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

REPLY BRIEF OF PETITIONER

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Dated: February 6, 2019

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I. CLASS CERTIFICATION IS PROPER BECAUSE RULE 23 CONTEMPLATES AND ADDRESSES THE ALLEGED INDIVIDUALIZED ISSUES RAISED BY RESPONDENT

Just last year, this Court noted that it is bound to enforce an unambiguous rule of civil procedure and may not change such a rule without invoking its rule-making authority.[1] This same reasoning applies here yet that is precisely what the Court of Appeals did when it read into Rule 23 the federal predominance and superiority requirements. More specifically, the Court of Appeals reversed the class certification finding 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.[2] In so doing the Court of Appeals ignored that the predominance and superiority limits were "intentionally omitted" by the rule's drafters.[3] While Rule 23(a)(2) requires common questions of law or fact, "[t]here is no qualitative or quantitative test in the Rule."[4]

This expansive view of class certification means "the mere existence of individual issues does not defeat class action status."[5] Indeed, the rule itself offers ample ways to resolve individual issues. For example, the rule allows the circuit court to create a post-judgment claims process where individual issues are resolved. Rule 23(d)(2), SCRCP, authorizes the circuit court to notify class members about the "entry of judgment" on

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[1] Pee Dee Health Care, P.A. v. Estate of Thompson, 424 S.C. 520, 531, 818 S.E.2d 758, 764 (2018) (refusing to read a ten-day limit into Rule 11, SCRCP).

[2] 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).

[3] Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 354-55, 523 S.E.2d 781, 783 (1999).

[4] McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 158 (Ct.App.1986).

[5] Id. at 568, 340 S.E.2d at 158.

their behalf, including "notice to absent persons that they may come in and present claims[.]" Rule 23(e)(2), SCRCP, authorizes the circuit court to issue an "order" or "judgment" that "establishes a process for identifying and compensating members of the class" and provides for what happens after this "claims process has been exhausted." The "residual funds" from this process do not exist until "after the payment of all approved class member claims, expenses, litigation costs, attorney's fees, and other court-approved disbursements to implement the relief granted." Rule 23(e)(1), SCRCP.

These provisions allow the court to enter a class-wide judgment for money damages and then notify the absent class members that they may come in and present claims on that judgment. Here, the claims process would require class members to show that they are in fact class members and lost at least $100 due to DSS's unilateral cut in benefits. DSS will be free to ask the court to also allow it to also assert whatever total or partial defenses it may have against a particular class member's claim. If the defense to the particular claim is successful, the court could approve a disbursement or reversion back to DSS of the funds DSS saved by asserting the particularized defense. Under this process, a successful defense would not create "residual funds" that are partially distributed to the Bar Foundation as alleged. Rather, a successful defense would create a reversion of funds to DSS. There are no "residual funds" unless there is money left over after DSS gets the benefit of whatever defenses it successfully raises in the claims process. This is not unusual. Whenever there is a judgment for class-wide money damages, there must be a process for absent class members to identify themselves and resolve the amount of their individual damages. Special masters or referees are often

appointed to preside over this process.[6] Of course, the special referee appointed to preside in the proceedings could also resolve any individual defenses DSS elects to raise.

Rule 23(d), SCRCP, also provides class certification orders "may be conditional and altered or amended before the decision on the merits." This allows the court to bifurcate the liability issues in the prima facie case from the individual damages and defenses DSS may assert. The court may even elect to decertify the class after the liability-only trial.[7] Under this procedure, the court would notify the absent class members they could pursue their claim for damages subject to DSS's individual defenses. The benefits of this procedure are manifest and the purpose for class actions in the first place. Namely, the Courts would not be burdened with the inefficiency of class members re-litigating the same prima facie case that is clearly common across all members of the class.

The last and perhaps easiest way to handle the individualized issues DSS is raising is to simply enforce the class definition. As it stands now, absent persons are not class members unless they have or had a binding subsidy agreement with DSS and lost at least $100 from DSS's cut. If absent members did not suffer at least $100 in damages from the cut—for whatever reason, including any of the individual issues DSS raises—they are simply not part of the class.

If DSS wanted further assurance on this, it could move to exclude from the class those who DSS claims lack binding contracts or who have individualized issues. At that

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[6] See In re Visa Check/Mastermoney Antitrust Litig. v. Visa, 280 F.3d 124, 141 (2d Cir. 2001) (Sotomayer, J, citing 1 Newberg & Conte, NEWBERG ON CLASS ACTIONS § 4.26 at 4-91 to 4-97); Brooks v. GAF Materials Corp., 301 F.R.D. 229, 234 n. 7 (D.S.C. 2014) (explaining how class-wide damages would be determined at trial, followed by a proceeding before a special master).

