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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000190-ME
AND
NO. 2013-CA-000956-ME

HAYNES TRUCKING, LLC; AND L-M ASPHALT PARTNERS, LTD, D/B/A ATS CONSTRUCTION — APPELLANTS

APPEALS FROM FAYETTE CIRCUIT COURT
v. HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 10-CI-03986

JAMES MELVIN HENSLEY, DANNY LAINHART, JAMES D. FETTERS, TONY MITCHELL, WILLIAM ABNEY, AND CHARLES BUSSELL ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; AND HARTFORD FIRE INSURANCE COMPANY — APPELLEES

AND NO. 2013-CA-000329-ME

HARTFORD FIRE INSURANCE CO. — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 10-CI-03986

JAMES MELVIN HENSLEY, DANNY LAINHART, JAMES D. FETTERS, TONY MITCHELL, WILLIAM ABNEY, AND CHARLES BUSSELL ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED — APPELLEES

AND NO. 2013-CA-000978-ME

HARTFORD FIRE INSURANCE CO.;
HAYNES TRUCKING, LLC;
AND L-M ASPHALTPARTNERS, LTD,
D/B/A ATS CONSTRUCTION APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
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ACTION NO. 10-CI-03986

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WILLIAM ABNEY, AND CHARLES BUSSELL,
ON BEHALF OF THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED APPELLEES

OPINION AND ORDER
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Haynes Trucking, LLC and L-M Asphalt Partners, Ltd., d/b/a/ ATS Construction appeal the following orders entered by the Fayette Circuit Court: an order certifying class dated January 23, 2013; an amended order certifying class dated May 23, 2013, and an order dated December 2, 2011, denying partial summary judgment. Hartford Fire Insurance Co. also appeals the orders certifying class.

These four consolidated appeals emerge from a class-certification procedure in a wage and hour action pertaining to the purported nonpayment of prevailing wages, benefits, and overtime in connection with public works projects in Kentucky. The Appellants maintain, among other things, that the Fayette Circuit Court improperly certified a diverse class of truck drivers. In addition, several motions by both Appellants and Appellees were passed by our Court to this merit panel including Appellees' motion to dismiss the appeal by the Appellants of the trial court's order denying the motion for partial summary judgment.

All of the outstanding procedural motions were dismissed at oral arguments as moot. Furthermore, we dismiss the Appellants' appeal of the denial of the partial summary judgment as untimely. Finally, after careful consideration of the record and the arguments, we vacate and remand the certification order with directions to decertify the class.

FACTUAL BACKGROUND

James Melvin Hensley and other named plaintiffs ("Hensley et al.") brought this class action under Kentucky Rules of Civil Procedure (CR) 23 to recover back pay and statutory damages as authorized under Kentucky Revised Statutes (KRS) 337.505 to 337.550. They maintain that they, as named plaintiffs,

and other class members were not paid prevailing wages, benefits, or overtime in connection with their employment on public work projects in Kentucky between 1995 and 2010. Hensley and the other plaintiff-appellees worked as truck drivers for Haynes Trucking, LLC ("Haynes Trucking") on various public work projects. According to them, they performed on-site labor at the projects including milling work, rock laying, earth moving, and paving without receiving the mandated prevailing wages.

L-M Asphalt Partners, Ltd. d/b/a ATS Construction ("ATS") was the general contractor, and Haynes Trucking provided trucking services. Beginning in 1995, Haynes Trucking and ATS had a number of contracts to transport material to the site of public work projects in Lexington, Fayette County, Kentucky. Four public work projects, primarily for the Commonwealth, are referenced by Hensley, et al. throughout the deposition testimony. The projects are the South Limestone/Streetscape project, the Loudon Avenue project, the Kentucky Horse Park project, and the Bluegrass Airport project.[1] In addition to these public works projects, other projects, such as the work on Interstate 75, are discussed by the named plaintiffs. It is unclear whether some of the projects were federally funded public work projects.

