STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case Number 2014-002254

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

v.

South Carolina Department of Social Services, Appellant

PETITION FOR REHEARING

Respondents ask the Court to review whether it overlooked or misapprehended the standard of review; the text of Rule 23, SCRCP; and three distinctions between this case and *Gardner v. South Carolina Dep't. of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). The Court should withdraw its Opinion and either affirm the circuit court or more specifically address these issues.

I. The Opinion does not explain how the circuit court abused its discretion.

"A trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion." *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1998). Appellate courts thus "generally defer to the trial court's discretion in granting class certification

absent an error of law." *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200. Respondent earlier emphasized this limited standard of review. Respondent's Brief at 13.

The Opinion states this standard yet reverses because it views the *Gardner* decision as more "analogous" to this case than did the circuit court. Opinion at 6-7. The circuit court concluded that *Gardner* was not analogous because the prejudice issue that created the individualized inquires in that case was one of the two elements that each plaintiff in *Gardner* had to prove to establish its claim. ROA 12-13, 28-30. The circuit court found that this was not true here as there was no prejudice element to the causes of action in the case at bar. ROA 10-14, 26-30, 39-40.

A few facts put this in context. In June 2002, the then-Director of DSS issued across-the-board cuts in the adoption subsidies that DSS had contracted to pay some 4,000[1] families, including BLH's adoptive parents. ROA 3, 19-20, 131-133, 216 lines 8-12, 226 lines 6-9. In 2004, the DSS rescinded a similar cut in subsidies for children in foster care yet has never restored the cut in benefits for adoptees whose adoptive parents had earlier accepted all the legal responsibilities of parenthood. ROA 3, 19-20.

BLH alleges a single count against DSS for a breach of contract. ROA 52 ¶¶ 18-20. To establish a prima facie case, Respondent and other similarly situated adoptees need only show the existence of a contract, its breach, and damages caused by the breach. *Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC,* 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015)(citing elements for a breach of contract).

The circuit court ultimately certified a class of adoptees who had "at least five (5) months of lost benefits due to the cut in the assistance agreement[s] beginning on the date of the foster care reinstatement in 2004." ROA 41-42. The court ruled that the common issues it certified

[1] While the initial approximate number alleged was 4,000; DSS has indicated in discovery responses that only about 1,600 meet the class definition.

determine the class member's prima facie case because DSS stipulated that it made a fixed, across-the-board cut in the amount of the adoption subsidies that it had contracted to pay adoptive parents. ROA 39-40. To the circuit court, this means that the lawfulness of the DSS's simultaneous, unilateral cut in the amount it contracted to pay determines every element of every class member's prima facie claim such that liability for the breach of contract may be established—or defeated—in one stroke. ROA 10-14, 26-30. And the fact that there was "a uniform, across the board cut of benefits, in the exact amount, at the exact same time[,]" is also what the federal court similarly focused on when it found that the common issues not only exist but predominate. ROA 80.

So how one views the strength of the analogy to *Gardner* depends on how one views the relative importance in having one proceeding resolve 4000 breach of contract claims. The abuse of discretion standard normally leaves such judgment calls to the circuit court. To reverse, the Opinion should explain how that court crossed out of its zone of discretion into reversible error. As it is now, it seems that the Court simply substituted its judgment for that of the circuit court.

II. The Court did not apply the text of Rule 23, SCRCP.

This Court further concluded that the individual defenses that DSS identified negate the benefits of a class action on the common questions that were certified. Opinion at 7-8. This misreads Rule 23, SCRCP, in three ways.

First, the Court is reading predominance and superiority requirements into the rule. The official commentary to Rule 23(a), SCRCP, notes that the rule "is drawn principally from Federal Rule 23(a)." The federal rule differs from the South Carolina rule, however, in that federal class actions for damages also require that the common issues predominate and that this predominance render the class action method superior to other ways of resolving the case. *See,*

e.g., Deposit Guar. Nat. Bank of Jackson, Mississippi v. Roper, 445 U.S. 326, 329 n. 2 (1980)(describing Federal Rule 23(b)). The text of the South Carolina rule lacks these predominance and superiority requirements.

Nearly 20 years ago, the Supreme Court of South Carolina described these omissions as "intentional." The Court stated, "The drafters of Rule 23, South Carolina Rules of Civil procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP endorses a more expansive view of class action availability than its federal counterpart." *Littlefield v. South Carolina Forestry Comm'n,* 337 S.C. 348, 354-355, 523 S.E.2d 781, 784 (1999). Then, years after *Gardner* was rendered in 2003, the Court repeated the same observation that these omissions were intentional. *Grazia v. South Carolina Plastering, LLC,* 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010). After that, new terms were added to Rule 23, SCRCP, in 2016. But the rule has never been amended to add the predominance and superiority requirements that the drafters intentionally omitted.

