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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2018-001351
Case No. 2013-CP-42-1569

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.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Andrew F. Lindemann
Joel S. Hughes
LINDEMANN, DAVIS & HUGHES, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Respondent

STATEMENT OF THE CASE

The Petitioner BLH 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 Respondent South Carolina Department of Social Services ("DSS").[1] 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. 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

[1] The Petitioner BLH was a minor when this action was filed. BLH has since reached majority and should be substituted as the proper party-plaintiff.

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. (R. 51-52).

On October 4, 2013, BLH filed an unsupported motion for class certification. The motion itself consists of two sentences. (R. 70). 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." (R. 70). 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." (R. 48).[2]

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. (R. 1).

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

Before ten days elapsed, DSS filed a Rule 59(e) motion asking that a formal order be issued. (R. 98-100). In response, Judge Gibbons issued a formal order, that being the Order on Plaintiff's Motion for Class Certification, filed May 29, 2014. (R. 3-18). DSS then filed a Rule 59(e) motion as to the formal order and requested oral argument, which was not allowed. (R. 101-110). 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. (R. 121-125).

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 the Court of Appeals 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, the Court of Appeals 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. (R. 35-46). 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 S.C. Code Ann. § 63-9-780(C) for the disclosure of the names and addresses of the adopted children who comprise the class. (R. 43). 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." (R. 44).

The Respondent DSS then filed a timely Amended Notice of Appeal. DSS raised two issues on appeal. First, DSS argued that 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. Second, DSS argued that the Circuit Court erred in certifying the class when the class representative failed to prove the requisite element of commonality.

On April 25, 2018, the Court of Appeals issued a decision reversing the grant of class certification. The Court of Appeals found that BLH failed to establish commonality, and for that reason, the Court also determined that "it is unnecessary that we address the constitutional and statutory concerns raised in DSS's challenge to the notification process." Slip Op. at 8.

The Court of Appeals denied a petition for hearing. The Petitioner BLH has now filed a petition for writ of certiorari.

DISCUSSION

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. The Respondent DSS

submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion. In addition, the decision of the Court of Appeals does not conflict with any existing decisions of this Court. Instead, the Court of Appeals relied exclusively on this Court's decision in *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). Finally, this case, as decided by the Court of Appeals, does not involve any issue of first impression nor any issue of great public interest or importance.[3]

Based upon the foregoing considerations, there is no need for this Court to review the decision of the Court of Appeals.

II. The Court of Appeals was correct in ruling that the Circuit Court erred in certifying the class when the class representative failed to prove the requisite element of commonality.

Under South Carolina law, class certification 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

[3] The issue related to the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adoptive children, the adoptive parents, and the biological parents is one of significant importance, but the Court of Appeals did not find it necessary to reach that issue.

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. *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 Court of Appeals agreed with DSS's position that BLH failed to establish commonality. The Court of Appeals focused on this Court's decision in *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190, 200 (2003), which the Court of Appeals found to be "analogous" to the present case. In *Gardner*, this Court 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." 577 S.E.2d at 200. (Emphasis added). Importantly, "[c]ommonality is met only where the class shares a *determinative* issue." 577 S.E.2d at 200-201. (Emphasis added). This 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, this Court held that "a representative plaintiff cannot establish commonality if the court must investigate each plaintiff's individual claim." *Id.*

As the Court of Appeals agreed, the *Gardner* case is particularly instructive in evaluating the commonality prong of the class certification test. In *Gardner*, 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. This Court reversed the certification of a plaintiff class for a lack of commonality. This 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. This 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. (Emphasis added).

As the Court of Appeals found, that same level of individualized inquiry is necessary in the present case. The Court of Appeals explained that "[s]everal issues here will require individualized inquiry such as whether each set of adoptive parents accepted or consented to the reduction in payments, exhausted any

available administrative remedies, entered into renewal agreements, or at any pertinent time terminated their agreements." Slip Op. at 7. Thus, the Court concluded that, as in *Gardner*, "there are more than 'minor factual differences' among the various class members." Slip. Op. at 7. Again, citing *Gardner*, the Court held "the necessity of such individualized inquiries 'negates the benefits of a class action suit.'" Slip Op. at 8.

