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)

Supreme Court Case Number 2018-001351

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

BRIEF OF PETITIONER

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ISSUE ON APPEAL

Whether the circuit court was within its broad discretion to certify the class action in this matter under Rule 23, SCRCP.

STATEMENT OF THE CASE

This class action involves an across-the-board, $20-per month cut of Adoption Assistance Subsidies (hereinafter referred to as "AAS") to over sixteen hundred (1,600) South Carolina families and the adopted children beneficiaries. This cut was implemented by the Respondent South Carolina Dep't. Of Social Services ("DSS") 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 not been reinstated. The stated purpose of the contractual AAS agreements is to benefit the adopted children of South Carolina, such as Petitioner BLH. Petitioner and the members of the certified class allege DSS action constitutes a breach of contract for which there is no defense and that y the adopted children are entitled to recovery.

Initially brought in state court and removed by DSS to federal court, this case was filed first in 2011 as a 42 U.S.C. Section 1983 action against the DSS Directors individually: Elizabeth Patterson, Kim Aydlette, Kathleen Hayes, and Lillian Koller. The plaintiffs were 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 individual defendants moved to dismiss on the basis of the statute of limitations and plaintiffs corrected the caption and amended the complaint to clarify that the 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." The individual defendants filed a motion for summary judgment based on qualified immunity, including various exhibits. BLH filed a cross motion for summary judgment also with 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 the individual defendant's motion for summary judgment by order dated August 17, 2012. The individual defendants filed an appeal to 4th Circuit Court of Appeals.

On April 1, 2013, BLH filed a breach of contract claim against the South Carolina Department of Social Services, which was not a defendant in the federal case. (Appx. pp. 50-57). The claims were based on state law only and were filed prior to any adjudication on the federal claims.

The remaining issue before the 4th Circuit was only the claim under Section 673 (a)(3) of the Federal Adoption Assistance and Child Welfare Act ("AACWA"). On July 3, 2013, the Fourth Circuit issued an order in favor of BLH's argument that Section 673 (a)(3) of the AACWA gave rise to a privately enforceable federal right. However, the court granted the individual defendant's 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 has no binding effect on the case at bar for a number of reasons, including that this federal exception was eliminated in 2004 when the foster care maintenance rate was reinstated. The Fourth Circuit did not address

any of the class certification issues as those were not part of the individual defendant's appeal.

Petitioner served discovery requests on Respondent in this case (Case No. 2013-CP-42-1569) on July 26, 2013. (Appx. pp. 244-251). Petitioner sent multiple emails and other correspondence but still no responses were provided. (Appx. pp. 252-254). Petitioner filed a motion to compel in October of 2013. (Appx. pp. 64-73). At the same time, Petitioner filed its motion for class certification. (Appx. p. 74). Still DSS provided no responses. On March 10, 2014 Respondent filed a motion for summary judgment. (Appx. pp. 130-153). 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, DSS emailed its discovery responses to Petitioner. No depositions had been taken due to the delay caused by Respondent. Nonetheless, significant documentation was in the record due to the previous filings, affidavits from both sides, and other relevant documentation.

On April 7, 2014 Petitioner submitted its memorandum in support of the motion for class certification with exhibits. (Appx. pp. 75-89). Respondent submitted its memorandum in opposition to motion for class certification and a memorandum in support of summary judgment. (Appx. pp. 89-101). On April 8, 2014 Judge Gibbons issued a Form 4 Order granting the motion for class certification and denying the motion for summary judgment. (Appx. pp. 5-6).

On April 28, 2014 Respondent filed a 59(e) Motion requesting a formal order. (Appx. pp. 102-104). On April 29, 2014 Judge Gibbons requested that Petitioner submit a proposed order. Petitioner submitted the order on May 10, 2014. On May 12, 2014,

counsel for Respondent 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 Respondent, the Court issued a formal order on May 29, 2014. (Appx. pp. 7-22). Petitioner'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, Respondent filed another Rule 59(e) Motion for Reconsideration. (Appx. pp. 105-124). In response to the 59(e) Motion, the court accepted Petitioner's amendments to the Order. The revised Order was filed September 16, 2014. (Appx. pp. 23-37).