In this case, the circuit court repeatedly cited *Littlefield* to note that neither predominance nor superiority is required to certify a class. ROA 9, 25. Respondents made the same point on appeal. Respondent's Brief at 14. Yet the Opinion does not address *Littlefield* and appears to impose the omitted predominance and superiority requirements.

The Court also misapprehended the text a second way. In Rule 23(a), SCRCP, the requirement that there be "questions of law or fact common to the class" is immediately followed by the requirement that "the claims *or* defenses of the representative parties are typical of the claims *or* defenses of the class." Rule 23(a), SCRCP (emphasis added). The disjunctive is significant. It shows that a class is proper if the common questions are typical of claims alone.

There is no requirement that the common questions simultaneously resolve both the claims and defenses to those claims.

The circuit court in this case was faithful to the disjunctive "or," ruling that class actions are designed to avoid each class member from having to prove the elements of their causes of action. ROA 13, 29-30. Respondents echoed this on appeal, arguing that the class certification should be evaluated on how well the common questions resolve the class members' causes of action and not the potential defenses to the claims. Respondent's Brief at 18-19.

This is how the United States Supreme Court does it. When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods, Inc. v. Bouaphakeo,* 136 S.Ct. 1036, 1045, 194 L.Ed.2d 124 (2016). In *Tyson Foods*, the Court affirmed a class certification to determine whether time employees spent donning and doffing protective gear counts toward overtime pay. The Court acknowledged that the employer had individual defenses against those workers who did not work enough hours for the issue to matter. This did not defeat class certification, however, because the class could present statistical evidence on the hours worked. *Id.,* 136 S.Ct. at 1045-1049.

This case is even more suitable for class treatment. In *Tyson Food,* plaintiffs had to rely on statistical evidence to prove their class membership and common injury because the defendant did not keep records. *Id.* 136 S.Ct. at 1046-1047. In this case, the circuit court ruled that the DSS records would identify exactly who is in the class, and precisely how much damages they would recover, if the breach of contract claim succeeds. ROA 14, 30, 40.

Lastly, the Rule 23(e), SCRCP, provisions on residual funds, added to the rule in 2016, further confirm that individual defenses do not, by themselves, defeat class certification. The rule envisions that a class action may be certified, and a judgment entered on common questions that resolve every class member's prima facie case. This class-action judgment may create a fund upon which class members may make claims. If there is a fund, a defendant may remain free to assert any individual defenses to a particular class member's claim. If successful, those individual claims are not approved and are never paid, thus creating the residual fund that Rule 23(e) envisions.

Accordingly, Rule 23, SCRCP does not require plaintiffs to prove common defenses to certify a class that resolves the class members' prima facie case. Individual defenses may be handled when one later proves their class membership and makes a claim.

III. The case differs from *Gardner* in three significant ways.

This Court's analogy to *Gardner* also seems to have overlooked three significant distinctions that the circuit court drew and that the Respondents raised on appeal. ROA 10-14, 26-30, 39-40; Respondent's Brief at 17-23.

Initially, the Supreme Court in *Gardner* made a point to say that the case "is significantly more complex due to the fact it is a bilateral class action," meaning that the plaintiffs wanted a class of plaintiffs who were suing and to certify a separate class of defendants being sued. *Gardner*, 353 S.C. at 21 n. 12, 577 S.E.2d at 200 n. 12. This case is a single count, breach of contract action against one defendant for failing to pay what its form contracts require.

The next distinction has already been mentioned in that the individual class-defeating issues in *Gardner* case went to the heart of what the plaintiffs in that case had to prove to prevail in

their prejudice claim. For this reason *Gardner* is not precedent on whether a court may even consider affirmative defenses in determining whether to certify a class of plaintiffs.

In stating this, BLH is not suggesting that each plaintiff has the same amount of damages. A prima face case, however, only requires proof that the breach of contract caused some damages and—by definition—all the class members lost at least $100 in benefits "due to the cut in the assistance agreement[s]." ROA 41-42. Beyond these required, minimum damages, the amount of damages from the breach may vary for each class member. Respondent cited multiple cases noting that South Carolina courts have repeatedly acknowledged that class certification is appropriate in cases in which the damages were different for each class member. Respondent's Brief at 21 (citing *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); and *McGann v Mungo*, 287 S.C. 561, 569, 340 S.E.2d 154, 158 (Ct. App. 1986) (noting: "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."). The Opinion, however, improperly focused on the damages and concluded potential administrative remedies, contract renewals, and early terminations precluded class certification without distinguishing the foregoing well-established law. Opinion at 7.

The last distinction between the case at bar and *Gardner* is that the individual issues in *Gardner* involved prejudice which had to be proven by every proposed class claimant. *Gardner*, 353 S.C. at 14-15, 577 S.E.2d at 197. In contrast, prejudice is not an element of the breach of contract claim for Respondent's and the other class members. The alleged defenses by the DSS may not actually ever apply to anyone in the class. They are just allegations without any basis for

applicability at all in the ROA. The circuit court emphasized this, and declined to go down that path, because it is inappropriate to deny class certification based on defenses that may never apply. ROA 12, 28.

