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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case Number 2014-002254

Opinion # 5556 (S.C. Ct. App. filed April 25, 2018)(Shearouse Ad. Sh. No. 17)

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

v.

South Carolina Department of Social Services,
Respondent

PETITION FOR A WRIT OF CERTIORARI

This appeal involves Rule 23, SCRCP, class actions. Certiorari is needed to:

- clarify a circuit court's discretion to certify a class action,
- apply Rule 23, SCRCP, as it is written, and
- reconcile the tension that the Court of Appeals has created between *Littlefield v. South Carolina Forestry Comm'n,* 337 S.C. 348, 354-355, 523 S.E.2d 781, 784 (1999), and *Gardner v. South Carolina Dep't. of Revenue*, 353 S.C. 1, 22, 577 S.E.2d 190, 201 (2003).

Statement of the Case

In March 1999, the South Carolina Department of Social Services ("DSS") entered into a form contract with the Hensleys "for the purpose of facilitating the legal adoption" of BLH. ROA 131. The contract required DSS to pay them a fixed, monthly subsidy if they adopted BLH. ROA 131. They then adopted BLH. ROA 47 ¶ 5.

In June 2002, DSS unilaterally imposed an across-the-board cut in the payments that it had contracted to pay the Hensleys and other adoptive parents who DSS induced to adopt children held in its care. ROA 3, 19-20, 39-40, 55 ¶ 5, 131-133, 216 ll.8-12, 226 ll.6-9. In 2004 DSS rescinded a similar cut in subsidies for children in foster care, yet has never restored the cut in benefits for adoptees whose adoptive parents had accepted all the legal responsibilities of parenthood. ROA 3, 19-20.

BLH alleges a single count against DSS for a breach of the contract. ROA 52 ¶¶ 18-20. To establish a prima facie case, BLH and other similarly situated adoptees need only show that they entered into DSS's form contracts for the subsidy payments, that the cut in the payments constitutes a breach, and that they were damaged by the breach. See *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).

In the trial court, 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 55 ¶ 5, 39-40. A federal court focused on this same "uniform, across the board cut of benefits, in the exact amount, at the exact same time[,]" when it certified a federal class action against the DSS. ROA 80. In this case, the circuit court likewise relied on the nature of the across-the-board cut to certify 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. DSS has indicated that this class includes at least 1600 families.

In certifying this class, the circuit court distinguished *Gardner* because the individualized inquiries in that case were based on an element of prejudice that each plaintiff in that case had to prove to establish his or her claim. ROA 12-13, 28-30. The circuit court found that no individual inquiry was required in this case because, among other reasons, no prejudice element was applicable in the cause of action brought by BLH and the class. ROA 10-14, 26-30, 39-40. The circuit court further relied on *Littlefield* to conclude that the rules do not require that the common issues predominate or render a class action a superior way to resolve the dispute. ROA 9, 25.

The Court of Appeals did not question that the class as certified would entirely resolve all the class members' prima facie claims for a breach of contract. Nonetheless it reversed the class certification, citing *Gardner* as authority for its ruling that DSS's alleged affirmative defenses negate the benefits of a class action. *BLH v. South Carolina Department of Social Serv.*, Op. # 5556 (S.C. Ct. App. filed April 25, 2018) (Shearouse Ad. Sh. No. 17 at 110). This analysis did not address the distinctions that the circuit court drew between *Gardner* and this case; nor did the Court of Appeals address *Littlefield* and its holding that the South Carolina rule lacks the federal predominance and superiority requirements. *Id.*

BLH timely petitioned the Court of Appeals for rehearing. See, Petition for Rehearing. In the Petition BLH asked the Court of Appeals to explain how the circuit court's reasoning was an abuse of discretion; to apply Rule 23, SCRCP, as it is written;

and to address *Littlefield* and the distinctions that the circuit court drew between *Gardner* and the case at bar. Petition for Rehearing. The Court of Appeals denied the petition without elaboration. Order Denying Rehearing.

Argument

I. The Court needs to clarify the scope of a trial court's discretion to certify a class.

"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).

In exercising this discretion, the circuit court reasoned that class certification was warranted because the lawfulness of DSS's simultaneous, unilateral, and fixed cut in the amount it contracted to pay will resolve every class member's prima facie claim such that liability for a breach of the form contracts may be established—or defeated—in one stroke. ROA 10-14, 26-30. The circuit court then limited the class to those who had "at least five (5) months of lost benefits *due to* the cut in the assistance agreement[s] . . .." ROA 41-42 (emphasis added). So the class as certified will entirely resolve every element of the shared cause of action for every class member who suffered $100 or more in damages from the cut. DSS indicated that this includes at least 1600 families.