On September 26, 2014, Respondent filed yet another Rule 59(e) motion. (Appx. pp. 125-129). On October 16, 2014, Respondent also 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 Respondent to appeal with the 59(e) motion still pending before the circuit court. The Court of Appeals ruled with Petitioner and stayed the appeal until DSS's 59(e) Motion had been resolved.

On February 27, 2015 the circuit court held another hearing on the most-recent 59(e) Motion filed by Respondent. Respondent re-argued all class certification issues. The matter of class notice came up specifically and Respondent agreed to provide the personal identifying information on the class members within 90 days of the date of the order. Respondent provided this information without objection, without request for review *in camera,* and without any labeling that the information was confidential or constitutionally protected. There was some limited discussion of confidentiality but it was not contentious and the parties agreed that this would be addressed by the court at the

time of class notice. Counsel for DSS even stated in the record: "We can agree with some language on the protective order." (Appx. p. 240, lines12-13). Yet more than a month later, counsel for DSS wrote the circuit court an email raising for the first time the issue that "many of those children may have no idea that they were adopted . . ." (Appx. p. 257). Counsel for Respondent 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." (Appx. p. 257).

On April 30, 2015 Judge Gibbons issued the formal order again granting the motion for class certification. (Appx. pp. 35-45). The Order noted that the court found "good cause" under S.C. Code 63-9-780(c) 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 left the confidentiality questions raised post-hearing by DSS' counsel's emails for consideration at the time of the class notice. The circuit court action has been stayed since June 2015 and because of the stay there has been no ruling on the form or content of any class notice.

In certifying this class, the circuit court distinguished Gardner v. S.C.Dep't. of Revenue 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. (Appx. 16-17; 32-34). 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. (Appx. pp. 14-18, 30-34, 43-47). 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. (Appx. pp. 13, 29).

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 v. S.C. Dep't. of Revenue 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 v. S.C. Dep't. of Revenue and the case at bar; nor did the Court of Appeals address the argument that South Carolina has no predominance and superiority requirements per Littlefield. Id.

BLH timely petitioned the Court of Appeals 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 v. S.C. Dep't. of Revenue and

the case at bar. The Court of Appeals denied the petition without elaboration. This Court granted Certiorari on November 9, 2018.

ARGUMENTS

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE CLASS

a. Introduction

Circuit courts enjoy broad discretion in deciding whether or not to certify a class action under Rule of Civil Procedure 23(d).[1] South Carolina Appellate Courts "generally defer to the trial court's discretion in granting class certification absent an error of law."[2] Rule 23(d) requires the circuit court to determine whether a class action is to be maintained as soon as practical after the commencement of an action.[3] The court need not consider the merits of the action for the purpose of issuing an order under S.C. Rule 23.[4]

The circuit court properly certified this class because the legality of Respondent's simultaneous, unilateral, and fixed cut to the amount it contracted to pay 1600 plus families may be established—or defeated—concurrently and efficiently.[5] The class is limited to those who had "at least five (5) months of lost benefits due to the cut in the assistance agreement[s] ...."[6] Every element of the shared cause of action can be resolved in one proceeding by the lower court. Under these circumstances a class action is undoubtedly the most effectual way to resolve these prima facie claims for a breach of contract—regardless of whether or not Respondent alleges peculiar and unproven

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[1] Tilley v. Pacesetter Corp., 333 S.C. 33, 42-43, 508 S.E.2d 16, 21 (1998).
[2] 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).
[3] Rule 23(d), SCRCP.
[4] Id.
[5] See Circuit Court Order (Appx. 14-18; 30-34).
[6] Id. at 45-46.

defenses to some of the class claims. The purpose of the abuse of discretion standard is to leave such judgment calls to the trial court.

In a case closely analogous to the one at bar, this Court held that class certification was appropriate in a case involving a complaint of statutory violation by a state agency.[7] In that case, the Court held that class treatment is especially appropriate where the number of potential plaintiffs is large, where there is one main issue of law identical for all plaintiffs, where all injuries resulted from the same act, and where calculation of damages would not be difficult.[8] These factors are all present in this action and accordingly the Littlefield decision is most instructive.