[7] In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d at 141.

point, DSS could explain how its defenses apply and identify which class members purportedly waived or consented to the subsidy cut or who chose to pursue administrative remedies.[8] If in fact the alleged defenses are not conjured for the purpose of avoiding class certification, DSS could easily identify the class members presenting particularized issues as it has volumes of information on every single class member. If DSS made such a showing, the circuit court could then consider its options how to handle the individual issues that may have merit.

This is how the First Circuit handled a similar issue. In Smilow v. Southwestern Bell Mobile Sys., a putative class sued a wireless telephone provider for breaching a form contract.[9] The district court decertified the class because some class members purportedly waived the right to seek damages from the breach.[10] On appeal the First Circuit reversed and reinstated the class action, holding that the common issues surrounding the breach of the form contract predominated "[e]ven in the unlikely event that individual waiver determinations prove necessary."[11] The Court noted, "Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members ... If, moreover, evidence later shows that an affirmative defense is likely to bar claims against at least some class members, then a court has available adequate procedural mechanisms [,]" including creating subclasses of those with potentially barred claims or excluding them from the

[8] See Littlefield, 337 S.C. at 354, 523 S.E.2d at 784 (holding the circuit court could overcome an objection to the class by redefining the class).

[9] Smilow v. Southwestern Bell Mobile Sys., 323 F.3d 32 (1st Cir. 2003),

[10] Id. at 36-37

[11] Id. at 39.

class altogether.[12] The same is true here. The First Circuit also aptly observed that there is even less reason to decertify a class where the possible existence of individual issues is a matter of conjecture.[13] Just as in Smilow, this class action alleges breach of a form contract. There, just as here, the defendant claimed individual issues existed for some of the class members. The Petitioners urge the Court to reach the same conclusion; albeit under a less stringent standard and hold that any alleged particularized issues are no more than allegations that can be addressed through the foregoing mechanisms. Such a ruling is consistent with the long-standing class certification law of this state that a single common issue is sufficient to implement the efficiencies of class-wide dispute resolution even in the presence of alleged individualized issues.[14]

II. THERE IS NO CONSTITUTIONAL RIGHT "NOT TO KNOW" ABOUT ADOPTION STATUS, BUT EVEN IF THERE WERE, THIS CLASS ACTION DOES NOTHING TO INFRINGE ANY ALLEGED RIGHT

In an effort to avoid its contractual obligations, DSS seeks to extrapolate from a statutorily protected privacy right (protecting the identity of the parties in an adoption), a never-before-known constitutional right (the right for an adult adoptee to be shielded from his/her adoptive status). As BLH demonstrated in its Initial Brief, none of the cases cited by DSS for this alleged right to privacy involves such an expanded constitutional right; instead, the cases cited by DSS protect the *identities* of the parties

[12] Id. at 39-40.

[13] Id. at 40.

[14] McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) (Rule 23 "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. ... [Rather the question is: are the issues] 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.").

from each other, especially the privacy of birth parents. Birth parents are in no way implicated by this proposed class-action; they are never named in any notice.

And as is further explained in the BLH Initial Brief, this newfound[15] DSS impulse to shield from a child that he/she joined a family through adoption is contrary to DSS policy and practice. The preparation of a "life book" is a DSS policy directive, a policy that carries the weight of law[16] and firmly embraces the right of children to know of their adoptive status and birth history. Further, the adoption statute envisions the child to be an active and fully aware participant in the adoption process.[17]

BLH does not know whether 100% of adoptees, most of whom are adults,[18] are aware of their adoptive status; this is an unknowable statistic. Neither should DSS opine that "many" children in the class are not aware they were adopted. (App. p. 280). Given the age of foster children, it is likely, however, that many more than 97% of adoptees

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[15] DSS now takes umbrage at the prospect of disclosing to BLH the identities of all adopted children who meet the class definition (Respondents brief p. 15). And yet, DSS doth protest too much, as they have already turned over these names and addresses. *See* Petitioners Statement of the Case, p. 9, noting that on February 27, 2015 DSS was ordered to provide this information without objection, without request for review *in camera*, and without any labeling that the information was confidential or constitutionally protected. The parties agreed that confidentiality issues would be addressed by the court at the time of the class notice.

[16] *Department of Social Services Human Services Policy and Procedures 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.)

[17] *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 also* 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.