[1] Drivers for Haynes Trucking logged time on South Limestone/Streetscape project between 2007 and 2010; Loudon project between 2007 and 2008; Kentucky Horse Park project between 2009 and 2010; Bluegrass Airport at various times in 2006, 2009, and 2010.

Nonetheless, Kentucky law provides that workers are to receive prevailing wages and benefits for the construction of public works within the Commonwealth. Hartford Fire Insurance, Co. ("Hartford Insurance"), a named co-defendant in the underlying action, was surety for the public works' performance bonds. It too argues that the trial court's class certification was improper.

ATS regularly bids on general contracts for public road construction, paving, and resurfacing projects in Kentucky. ATS uses Haynes Trucking as a vendor of trucking services for these projects although Haynes Trucking is not listed as a subcontractor in the bid packages. Hence, there are no project-by-project written subcontracts between ATS and Haynes Trucking. Hauling services are provided by a written hauling agreement between the parties, and the written agreement applies to all ATS projects.

Haynes Trucking provides hauling services on both a by-the-haul basis and a man-plus-truck per hour basis. The hauls are recorded on a green Haynes Trucking time card, which provides a variety of information. On the man-plus-truck per hour basis, the customer is invoiced a set amount and is recorded on a white Haynes time card. A driver may work both a by-the-haul and a man-plus-truck per hour basis on the same day. Based on Haynes Trucking's business practices, the time cards have been maintained back to 2004.

Appellees allege that the putative class consists of Haynes Trucking drivers who drove for Haynes on ATS public work projects and worked on the site of the projects but were not paid prevailing wages or benefits. From 2005 to 2010,

Haynes Trucking had an average of 60 drivers per year. Nonetheless, it is unclear which truck drivers performed the majority of the work or, for that matter, any work on the public work projects.

PROCEDURAL BACKGROUND

The action commenced on July 9, 2010, when Hensley et al. filed their class action complaint in Fayette Circuit Court. In the response to discovery requests, they initially stated that the class "consists of any driver that drove for Haynes on-site at a public works project within the last five (5) years that was not paid the prevailing wage." Further, in the complaint, Hensley, et al. maintains that the class had an excess of seventy individuals.

An amended class action complaint was filed on February 14, 2011. The amended complaint added an additional class representative and expanded the period of the purported claims from five years to fifteen years, asserting that in addition to the violations of the prevailing wage act, the putative class members had breach of contract claims based on a third-party beneficiary theory. Further, the amended complaint changed the definition and scope of the putative class by stating the plaintiffs were "a putative class of individuals who work or worked as dump truck drivers and in other construction-related trades . . . ."

On July 8, 2011, Haynes Trucking and ATS jointly filed a motion for partial summary judgment arguing that the limitations period applicable to Hensley and the other plaintiff-appellees' claims was five years rather than the fifteen years because the Appellees are not third-party beneficiaries on any of the public works

contracts, and thus, the claims for breach of contracts, which has a fifteen-year statute of limitations, should be dismissed with prejudice. On December 2, 2011, the trial court denied Haynes Trucking and ATS's motion for partial summary judgment.

On March 1, 2012, Hensley et al. filed the motion for class certification. After oral arguments on December 21, 2012, the Fayette Circuit Court entered its first order certifying the class action on January 23, 2013. Thereafter, Haynes Trucking and ATS filed a joint notice of appeal[2] from the original certification order and the denial of the partial summary judgment.

Hartford Insurance filed a separate notice of appeal of the certification order, but unlike Haynes Trucking and ATS, Hartford Insurance did not appeal the denial of the partial summary judgment. Additionally, on that same day, besides the notice of appeal, Hartford Insurance filed a CR 60.02 motion asking the trial court to clarify its class certification order. Subsequently, our Court held the original appeal in abeyance for thirty days to allow the trial court to consider the CR 60.02 motion.