This reasoning amply supports the trial court's view that a class action is the best way to resolve at least 1600 class members' shared, prima facie claims for a breach of contract—regardless of whether or not DSS alleges peculiar and unproven defenses to some of the class claims. The abuse of discretion standard normally leaves such judgment calls to the trial court.

II. Rule 23, SCRCP, deserves a plain reading.

The Court of Appeals also departed from the text of Rule 23, SCRCP. The Court reversed the class certification by stating that resolving the class members' prima facie case did not predominate in such a way as to render a class action superior to 1600 or more families bringing separate claims. *BLH.,* Shearouse Ad. Sh. No. 17 at 110. This ruling misapplies Rule 23 in three different ways.

First, the Court improperly read into the state rule predominance and superiority requirements found only in the federal rule. Unlike the state rule, Federal Rule 23 requires that common issues predominate and that this predominance renders a class action 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 state rule omits these requirements and this Court has described these omissions as "intentional." *Littlefield,* 337 S.C. at 354-355, 523 S.E.2d at 784 ("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."). This Court has repeated that these omissions were intentional over a number of years, both before and after *Gardner* was decided in 2003. *Grazia v. South Carolina Plastering, LLC,* 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010). Furthermore, though Rule 23, SCRCP has been revised over the years, it has never been amended to add any predominance and superiority requirements that the Court of Appeals opinion read into the rule.

The Court of Appeals also misinterpreted the text of Rule 23 in 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 there are common questions as to the claims alone. There is no requirement that the common questions simultaneously resolve both typical claims *and* potential defenses to those claims. This is how the trial court read the rule when it ordered that the class may be certified to avoid each class member having to independently prove the very same elements of the very same breach of contract cause of action. ROA 13, 29-30.

The analysis adopted by the trial court is uniform across the country and dictated by the United States Supreme Court. More specifically, the U.S. Supreme Court has stated that when "one or more of the central issues in the action are common to the class ... 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. The case at bar is even more suitable for class treatment than *Tyson Foods.* In *Tyson Foods* 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 the damages they would recover, if the breach of contract claim succeeds. ROA 14, 30, 40.

Lastly, there is provision in Rule 23(e), SCRCP for the creation of "residual funds." This provision further confirms that individual defenses do not defeat class certification because the residual funds provision would be meaningless under the Court of Appeals interpretation of Rule 23. For example, Rule 23(e) explicitly contemplates a defendant asserting individual defenses to particular class member's claims long after class certification and even judgment based on any defenses applicable to that class member individually. If a defendant successfully asserts defenses to individual claims then the claims are not paid, thus creating the residual fund under Rule 23(e) envisions. Thus, were the Court of Appeals interpretation of Rule 23 correct, the residual fund provision of Rule 23(e) would essentially be rendered meaningless. See *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012)("The statutory language must be constructed in light of the intended purpose of the statute [citation omitted]. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.").

In short, the trial court gave Rule 23, SCRCP its plain meaning, but the Court of Appeals opinion added terms, misread provisions, and/or rendered parts of Rule 23 meaningless. The trial court was correct and did not make any error of law, much less abuse its discretion.

III. The Court of Appeals created an unnecessary tension between the *Littlefield* and *Gardner* decisions.

The Court of Appeals' only stated reason for denying class certification was its determination that issues in the present case "requiring individualized inquiry" were similar to those in *Gardner* and thus the requirement of commonality could not be met. *BLH.*, Shearouse Ad. Sh. No. 17 at 110. In so doing, the decision Court of Appeals essentially interpreted *Gardner* to impose predominance and superiority requirements that are not found in S.C.R.Civ.P. 23. This interpretation is contrary to the clear case law from this Court noted above regarding the intentional omission of the predominance and superiority requirements. If for no other reason, this Court should grant certiorari to address whether the predominance and superiority requirements are or are not part of South Carolina class action law. This Court, not the Court of Appeals, must be the one to decide South Carolina law in this regard.

In BLH's view, the Court of Appeals misread *Gardner* and also did not address any of the important distinctions that the trial court drew between the case at bar and *Gardner.* ROA 10-14, 26-30, 39-40. First and foremost, *Gardner* was "significantly more complex due to the fact it [was] a bilateral class action," meaning that the plaintiffs not only sought to certify a class of the plaintiffs who were suing but also to certify a separate class of the defendants being sued. *Gardner*, 353 S.C. at 21 n. 12, 577 S.E.2d at 200 n. 12. Furthermore, one of plaintiffs' causes of action in Gardner included a complex prejudice element. In stark contrast, the case at bar is a single count, breach of contract action against one defendant for choosing not to pay money agreed to under the DSS form contracts with class members. ROA 52 ¶¶ 18-20.