[18] DSS correctly points out that the vast majority of these adopted children have now reached the age of majority. see Respondent brief footnote 6, noting that the class-action applies only to adopted children who have been adopted by June 20, 2002, which is more than 16 years ago, meaning that only those children that were less than two years of age at that time could still be minors.

know that they were adopted.[19] Whatever this unknowable number may be, this conjecture should not allow DSS to usurp millions of dollars from the very families they claim to now protect. Even if this Court were to accept the DSS invitation to find a constitutionally protected right of adult adoptees to be shielded from their adoptive status, the notice provisions of SCRCP, Rule 23 are up to the task.

SCRCP, Rule 23(d) envisions the trial court to impose such terms on a notice "as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." Unlike most class-actions, this Defendant (DSS), has at-the-ready the names and addresses of each and every adoptive family who meets the class definition, a fact never challenged by DSS. Certainly, with the guidance of this Court, the trial court can fairly protect all involved, even if this Court finds a privacy right worthy of protection. For instance, minor adoptees may receive notice through the adoptive parents. For adoptees who have reached majority, notice could be sent to their adoptive parents, who could, in this notice, be empowered to disregard the notice, if such notice would infringe on any perceived confidentiality right of the adoptive family, or to pass on the notice to their adult child. In addition, or instead, the court may order a notice by publication to adoptees who meet the class definition. This publication would infringe on no constitutional right. After all, these adoptees do not know what they do not know -

[19] The United States Department of Health and Human Services reports that almost all adopted children ages five and older (97%) know they were adopted. This statistic is based on a nationally representative survey of adoptive families across all adoption types, private infant adoption as well as foster care adoption. The percentage of foster care children who know about their adoption is certainly higher than this 97%, given the fact that foster children are older at the time of their placement than children placed through private infant adoption. 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)

a notice by publication would alert adoptees who know of their adoptive status, but would in no way infringe upon unaware adoptees.

To sum up, whether a constitutionally protected right is recognized by this court or not, DSS should not be allowed to avoid its contractual obligation to families. Notices – whether to the adoptee, the adoptive parents, or by publication – can be appropriately tailored and crafted.

III. PETITIONER HAS NOT ABANDONED ANY ARGUMENTS

DSS first alleges Petitioner abandoned the issue of a circuit court's discretion to certify a class. DSS is mistaken. Among a number of other references, the very first argument section of Petitioner's Initial Brief addresses the circuit court's discretion in whether or not to certify a class.[20]

Second, DSS alleges Petitioner has abandoned its arguments that the Court of Appeals improperly adopted predominance and superiority requirements into its opinion. Again, DSS is mistaken. The Statement of the Case clearly draws a contrast between the proper legal analysis employed by the circuit court rejecting any predominance requirement and the erroneous analysis by the Court of Appeals incorporating predominance and superiority requirements.[21] Indeed, the majority of Petitioner's commonality argument is spent analyzing the interplay between Littlefield and Gardner and the Court of Appeals improper citation to Gardner for the predominance requirement.[22]

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[20] Petitioner Initial Brief, pages 13-14.

[21] Id. at pages 11-12.

[22] Id. at pages 14-18.

Third, DSS alleges Petitioner has abandoned its argument that the Court of Appeals created an unnecessary tension between Gardner and Littlefield. Again, the majority of Petitioner's commonality argument is spent analyzing the interplay between Littlefield and Gardner and the Court of Appeals misapprehension of Gardner.

CONCLUSION

Throughout this litigation DSS has sought refuge in procedural arguments, in its effort to avoid facing the substantive fact: DSS unilaterally breached its own contracts with some of our state's most needy. This litigation has been pending since 2011, laboring under the weight of DSS's procedural maneuvers. Fortunately, this Court has the moment and authority to upend this wrong by allowing the certification of a simple breach of contract class action. Petitioner respectfully requests that the Court do so by upholding the grant of class certification and remanding to the circuit court for further proceedings.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE FOR PETITIONER'S BRIEF

This will certify that Petitioner's Reply Brief is in compliance with Rule 211 SCACR.

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South Carolina Department of Social Services, Respondent t.

CERTIFICATE OF SERVICE

I certify I have served the Petitioners' Brief, on February 6, 2019, 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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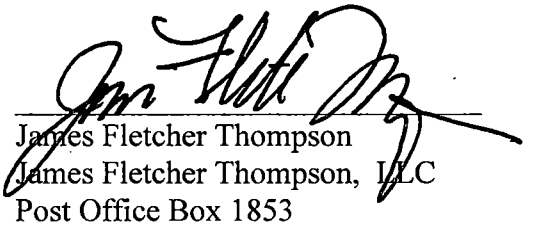

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