; Bates v. Tenco Services, Inc., 132 F.R.D. 160, 163 (D.S.C. 1990.) (Any difference in the degree of harm suffered by class members does not diminish the proposed representatives' claims).

[60] McGann, 340 S.E.2d at 158.

[61] O'Quinn, at 104, 249 S.E.2d at 738 (emphasis added).

the law. Further, Appellant can easily determine if there was a renewal, appeal, or early termination, which, admittedly, may reduce the damages to which that particular claimant would be entitled.

Finally, even assuming Appellant is correct that renewal, appeal, or early termination would cause some type of issue to the lower court, any such issue could be remedied by revising the class definition as necessary given the circuit court's authority to redefine the class as appropriate.[62] This is among the many reasons an interlocutory appeal of class certification is improper.

iv. Damages to third-party beneficiaries do not require individual inquiry.

Third-party beneficiaries (BLH and the putative class members) have the right to enforce all of the terms of a contract intended for their benefit.[63] There is no requirement under the law that the third-party beneficiaries show that the contractually owed amount, if paid, would have actually been used for the third-party beneficiary's benefit. It is enough to show that there was a breach in the contract and the damages that consequentially flowed from the breach. In this case, the contract at issue clearly is intended for the benefit of the child and the child has the right to enforce that contract.

Further, in evaluating class certification, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the

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[62] Littlefield, 337 S.C. at 354, 523 S.E.2d at 784

[63] 30 S.C. Jur. Contracts § 68 (citing Svenningsen v. Knight, 286 S.C. 299, 303, 333 S.E.2d 78, 81 (Ct. App. 1985) ("a contract between two persons for the benefit of a third can be enforced by the third person even if he is not named in the contract"); see also, R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n., 384 F.3d 157, 164 (4th Cir. 2004) (finding that under South Carolina law, when contract is made for benefit of third person, that person may enforce contract if contracting parties intended to create direct benefit to such third person) (citing Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827, 833 (1997)).

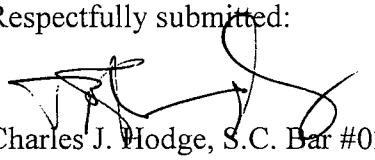
claim is really for less than the jurisdictional amount to justify dismissal."[64] The Plaintiff's Class claim for damages was made in good faith and it controls on this issue. Appellant's speculative argument that perhaps the third-party beneficiaries received the same care anyway is without merit as the damages caused by the breach are tangible, identifiable, and real. For the foregoing reasons, the lower court did not abuse its discretion in certifying the class and finding Plaintiff's class met the element of commonality.

[64] Gardner v. Newsome Chevrolet-Buick Inc., 304 S.C. 328, 331, 404 S.E.2d 200, 201-02 (1991)(emphasis in original).

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Court should dismiss the appeal and remand the case to the circuit court.

Respectfully submitted:



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STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brian M. Gibbons, Judge

Appellate Case No. 2014-002254

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 AND COMPLIANCE WITH 211(b)

This is to certify that I did serve on this date a copy of **RESPONDENT'S FINAL BRIEF** in the above-mentioned matter on the person(s) listed below by enclosing a copy of same in an envelope with sufficient postage thereon prepaid in the United States mail, addressed as follows:

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This will further certify that Respondent's Final Brief is in compliance with SCACR 211(b).

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