On May 10, 2013, the trial court granted Hartford Insurance's CR 60.02 motion and clarified that while Hartford Insurance was a co-defendant, it should not have been included as a class defendant in the original order certifying the class. Next, the trial court entered an amended class certification order on May

[2] Haynes Trucking and ATS had originally named Hartford Insurance as an appellee. But the second notice of appeal by Hartford Insurance identified Haynes Trucking and ATS construction as co-Appellants.

23, 2013, clarifying that the class defendants in the case consisted solely of Haynes Trucking and ATS.

On May 31, 2013, Haynes Trucking and ATS filed a joint notice of appeal for the following orders: the trial court's December 2, 2011order denying Haynes Trucking and ATS's joint motion for partial summary judgment, the January 23, 2013 certification order, and the May 23, 2013 order. In addition, they are now contesting the trial court's jurisdiction. Thereafter, Haynes Trucking and ATS made a motion to consolidate this appeal, designated No. 2013-CA-000956-ME, with No. 2013-CA-000190, and consequently No. 2013-CA-000329-ME.

Likewise, on June 3, 2013, Hartford Insurance reasserted its first appeal and filed a second notice of appeal for both the original and amended class certification orders. On June 20, 2013, Hartford Insurance filed a motion with our Court to consolidate Nos. 2013-CA-000190-ME and 2013-CA-000329-ME.

To summarize the appeals - the original and amended orders of class certification led to four separate appeals to the Court of Appeals: two joint appeals by the class defendants-Appellants – Haynes Trucking and ATS (Nos. 2013-CA-000190-ME and 2013-CA-000956-ME) and two by Hartford Insurance (Nos. 2013-CA-000329-ME and 2013-CA-000978-ME).

Hartford Insurance moved to consolidate its two appeals of the trial court's January 23, 2013 and April 25, 2013 orders, which this Court granted "to the extent that the appeals will be considered on their merits by the same panel. Then, following the trial court's amended certification order, Haynes Trucking and

ATS moved to consolidate all appeals. On July 25, 2013, our Court entered an order, which stated:

> The Court orders that the motion to consolidate these appeals to be granted. Appeal Nos. 2013-CA-000190-ME and 2013-CA-000956-ME are consolidated for all purposes, including briefing. Appeal Nos. 2013-CA-000329-ME and 2013-CA-000978-ME are likewise consolidated for all purposes including briefing.

STANDARD OF REVIEW

The standard of review is different depending on the issue for our consideration. Subject matter jurisdiction is a question of law, and hence, reviewed *de novo*. *St. Joseph Catholic Orphan Society v. Edwards*, 449 S.W.3d 727, 734 (Ky. 2014). Likewise, the standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. CR 56.03. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

A trial court's decision certifying a class is subject to a very limited review and will be reversed only upon a strong showing that the trial court's decision was a clear abuse of discretion. *Sowders v. Atkins*, 646 S.W.2d 344 (Ky. 1983); *Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004). Under this standard, an appellate court will reverse if it is determined that "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal

principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

ISSUES

Haynes Trucking and ATS delineate the issues for our review as whether the trial court had subject matter jurisdiction to rule on class certification under CR 23; whether Hensley et al. satisfied the legal requirements under CR 23 for certification; and, whether the five- or the fifteen-year statute of limitations is applicable, that is, whether the third-party beneficiary theory is valid.

Similar to the arguments proffered by Haynes Trucking and ATS, Hartford Insurance implies that Hensley et al. has not satisfied the legal requirements for class certification under CR 23. Hartford Insurance maintains that our Court should reverse the class certification decisions of the trial court because the record does not support certification for six reasons: (1) the class is not ascertainable, (2) numerosity is not satisfied, (3) commonality is not satisfied, (4) common questions of law and fact do not predominate, (5) class damages are not susceptible to common class-wide proof, and (6) the class is unmanageable due to the individualized inquiries required.