While not binding on this Court, it is also 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.[9] 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.[10] 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.[11] In fact, the South Carolina Rule requires only that the "court find" that the above five elements are met and the following further illustrates why the Court of Appeals erred in overturning the trial court.[12]

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[7] Littlefield v. S.C. Forestry Comm'n., 337 S.C. 348, 355, 523 S.E.2d 781, 784 (1999) (finding the lower court abused its discretion in not certifying the class).
[8] Id.
[9] 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) (Appx. pp. 80-88).
[10] Littlefield at 354–55, 523 S.E.2d at 784.
[11] Melton ex rel. Dutton v. Carolina Power & Light Co., 283 F.R.D. 280, 297-298 (D.S.C. 2012) (citing Rule 23, SCRCP).
[12] Rule 23(a), SCRCP.

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."[13] A Plaintiff meets this test when the claims of the class members share one determinative issue.[14] "Not every issue in the case must be common to all class members."[15] "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."[16]

In this case, the common claim is that Respondent unilaterally breached a form contract it had with 1600 plus recipients of adoption subsidy benefits. The undisputed[17] facts of the case are that this alleged breach of contract 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). Multiple common questions of fact exist as each class member is subject to the same actions by Respondent.

There are also common questions of law. As in Littlefield, Petitioner alleges that a state agency misapplied a statute. Specifically, the allegation is a breach of contract in applying an across-the-board cut of contractually guaranteed benefits. More specifically, the common legal questions are:

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[13] Rule 23(a)(2), SCRCP.
[14] Gardner v. S.C. Dep't. of Revenue at 21-22, 577 S.E.2d at 200-201.
[15] Id.
[16] 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.").
[17] DSS 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." (Appx. p. 220. lines 6-8, 11-12).

1. whether the cut of benefits to adopted children breached the form contract and/or violated the duty of good faith and fair dealing; and
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."[18] There are common questions of law and the common determinative facts have been stipulated to. This is a classic case for class certification.

c. Gardner v. S.C. Dep't. of Revenue is inapposite to the case at bar

Respondent has previously improperly quoted 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 . . ."[19] This is improper because Respondent'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."[20] The Gardner v. South Carolina Dep't of Revenue decision was made because there was a predominate prejudice element requiring individualized inquiry. Specifically, the Court stated: "Plaintiffs cannot prevail unless they establish they were prejudiced . . . ."[21] There is no analogy to this case because

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[18] Hoban v. USLIFE Credit Life Ins. Co., 163 F.R.D. 509, 513 (N.D. Ill. 1995); La Sala v. American Sav. & Loan Ass'n. ("Controversies 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.").
[19] Respondent's Initial Appellate Brief, p. 23, Appx. p. 290
[20] Gardner v. S.C. Dep't. of Revenue, at 22, 577 S.E.2d at 201.
[21] Id.

prejudice is not an element of a simple 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."[22]
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.[23]
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."[24] This is especially so for adhesion contracts.[25]
5. There exists in every South Carolina contract an implied covenant of good faith and fair dealing.[26] This covenant requires that neither party will do anything which will injure the right of the other to receive benefits of the agreement.[27]

No showing of prejudice is required in order for class members in this case to prevail on their single count, breach of contract action against one defendant for breaching form contracts.[28]

The issues in Gardner v. S.C. Dep't of Revenue were also "significantly more complex due to the fact it [was] a bilateral class action," meaning that the plaintiffs sought not only to certify a class of those suing but also to certify a separate class of the

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[22] Sauner v. Pub. Serv. Auth. of S. Carolina, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).
[23] 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 the State could enforce it against parties it contracts with by the parties could not enforce the same contract against the State).
[24] Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010).
[25] 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.").
[26] Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995), reh'g denied, (Dec. 19, 1995).
[27] Shiftlet v. Allstate Ins. Co., 451 F. Supp. 2d 763 (D.S.C. 2006).
[28] Appx. p. 56 ¶¶ 18-20.

defendants being sued.[29] No such defendant class is sought here as there is only one named defendant. For these reasons Gardner v. S.C. Dep't. of Revenue is inapposite to the case at bar.

d. The alleged defenses are not applicable to class certification

Respondent's arguments against commonality essentially ask the court to accept the merit of the various defenses it has plead, which is improper. Rule 23(a), SCRCP, notes that "the claims *or* defenses of the representative parties" must be typical of the claims *or* defenses of the class.[30] 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. The only reason the Rule mentions defenses is in contemplation of a plaintiff seeking to certify a class of defendants being sued not for an analysis of whether plaintiffs' claims are susceptible to alleged defenses requiring individualized inquiry. In fact, in deciding the issue of class certification, the court in Gardner v. South Carolina Dep't of Revenue only mentioned examination of "defendants' anticipated defenses" in the determination of the propriety of a defendant class.[31] This only makes sense given the disjunctive nature of Rule 23 in assessing claims or defenses noted above. In sum, the Court of Appeals in this case mistakenly ruled that affirmative defenses required evaluation when certifying a plaintiff class and this was error.