In seeking a writ of certiorari, BLH initially argues that the Court of Appeals did not apply the correct standard of review. However, the Court of Appeals wrote as follows: "We generally defer to the trial court's discretion in granting class certification absent an error of law." Slip Op. at 6. That is the correct standard of review, and like this Court in *Gardner*, the Court of Appeals reversed upon finding an error of law on the issue of commonality.

Next, BLH argues the Court of Appeals adopted the "predominance and superiority requirements" from Rule 23(b)(3), FRCP. That is incorrect. The Court of Appeals never cite to or even imply any reliance on Rule 23(b)(3) of the Federal Rules of Civil Procedure. As is clearly explained, the Court of Appeals relied exclusively on this Court's decision in *Gardner*, in which this Court likewise did not rely on or cite to Rule 23(b)(3), FRCP. In fact, the Court of Appeals focused on this Court's holding that "[c]ommonality is met only where the class shares a *determinative* issue." *Gardner*, 577 S.E.2d at 200-201. (Emphasis added). Thus,

there is only the requirement that there must be a common *determinative* issue of law or fact. *See also*, *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765, 774 (Ct. App. 2011).[4] Moreover, contrary to BLH's assertion, there is no "unnecessary tension" between this Court's decisions in *Gardner* and *Littlefield v. South Carolina Forestry Commission*, 337 S.C. 348, 523 S.E.2d 781 (1999).[5]

BLH also argues that the Court of Appeals "misinterpreted the text of Rule 23" by misapplying the typicality requirement set forth in Rule 23(a)(3), SCRCP, which requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *See*, Rule 23(a)(3), SCRCP. This is an odd argument in that the Court of Appeals never addressed the typicality requirement nor did DSS raise the typicality requirement on appeal. At any rate, it should be obvious that the disjunctive "or" is used in Rule 23(a)(3) because a class action may be asserted by a plaintiff class or by a defendant class. The Court of Appeals never suggested that there must be common claims and common defenses, and that is not a basis for its decision.

BLH does, however, suggest that the Court of Appeals focused only on "DSS's defenses" to find that an individualized inquiry would be needed for the

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[4] In *Pope*, a writ of certiorari issued by this Court was dismissed as improvidently granted. *See*, *Pope v. Heritage Communities, Inc.*, 414 S.C. 199, 777 S.E.2d 832 (2015).

[5] BLH does not even discuss the *Littlefield* decision in any detail and certainly does not explain how *Gardner* and *Littlefield* are at odds. Likewise, the Court of Appeals in this case did not discuss *Littlefield* and did not create any "tension" between the two decisions.

class members. That is not the case. BLH and the class members brought a breach of contract claim which requires proof by the plaintiff of "(1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach." *Hennes v. Shaw*, 397 S.C. 391, 725 S.E.2d 501, 506 (Ct. App. 2012). Thus, the contracts for each class member must be valid and enforceable, and the essential terms must be established by the plaintiff. As the Court of Appeals recognized, there are a number of issues requiring individualized inquiry to determine whether the class members were suing on a valid, binding contract, including whether the contract had been terminated,[6] whether the adoptive parents entered renewal agreements with new terms,[7] whether the adoptive parents utilized the administrative process to obtain an adjustment in the subsidies,[8] and others. Those

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[6] The Adoption Subsidy Agreement includes a "termination" provision which includes eight different bases for termination. (R. 133). 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. (R. 133). 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.

[7] 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.

[8] The Adoption Subsidy Agreement provides that "[a]djustments 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. 131). Thus, an individualized inquiry must be made whether each class member's adoptive parents received any adjustment, upward or downward,

are not DSS's affirmative defenses, but rather fall within the plaintiff's burden of proof in a breach of contract action.

Finally, BLH makes the curious argument that the new rule on residual funds set forth in Rule 23(e), SCRCP, will be rendered meaningless by the Court of Appeals' decision. BLH suggests that residual funds result from the defendant successfully asserting a defense to an individual class member's claim. But that does not create residual funds. Instead, residual funds result from primarily class action settlements where the amount paid in settlement covers all claims made by class members, attorney's fees and expenses, leaving leftover or unclaimed funds. *See, Briggs v. United States*, 2012 WL 476348, *2 (N.D. Cal. 2012) ("Some class action settlements result in some amount of unclaimed or residual funds"). Residual funds do not arise from a defendant's successful assertion of defenses to individual claims. In fact, if BLH's position were correct, there would be no incentive or reason for a class action defendant to assert individual defenses because, pursuant to Rule 23(e)(2), residual funds are paid to charity and cannot be reclaimed by the defendant.