ANALYSIS

We begin by noting that although the appeal is interlocutory, jurisdiction to entertain the appeal is provided by CR 23.06. Moreover, we highlight that "it is well established that Kentucky courts rely upon Federal caselaw when interpreting a Kentucky rule of procedure that is similar to its federal

counterpart." *Curtis Green Clay Green, Inc. v. Clark*, 318 S.W.3d 98, 105 (Ky. App. 2010). Federal Rules of Civil Procedure (FRCP) 23 is the federal counterpart of CR 23 and is similar. Thus, federal case law is persuasive in interpreting CR 23. Initially, the Court addresses the issue of subject matter jurisdiction.

I. Subject matter jurisdiction

In the present case, Haynes Trucking and ATS argue that the trial court lacked subject matter jurisdiction over the claims of Hensley and the other putative class members. The basis of the argument is that, in general, the claims of individual class members may not be aggregated to satisfy the jurisdictional minimum amount in controversy. *Line v. Astro Mfg. Co.*, 993 F. Supp. 1033, 1039 (E.D. Ky. 1998). Haynes Trucking and ATS conclude that rule against aggregation requires dismissal of litigants whose claims do not satisfy the jurisdictional minimum. *Lamar v. Office of Sheriff of Daviess County*, 669 S.W.2d 27, 31 (Ky. App. 1984)(*citing Zahn v. International Paper Company*, 414 U.S. 291, 945 S.Ct. 505(1973). Therefore, they proffer that the trial court had no jurisdiction to certify the class and the action should be dismissed.

In Kentucky, class actions involving parties with separate and distinct claims that involve common questions of law or fact are subject to the rule that each plaintiff in the class must show that its individual claim exceeds the jurisdictional amount. *See Kentucky Dept. Store, Inc. v. Fidelity–Phenix Fire Ins. Co. of N. Y.*, 351 S.W.2d 508, 509 (Ky. 1961). In such cases, the critical question

is whether in a "spurious" class action the claims of the members of the suing class may be aggregated in determining jurisdictional amount. They cannot.

However, a class action is allowed to proceed where the separate claims of the different parties are below the jurisdictional amount if the relief to be granted is such that the parties have a common and general interest in its enforcement. *See Batman v. Louisville Gas & Electric Co.*, 187 Ky. 659, 220 S.W. 318, 320 (Ky. App. 1920). Given that the issue here is the enforcement of the prevailing wage and benefit act, the parties here do have a common interest in its enforcement.

Most significant, however, is Haynes Trucking and ATS conceding that the Appellees provided in their "Reply in Support of Motion for Class Certification," which was attached to their brief, that one class member, William Abney, met the jurisdictional amount.[3] In fact, *Lamar* only requires that one class member satisfy the jurisdictional amount. It states:

> We specifically hold, therefore, with respect to CR 23, that the sums of the individual claims of the respective parties may not be aggregated in order to meet the jurisdictional amount requirements for an action to be brought in the circuit court and be maintained as a class
>
> action **where none of the individual claims is equal to or exceeds the statutory jurisdictional amount**.

Lamar, 669 S.W.2d at 31 (emphasis added).

[3] Although, we are aware that Appellants later deny this concession in their reply brief.

Here, William Abney's claim was sufficient to invoke jurisdiction. Since a trial court lacks subject matter jurisdiction to certify a class only when "none of the individual claims is equal to or exceeds the statutory jurisdictional amount," in the case at bar, one class representative alleged damages exceeding the jurisdictional minimum. *Id*. Thus, the trial court had jurisdiction to certify the class.

II. Prevailing wage law

The Davis-Bacon Act, 40 U.S.C. § 3141-3142, provides specific requirements for when prevailing wages must be paid. The Kentucky Act (KRS 337.505-337.550) mirrors the federal act. KRS 337.510(2) stipulates, among other things, that all public work contractors and subcontractors pay employees, performing work under a public works contract, a prevailing hourly rate of wages. Federal and state regulations set forth distinct criteria that determine precisely the nature of the activities that constitute "prevailing wage-eligible" work under public construction contracts.