This contention is further supported by the existence of the residual fund provision in Rule 23(e). This provision further confirms that individual defenses do not

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[29] Gardner v. S.C. Dep't. of Revenue, 353 S.C. at 21 n. 12, 577 S.E.2d at 200 n. 12

[30] Rule 23(a), SCRCP (emphasis added).

[31] Gardner v. S.C. Dep't. of Revenue, 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).

defeat class certification because the 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 an individual class member. If a defendant successfully asserts defenses to individual claims then the claims are not paid, thus creating the residual fund Rule 23(e) envisions. Under the Court of Appeals analysis of Rule 23 the residual fund provision is rendered meaningless, which of course violates the rules of statutory construction.[32]

This trial court properly 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.[33] This reasoning has long-standing, uniform support in South Carolina and other courts across the country including 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."[34] 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

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[32] 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.").

[33] Appx. pp. 17, 33-34.

[34] Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036, 1045, 194 L.Ed.2d 124 (2016).

class certification, however, because the class could present statistical evidence on the hours worked.[35] 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.[36] 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.[37]

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."[38] 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 error to deny class certification based on defenses.[39] Otherwise, a defendant would always be able to defeat class certification by conjuring a meritless defense that requires individualized inquiry and that is precisely what Respondent has done here.

e. Even if alleged defenses are considered they all lack merit

Even assuming it would be proper for the Court to evaluate alleged defenses for purposes of class certification, the purported defenses raised by Respondent all lack merit.

1. Failure to Exhaust Administrative Remedies

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[35] Id.,136 S.Ct. at 1045-1049
[36] Id. 136 S.Ct. at 1046-1047.
[37] Appx., pp 18, 34, 44.
[38] O'Quinn v. Beach Associates, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978) (emphasis added).
[39] Appx. pp. 16, 32.

The contract at issue in this case states that adoptive parents "may appeal" a reduction in the adoption subsidy.[40] 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.[41] The Director is the DSS final decision maker and she made the determination to implement the across the board cut. There was no higher administrative level to which an appeal could be made and there is no requirement that one invoke non-mandatory administrative remedies to redress wrongs that the administrative scheme is not designed to redress.[42]

2. Waiver

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.[43] This Court calls this a waiver of the breach of contract.[44] 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 the children back. They are legally and morally at the mercy of Respondent to keep the contractual promises it 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,

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[40] Appx. p 137, para. V.
[41] Appx. p. 59 ¶ 5.
[42] Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 103, 674 S.E.2d 524, 530 (Ct.App. 2009).
[43] BLH., Shearouse Ad. Sh. No. 17 at 110.
[44] Sterling Develop. Co. v. Collins, 309 S.C. 237, 240-241, 421 S.E.2d 402, 404 (1992).

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.

3. Novation

Novation is another purported defense. The burden of proving novation is on the party asserting it[45] and the party asserting novation must prove "the intention to substitute a new obligation in place of the existing one."[46] It defies all logic to believe that a special needs child or parent who is barely surviving on the benefits provided would intentionally agree to accept less assistance for their food, clothing, medical care and other needs. Accordingly, novation is a meritless defense

4. Implied Consent

Implied consent is not a proper defense to the class breach of contract claim. The only cases cited by Respondent in support of this defense involve oral employment contracts. The implied consent defense in those cases is explicitly limited to employment oral contract wage cases.[47] This is not an oral contract or a wage case and accordingly implied consent is not a proper defense.