Two examples make the point. On administrative remedies, there is no evidence to support this purported defense. The only record evidence states that adoptive parents "may appeal" a reduction in the adoption subsidy. ROA 133. The permissive "may" means that administrative remedies need not be exhausted. And there is no suggestion that the DSS's administrative procedures could redress its Director's decision to impose the across-the-board cuts that she imposed. The DSS final decision maker had already made her decision. One need not try to invoke administrative remedies to redress wrongs that the administrative scheme is not designed to redress. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 103, 674 S.E.2d 524, 530 (Ct. App. 2009).

Waiver is the second example of a conjured defense that defies logic. This Court pointed to the individualized issues surrounding whether each set of adoptive parents accepted or consented to the cut in their payments. Opinion at 7. The Supreme Court calls this a waiver of the breach of contract. *Janasik v. Fairway Oaks Villas Horizontal Property Regime,* 307 S.C. 339, 415 S.E.2d 384 (1992). Waiver is an affirmative defense under Rule 8, SCRCP, and will require that the DSS prove a voluntary and intentional abandonment or relinquishment of a known right. *Id. at* , 415 S.E.2d at 387. In other words, DSS must prove that an adoptive parent (made fully aware of their right to more money for the adoptive child) voluntarily and intentionally responded "no, I choose not to provide my adopted child with funds for food, clothing, and other needs."

Even if there were some legal theory on how contract defenses could apply to any class member, this itself would create a common, class-wide question of law because there is only one

form contract that was used for the entire class. On these facts there is no reason to break up a class that will fully resolve everything a plaintiff must prove.

Conclusion

The Supreme Court noted years ago, "[I]t cannot be true that the State is empowered to contract with individuals and yet retains the power to avoid its obligations. Neither the State nor its citizens can be bound, yet not bound, by a single contract." *Kinsey Const. Co., Inc. v. S.C. Dep't of Mental Health,* 272 S.C. 168, 172, 249 S.E.2d 900, 903 (1978), *overruled on other grounds McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). Despite this, the DSS unilaterally decided that it did not have to pay at least 1,600 families what it contracted to pay to induce the adoptive parents to adopt some of the State's neediest children. This is not right, and the adoptive parents should be able to prove it is not right without atomizing the dispute into many separate claims.

The Court should withdraw its opinion and affirm that the circuit court had the discretion to properly certify the class under Rule 23, SCRCP. Alternatively, Respondents' ask that the Court explain how the circuit court committed a legal error or other abuse of discretion and address the distinctions that the circuit court drew between this case and the *Gardner* decision.

Respectfully submitted,

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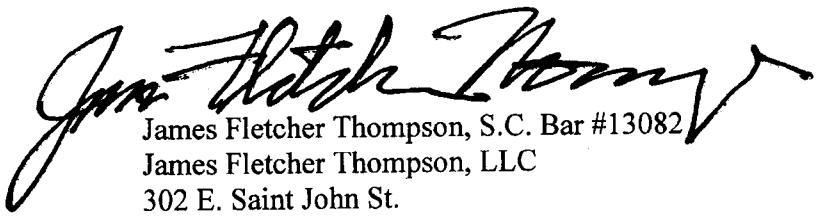

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The Honorable Brian M. Gibbons, Judge

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

I certify I have served the Respondent's Petition for Rehearing on all counsel of record by facsimile transmission and by depositing a copy of it in the United States Mail, postage prepaid, on May 9, 2018, addressed as follows:

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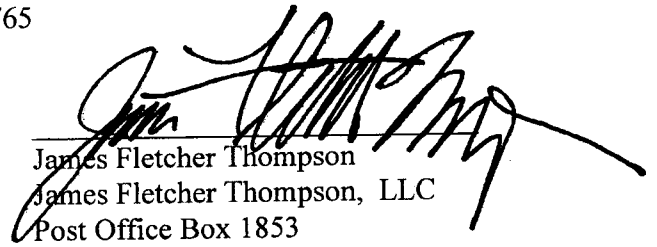

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May 9, 2018
(via facsimile (803) 734-1839 and FedEx Priority Overnight)

The Honorable Jenny Abbott Kitchings
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RE: *BLH by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated v. South Carolina Department of Social Services*
Appellate Case No. 2014-002254

Dear Ms. Kitchings:

Please find enclosed by facsimile transmission the Respondents' *Petition for Rehearing* and copy of Certificate of Service. By FedEx priority overnight, we are transmitting the following:

1. Original and six (6) copies of the Respondents' *Petition for Rehearing*
2. *Check for $25 filing fee*
3. Original Certificate of Service

With respect and kind regards, I am,

Sincerely,

JAMES FLETCHER THOMPSON

/mhw

Enclosures

Cc (via facsimile and U.S. Mail): Andrew F. Lindemann, Esq.
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FROM: **James Fletcher Thompson**

DATE: **May 9, 2018** **TIME: 3:30 pm**

Please see attached.

Thank you.