The primary issue in this case is whether the truck drivers were entitled to the prevailing wage scale in the work that they performed for Haynes Trucking and ATS. In presenting this issue, Hensley et al. moved for certification as a class, which the trial court granted. Appellants maintain the trial court erred in its certification of the class.

One question posed specifically under KRS Chapter 337 was whether class actions may be maintained for prevailing wage actions. Two recent

Kentucky cases, both of which have been depublished, propose that under KRS 337.385, wage and hour cases are not permitted as class actions. In *Toyota Motor Mfg., Kentucky, Inc. v. Kelley*, 2013 WL 6046079 (Ky. App. 2013), our Court remarked *in dicta* that while it was not necessary for them to reach the merits of the argument as to whether KRS 337.385(1) permits class actions, it agreed with Toyota Motor Manufacturing that the text of KRS 337.385(1) provides a clear expression of intent that class actions are not permitted. *Id*. at 9.

The second case is *McCann v. Sullivan University System, Inc.*, 2015 WL 832280 (Ky. App. 2015), which was unpublished by operation of CR 76.28(4), when the Kentucky Supreme Court granted discretionary review. In this case, our Court expressly held the Kentucky Wage and Hour actions may only be brought by "one (1) or more employees for and in behalf of himself, herself, or themselves." KRS 337.385(2). In other words, the Court prohibited class actions in wage and hour cases.

Regarding actions to recover unpaid wages or liquidated damages, the statute states in pertinent part, "[s]uch action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves." KRS 337.385(2). This language appears to limit wage and hour actions to the individuals and appears to obviate class actions in such disputes.

Nonetheless, the case here involves a prevailing wage dispute. While both of these causes of action are found in KRS Chapter 337, the language for

prevailing wage actions is described in KRS 337.550(2), where it says "[a] laborer, workman, or mechanic may by civil action recover any sum due him or her as the result of the failure of his or her employer to comply with the terms of KRS 337.505 to 337.550." This language does not have the limiting language of KRS 337.385. Further, although overtime is an issue in the case at bar, overtime is discussed in the prevailing wage section. KRS 337.540(3) provides that "[a]ny laborer, workman, or mechanic worked in excess of eight (8) hours per day or forty (40) hours per week, except in cases of emergency shall be paid not less than one and one-half (1-1/2) times the basic hourly rate of pay as defined and fixed under this chapter for all overtime worked, and each contract with any public authority for the construction of public works shall so provide." Therefore, issues of overtime in prevailing wage disputes are governed by the specific language of prevailing wage statutes.

Because the certification of this particular class action will be decided based on an analysis of whether the trial court abused its discretion in certifying the class, it is not necessary for us to make a pronouncement as to whether class actions are permitted under KRS Chapter 337.505 – 337.550.

III. Certification of the class action

Prerequisites for certification of a class action

A decision to certify a class is a procedural question, and the prerequisites necessary for the certification of an action as a class action are set forth in CR 23.01:

> one or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

In sum, the requirements for class certification are numerosity, commonality, typicality, and adequacy of representation of the class representatives and the counsel. Furthermore, the movant seeking certification bears the burden of proof. *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).

Here, the Appellants argue that the evidence proffered to support class certification was merely self-serving and based on manufactured pleadings and affidavits, which relied on information provided by the named plaintiffs who later contradicted it during their depositions.

1. Numerosity

Hensley et al. must demonstrate that the putative class is so numerous that joinder of all members is impracticable. CR 23.01(a). To ascertain whether the number of parties is large enough to render it impracticable to join all parties is not dependent upon any specific number but upon the circumstances surrounding the case. Therefore, "[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *General Tel. Co. of the Northwest, Inv. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 330, 100 S. Ct. 1698, 1706, 64 L. Ed. 2d 319 (1980)).