5. Renewal agreement, appeal, early termination

Any 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, this is an issue to be addressed at the residual fund stage as there is no requirement for class certification that each class member has suffered the same amount of damages. South Carolina courts have repeatedly acknowledged that

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[45] Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct.App.1990) (citation omitted).
[46] Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 262, 199 S.E.2d 719, 722 (1973).
[47] Cooksey v. Beaumont Mfg. Co., 194 S.C. 385, 9 S.E.2d 790, 792 (1940) (citing 39 C.J. 175) (Noting that the basis for the decisions is a history of employee wage determination).

class certification is appropriate in cases in which the damages were different for each class member.[48] The McGann decision has been cited consistently by this Court in ruling on class certification cases and 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 [not absence of defenses to] the cause of action."[49]

Furthermore, the question of damages is easily answered because Respondent has all necessary information for everyone in the class showing the name, age, and benefits each class member would be entitled to if in fact its actions are determined to violate the law. Based on this Respondent can easily determine the precise damages if there was a renewal, appeal, or early termination.

Finally, even assuming renewal, appeal, or early termination would cause some type of issue to the lower court; any such concern could be remedied by revising the class definition as necessary given the circuit court's authority to redefine the class as appropriate.[50]

6. 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.[51] There is no requirement

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[48] 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); McGann, 340 S.E.2d at 158 (Noting that he 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).

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

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

[51] 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

under the law that a third-party beneficiary 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 claim is really for less than the jurisdictional amount to justify dismissal."[52] The class claim for damages was made in good faith and it controls on this issue. Any speculative argument that perhaps the third-party beneficiaries received the same care despite the cut of benefits is without merit as the damages caused by the breach are tangible, identifiable, and real.

II. 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." (Appx. p. 280). 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

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such third person) (citing Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827, 833 (1997)).

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

constitutional rights not only of the adoptive children but also the adoptive parents and even possibly the biological parents . . ." (Appx. p. 275).

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." (Appx. p. 276). 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.[53] In 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[54] 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, DSS' impulse to hide that a child joined a family through adoption is contrary to DSS policy.

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[53] *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 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).

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

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.[55] The adoption statute requires the adoption hearing, and papers and records of the adoption, including DSS files, remain confidential from public inspection.[56] While protecting the identities of the birth and adoptive family, the statute allows for non-identifying information of the adoption to be disseminated,[57] and allows the identity of the parties to be given with the consent of all.[58] 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.[59]

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.[60] There are many important and justifiable reasons why

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[55] *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).

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

[57] *See* S.C. Code § 63-9-780(d)

[58] *See* S.C. Code § 63-9-780(e)

[59] *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 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.

[60] 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

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.[61]

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 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.[62] 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.[63] 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.[64]

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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 described later in this 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)

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

[62] *See* Chapter 4, Adoption and Birth Parent Services, 415.02, Life Book. *See also* 415(2).

[63] *See* 415(6)(e)

[64] *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).

The preparation of this life book is a DSS policy directive, a policy that carries the weight of law[65] 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.[66]

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, DSS seeks to conjure up a purported constitutional right on behalf of families it does not represent, all in an effort to avoid its contractual obligation to these same families. What is more, DSS espouses 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.

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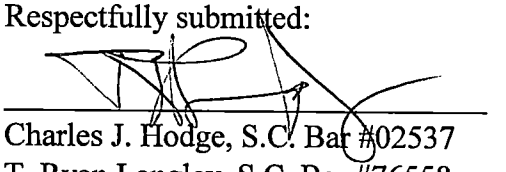
[65] *See* S.C. Code § 63-7-900(D)

[66] *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.)

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."[67] Yet that is precisely what DSS unilaterally decided to do in this case when it chose not to pay 1600 plus families contractually-owed benefits promised to some of our State's most needy. This is not right, and the class should be able to prove it is not right without atomizing the dispute into 1600 or more separate claims. This Court should reverse the Court of Appeals, affirm the certification by the trial court and remand for further proceedings.

Respectfully submitted:



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[67] 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).

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S.C. SUPREME COURT

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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)

Supreme Court Case Number 2018-001351

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

CERTIFICATE OF COMPLIANCE FOR PETITIONER'S BRIEF

This will certify that Petitioner's brief is in compliance with Rule 211, SCACR.

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Dated: 12-7, 2018

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CERTIFICATE OF SERVICE

I certify I have served the Petitioners' Brief, on December 7, 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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