In sum, the Court of Appeals was correct in ruling that the Circuit Court erred in certifying the class when BLH failed to prove the necessary element of

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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 the $20.00 reduction since 2004.

commonality. The Court of Appeals faithfully and accurately followed this Court's precedent in *Gardner*, which fully supports its decision in this case. As a result, BLH has presented no basis for a writ of certiorari to be issued.

III. If the Court grants the Petitioner's petition for writ of certiorari, the Court must also consider the confidentiality, privacy and due process issues raised by DSS but not reached by the Court of Appeals.

In its appeal to the Court of Appeals, DSS expressed grave concerns that the class action process as implemented by the Circuit Court would result in violations of the statutory and constitutional rights of confidentiality, privacy and due process enjoyed by the adopted children, the adoptive parents, and even the biological parents. As DSS pointed out, per the class definition approved by the Circuit Court, the class members would consist of the adopted children, many of whom (if not most of whom) have reached the age of majority by the present time.[9] It is important to recognize that the class members are *not the adoptive parents*; they are the adopted children themselves.[10] Thus, the Circuit Court class certification order, if

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

[10] This was based upon BLH'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 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.

it were reinstated by this appeal, requires DSS to disclose the identities of all adopted children who meet the class definition so that each of those adoptive children may be given notice of this class action about adoption subsidy benefits. But the person to whom that confidential information is to be disclosed is not the adopted child, the adoptive parents or the biological parents. It is a purported class representative seeking to bring the claims for all other similarly situated adopted children.

As DSS has pointed out, many of the adopted children who qualify as class members are likely not aware that they were adopted.[11] 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.[12] Regrettably, the disclosure of their

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[11] In the Court of Appeals, BLH cited to a report from the United States Department of Health and Human Services to the effect that 97% of children ages five and older know they were adopted. In so doing, BLH suggested that a majority of children know of their adoptive status; yet that misses the point entirely. It is not alright that only three percent of families will have their rights to confidentiality, privacy and due process violated. If even one family will have their constitutional rights violated, that is not something that the courts should order to occur and sanction with the imprimatur of the state, particularly in the absence of an extraordinary or compelling need to disclose that confidential information.

[12] *See*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); *Hodge v. Jones*, 31 F.3d 157, 163 (4th Cir. 1994) ("[m]uch like the foundational concept of individual privacy, the sanctity of the family unit is a fundamental precept firmly ensconced in the Constitution and shielded by the Due Process Clause of the Fourteenth Amendment"); *Jordan by Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) ("[t]he bonds

status as adopted children could result in the types of problems, emotional and otherwise, that this Court recognized in *McDonald v. Berry*, 243 S.C. 453, 134 S.E.2d 392 (1964).[13]

Significantly, the confidential information is not sought in this case because of any extraordinary or compelling need such as a need for the biological parent's medical history in order to treat the adopted child. *See*, *Doe v. Ward Law Firm*,

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between parent and child are, in a word, sacrosanct, and the relationship between parent and child inviolable except for the most compelling reasons").

[13] In *McDonald v. Berry*, 243 S.C. 453, 134 S.E.2d 392 (1964), 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, this 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. This 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.* This 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.

353 S.C. 509, 579 S.E.2d 303 (2003). Here, 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 at best. 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 no greater than $3,000, and for most it will be much less. 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.

Because the Court of Appeals found that BLH failed to prove the commonality requirement and reversed the grant of class certification, it became unnecessary to reach and address these issues of confidentiality, privacy and due process. However, if this Court is inclined to grant BLH's petition for writ of certiorari in this case, DSS should have the opportunity to be heard on these issues. The concern is real that 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 will likely cause real harm to persons who are not even parties to this litigation and cannot protect themselves. Once that confidential information is released and children are advised that they were adopted, that

revelation cannot be undone.

CONCLUSION

Based on the foregoing discussion, the Respondent South Carolina Department of Social Services respectfully requests that this Court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: _____

ANDREW F. LINDEMANN #13030
JOEL S. HUGHES #73708
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Respondent South Carolina Department of Social Services

Columbia, South Carolina

August 27, 2018

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., attorneys for the Respondent South Carolina Department of Social Services, does hereby certify that service of the **Return to Petition for Writ of Certiorari** 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 27th day of August 2018:

Charles J. Hodge, Esquire
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