In both certification orders, the trial court found that the class had at least 139 members, and hence, joinder of all members was not practicable. However, keeping in mind that Hensley et al. bear the burden of proof to establish the need for a class action, we observe that it is difficult to assess from the record that the class had 139 members. Indeed, Hartford Insurance proffered that based on the depositions of the named plaintiffs, only a core group of fifteen drivers may have prevailing wage claims. Moreover, while Haynes Trucking provided that for each year it employed an average of sixty drivers, it agreed with Hartford Insurance's assertion that perhaps only fifteen drivers performed the majority of work at the pertinent public work sites. Confusing the issue, too, is that some of the projects described in the deposition testimony were not the identified public works projects. For example, named plaintiffs talked about working on Interstate 75.

In their deposition testimony, Hensley et al. and Danny Lainhart identified the core group as a separate and distinct group. Abney and James D. Fetters testified that the stockpilers worked for the quarry, not ATS, and thus, they were not entitled to prevailing wages. Hensley et al. and Lainhart agreed with this proposition. Apparently, three groups exist – core group drivers, stockpilers, and "call-in" drivers. The Appellants assert that once the improperly included members are removed, the remaining proposed class only has fifteen members. They aver that this number does not satisfy the numerosity requirement and would not be impracticable to join.

2. Commonality

To address commonality, our Court must review whether questions of law or fact are common to class representatives and class members. CR 23.01(b). A complete identity of facts relating to all members is not necessary as long as there is a common nucleus of operative facts. *Wiley v. Adkins*, 48 S.W.3d 20, 23 (Ky. 2001). But the plaintiff must demonstrate that putative class members have suffered the same injury and not just violation of the same provision of the law. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

In its order, the trial court determined that the questions of law and fact were common to the class. It stated "all liability issues are common to the class, including whether the defendants were required to pay prevailing wages to truck drivers for the time spent on the public works projects."

The Appellants dispute the commonality of the issue because each member of the class requires an individualized evaluation to ascertain liability. In *Dukes*, the Supreme Court explained commonality as follows: "[t]heir claims must depend upon a common contention. . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551.

In fact, *Dukes* quoted the New York University Law Review article, which stated, "[d]issimilarities within the proposed class are what have the

potential to impede the generation of common answers." *Id*. (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 132 (2009)).

While claims must depend upon a common contention—for example, the assertion of failure to follow the prevailing wage scale, that common contention must be of such a nature that it is capable of class-wide resolution. Class-wide resolution means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. *Dukes*, 131 S.Ct. at 2551. Therefore, "what matters to class certification … is not the raising of common 'questions'—even in droves—but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." Nagareda, *supra* at 132.

In the instant case, Appellants proffer that while the claims do arise from a common nucleus of operative facts, the answers to these claims require an individualized assessment that will not be the same or dispositive of each member's claims. Appellees do not disagree with this contention as it relates to damages. Consequently, Appellants state that prerequisite for commonality is not met.

3. Typicality

As described in CR 23.01(c), typicality is when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." In the situation at hand, while the Appellees argue that all class

representatives are entitled to the prevailing wage, the Appellants again maintain that because the ultimate issue of liability will require an individualized evaluation as to each driver's duties, time on the job, time on the site, and date of the work among other things, the claims of the representative class could be quite different from each other, as well as the additional unnamed putative class members.

4. Adequacy of representation

The final prerequisite for class certification requires that Hensley et al. establish under CR 23.01(d) that "the representative parties will fairly and adequately protect the interests of the class." The adequacy inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–158, n. 13, 102 S.Ct. 2364, 2370–2371, n. 13, 72 L.Ed.2d 740 (1982). Indeed, "[a] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26, 117 S. Ct. 2231, 2250-51, 138 L. Ed. 2d 689 (1997)(quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977).

Accordingly, for this requirement to be met, the class representatives must meaningfully participate, understand the claims, and understand their roles as advocates for the absent class members. Haynes Trucking and ATS dispute the ability of Hensley et al. to do so. Noting that the named plaintiffs' deposition

testimony shows that they have made no effort to investigate other putative class members' claims or to assess whether there is a basis for substantive liability on a class-wide basis, Haynes Trucking and ATS suggest that the named plaintiffs do not adequately represent the class. However, given the commitment of the named plaintiffs plus the qualifications and experience of legal counsel, the representation is adequate.