Gardner was decided based upon the prejudice element of the plaintiffs' claim requiring individualized inquiry, not based upon the plaintiffs' claim being susceptible to potential defenses requiring individualized inquiry. In fact, in deciding the issue of class certification, the court in *Gardner* only mentioned examination of "defendants' anticipated defenses" in the determination of the propriety of a defendant class. *Gardner*, 353 S.C. at 22 ("A court determines the existence of commonality among defendants by examining the plaintiffs' claims and the defendants' anticipated defenses.") (emphasis added). This makes sense given the disjunctive nature of Rule 23 in assessing claims or defenses. In effect, the Court of Appeals mistakenly ruled that affirmative defenses were issues requiring evaluation when certifying a plaintiff class.

In stating this, BLH is not suggesting that each class member has the same amount of damages; merely that a prima face case only requires proof that there was breach of contract that caused the statutorily required amount of damages. In this case—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. *McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) ("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 Court of Appeals improperly concluded that potential administrative remedies, contract renewals, and early terminations implicate issues broader than the amount of damages but did not ever explain how or why those issues prevented class certification. *BLH.*, Shearouse Ad. Sh. No. 17 at 110.

Lastly, the individual issues in *Gardner* involved prejudice, and of course prejudice is nearly always an individual inquiry. *Gardner*, 353 S.C. at 14-15, 577 S.E.2d at 197. At this point there is not any evidence that any of DSS's alleged defenses even apply to any of the class members. They are just allegations. The circuit court emphasized this, and declined to go down that path, because it is inappropriate to deny class certification based on defenses. ROA 12, 28. Otherwise, a defendant would always be able to defeat class certification by conjuring defenses that require individualized inquiry, and that is precisely what DSS has done here.

Two examples make the point. On the alleged defense of failure to exhaust administrative remedies, 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. Even if exhaustion were a requirement, which it is not, there is no suggestion that DSS even has any administrative process to redress the damages incurred as a result of the Director's admitted decision to impose the across-the-board cuts. ROA 55 ¶ 5. The DSS final decision maker had already made her across the board cut. There is no requirement under the law that one invoke non-mandatory 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 a second example cited by the Court of Appeals, which asserted that there were individualized issues surrounding whether each set of adoptive parents accepted or consented to the cut in their payments. *BLH.*, Shearouse Ad. Sh. No. 17 at 110. This Court calls this a waiver of the breach of contract. *Sterling Develop. Co. v. Collins*, 309 S.C. 237,

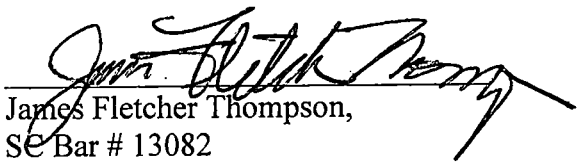
240-241, 421 S.E.2d 402, 404 (1992). Waiver is an affirmative defense under Rule 8, SCRCP, and would require that DSS prove the adoptive parents had options that are not apparent or intuitive. Once DSS cut the payments across the board, what were the adoptive parents supposed to do? Unlike foster parents, whose benefits DSS restored, adoptive parents cannot give their children back. They are at DSS's mercy to keep the promises that DSS made to induce the adoptions. Even if there is some legal theory on how the administrative remedies or a waiver defense could apply to any class member, this itself is a common, class-wide question of law. It is no reason to break up a class that will fully resolve everything a plaintiff must prove.

Conclusion

"[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). Yet that is precisely what DSS unilaterally decided to do in this case when it chose not to pay 1600 families contractually-owed benefits promised to assist the adoption of 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 1600 or more separate claims.

The Court should grant certiorari, reverse the Court of Appeals, and either affirm the class certification order or remand to the Court of Appeals to resolve the remaining issues.

Respectfully submitted,



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July 23, 2018

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.

CERTIFICATE OF SERVICE

I certify I have served the Respondents' Petition for Writ of Certiorari, on July 23, 2018, on the following attorneys of record by email and by depositing a copy of the same in the United States mail, postage prepaid:

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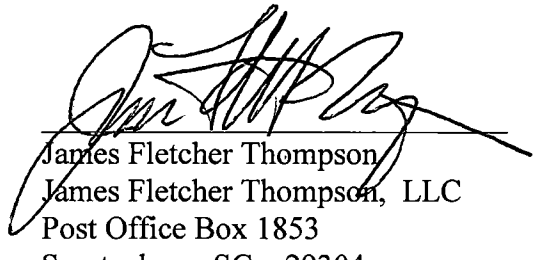

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July 23, 2018
(via hand delivery)

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 a copy of Respondents' Petition for Writ of Certiorari, together a Certificate of Service evidencing service on all counsel of record.

With respect and kind regards, I am,

Sincerely,

JAMES FLETCHER THOMPSON

/mhw

Enclosures

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