In sum, however, after reviewing the legal underpinnings of CR 23.01 and the evidence on the record, we hold that the trial court abused its discretion in determining that Hensley et al. satisfied the prerequisites for a class action. We conclude that based on the inchoate and insufficient nature of the evidence, procedural problems exist as to numerosity, commonality, and typicality. A class may only be certified if the trial court is satisfied, after rigorous analysis, that the prerequisites of the pertinent civil rules have been met. *Beattie v. CenturyTel Inc*., 511 F.3d 554, 560 (6th Cir. 2007). To perform a rigorous analysis of CR 23.01 prerequisites, a trial court must conduct a "probe behind the pleadings" which touches upon the merits. *Dukes*, 131 S.Ct. at 2550-51. Such a probe was not done in the case at bar.

Significantly, the trial court abused its discretion in certifying the class because Hensley et al. did not satisfy the requirement for commonality. The rationale behind commonality is that where common questions of fact and law exist, a class action saves the time and resources of the trial court by permitting an issue common to all the parties to be litigated in an economical fashion. *General*

Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 155, 102 S.Ct. 2364, 2369, 72 L.Ed 2d 740 (1982)(citations omitted). Here, the factual underpinnings of the case are not closely aligned, and therefore, the trial court abused its discretion in determining that the commonality prerequisite was satisfied.

Accordingly, we vacate the class certification order of the Fayette Circuit Court and remand with directions to decertify the class.

IV. Appeal of the denial of partial summary judgment

This issue emanates from Hartford Trucking and ATS's joint motion for partial summary judgment on July 8, 2011. They sought partial summary judgment in the issue regarding the statute of limitations. They argued that the limitations period applicable to the claims of the named plaintiffs and the asserted class herein is five (5) years and that any other claims are time-barred. Further, Haynes Trucking and ATS sought a trial court ruling that the named plaintiffs and members of the asserted class could not be considered third-party beneficiaries of the public works contracts.

On December 2, 2011, the trial court denied Haynes Trucking and ATS's motion for partial summary judgment. As noted by Appellees, the appeal of the partial summary judgment was based on a judgment that was not "final and appealable." Further, Appellees point out that the appeal was not timely since it was filed nearly forteen months after the order. In light of this motion, Hensley et al. filed a motion to dismiss the appeal, which was passed to the merits panel.

Because a denial of a motion for partial summary judgment is interlocutory, and thus not final and appealable, we dismiss the appeal of the denial of the summary judgment. Moreover, given that we have ordered the decertification of the class, the issue is moot.

For the aforementioned reasons, it is ordered that the motion to dismiss Haynes Trucking's appeal of the Fayette Circuit Court's denial of partial summary judgment is granted.

STUMBO, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

KRAMER, JUDGE, CONCURRING IN RESULT ONLY: I agree with the majority's decision to direct decertification. However, in my view we do not need to delve into an analysis of the elements of class actions because KRS 337.550(2) patently does not permit class action suits at all.

No Kentucky case law supports a conclusion to the contrary. None exists. My view, however, is based upon a comparison of KRS 337.550(2) with two other provisions in KRS Chapter 337. To review, KRS 337.550(2) provides as follows:

> (2) *A laborer, workman, or mechanic* may by civil action recover any sum *due him or her* as the result of the failure of his or her employer to comply with the terms of KRS 337.505 to 337.550. *The commissioner may also bring any legal action necessary to collect claims on behalf of any or all laborers, workmen, or mechanics*. No employer shall take any punitive measure or action

> against an employee because such employee has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under KRS 337.505 to 337.550. The commissioner shall not be required to pay the filing fee, or other costs, in connection with such action.

(Emphasis added.)

"On behalf of" means "as a representative of." *See* MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 110 (11th ed. 2005). "Him" and "her" are personal pronouns denoting an individual. These words do not have any peculiar meaning. Giving them their common and approved usage in the context of this statute as we are required to do,[4] I am left to conclude that pursuant to KRS 337.550(2) only "the commissioner" may bring a *representative* legal action "*on behalf of* any or all laborers, workmen, or mechanics," and that an *individual* "laborer, workman, or mechanic" cannot, but is limited to filing a singular civil action to "recover any sum due *him or her*."

As the majority points out, my line of thinking is unoriginal. In the unpublished opinion of *Toyota Motor Mfg., Kentucky v. Kelley*, No. 2012–CA–001508–ME, 2015 WL 6046079 (Ky. App. Nov. 15, 2013), for example, a panel of this Court arrived at roughly the same conclusion regarding a statute worded roughly the same way. The statute in question was KRS 337.385. It provides in relevant part:

> (1) Except as provided in subsection (3) of this section, any employer who pays any employee less than wages and overtime compensation to which such employee is

[4] *See* KRS 446.080(4).

> entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court.
>
> (2) If, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he or she had reasonable grounds for believing that his or her act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section. Any agreement between such employee and the employer to work for less than the applicable wage rate shall be no defense to such action. Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees *for and in behalf of himself, herself, or themselves*. [. . .]

(Emphasis added.)

The *Kelley* Court concluded, as I would conclude, that the above-italicized language in KRS 337.385(2)

> permits more than one person to bring a cause of action under KRS 337.385(1) in the same case, but they may not do so in a representative capacity. Further, the effect of the "for and in behalf of" language is to limit the individuals who may participate in an action under the Act to those who actually bring the action.

Id. at *9.[5]

[5] For parity of reasoning regarding this interpretation of KRS 337.385(2), *see McCann v. Sullivan University*, No. 2014-CA-000392-ME (Ky. App. Feb. 27, 2015); *Davenport v. Charter Communications, LLC*, 35 F.Supp.3d 1040, 1048 (E.D. Mo. 2014); *Anderson v. GCA Services*

Conversely, another section of KRS Chapter 337 demonstrates the General Assembly is perfectly capable—without any strained assistance from the judiciary—of clearly stating its intentions regarding when a class action *is* permitted. KRS 337.427, for example, provides in relevant part as follows:

> (1) Any employer who violates the provisions of KRS 337.423 shall be liable to the employee or employees affected in the amount of their unpaid wages, and in instances of willful violation in employee suits under subsection (2) of this section, up to an additional equal amount as liquidated damages.
>
> (2) *Action to recover the liability may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself, herself, or themselves and other employees similarly situated.* The court in the action shall, in cases of violation in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

The "in behalf of . . . other employees similarly situated" language is, as a matter of common interpretation, indicative of a class action. *See also Davenport v. Charter Communications, LLC*, 35 F.Supp.3d 1040, 1048 (E.D. Mo. 2014) (interpreting the above-italicized language in KRS 337.427(2) as allowing for class actions).

Group of North Carolina, Inc., 1:15-CV-37-GNS, 2015 WL 5299452, at *2 (W.D. Ky. September 9, 2015), slip copy.

Kentucky Revised Statutes 337.385, .427, and .550 cannot be considered in isolation but must be construed together, as part of one statutory scheme. The use of the unambiguous language providing for class actions in one provision, and its omission in other provisions, must be given meaning. And, as a general rule of statutory construction, an enumeration of a particular thing demonstrates that the omission of another thing is an intentional exclusion. *Louisville Water Co. v. Wells*, 664 S.W.2d 525 (Ky. App. 1984); *Wade v. Commonwealth*, 303 S.W.2d 905 (Ky. 1957). For these reasons, I believe decertification is mandated. KRS 337.550(2) lacks the "class action" language of KRS 337.427(2) and plainly limits the individuals who may participate in an action under that provision to those who actually bring the action.

ENTERED: _____

_____
JUDGE, COURT OF APPEALS

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