RENDERED: FEBRUARY 27, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000392-ME

MARY E. MCCANN, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 10-CI-001130

THE SULLIVAN UNIVERSITY
SYSTEM, INC., D.B.A
SULLIVAN UNIVERSITY COLLEGE
OF PHARMACY, SULLIVAN COLLEGE
OF TECHNOLOGY AND DESIGN,
SULLIVAN UNIVERSITY GLOBAL
E-LEARNING, DALE CARNEGIA [SIC]
KENTUCKIANA, INTERNATIONAL
CENTER FOR DISPUTE RESOLUTION
LEADERSHIP, SULLIVAN UNIVERSITY,
LOUISVILLE TECHNICAL INSTITUTE, THE
NATIONAL CENTER FOR HOSPITALITY STUDIES,
INSTITUTE FOR PARALEGAL STUDIES,
SPENCERIAN COLLEGE, AND INTERIOR
DESIGN INSTITUTE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: Mary McCann appeals from the Jefferson Circuit Court's February 27, 2014, order denying her motion to certify a class action. After careful review, we affirm.

The Sullivan University System, Inc. (Sullivan) employs Admissions Officers at its various schools, including Sullivan University, Sullivan College of Technology and Design, and Spencerian College, to recruit and enroll prospective students. Admissions Officers contact and conduct preliminary interviews with prospective students to assess whether he or she is a good candidate for admission to one of Sullivan's programs. They may also advise prospective students about Sullivan's academic programs and degree requirements. Based on the student's interview, the Admissions Officer determines whether the prospective student is suited for any of Sullivan's programs and whether to recommend any Sullivan programs to the student. Admissions Officers have discretion to decide whether to offer a prospective student an application/enrollment form.

At the time in question in this case, Admissions Officers' work schedules varied widely. Some Admissions Officers were scheduled to work forty hours per week. Others worked less than forty hours per week, and some Admissions Officers worked different schedules each week. Moreover, the hours

that some Admissions Officers worked varied depending on the time of year, whether the Admissions Officer worked with adult or high school prospective students, and whether the Admissions Officer was a Local Admissions Officer or a Regional Admissions Officer. Regional Admissions Officers determined their own schedules and work patterns. Their hours varied significantly from week to week. As one Regional Admissions Officer testified, they were "totally different" from other Sullivan employees.

Sullivan hired McCann in March 2006 as the Director of Admissions at Sullivan's campus at Fort Knox, Kentucky. According to McCann, in May 2007, she transferred to Sullivan's Spencerian College campus in Louisville, Kentucky as an Admissions Officer for adult admissions. Sullivan terminated McCann's employment in April 2008.

On February 18, 2010, McCann filed a class and collective action complaint against Sullivan on behalf of herself and all other current or former Admissions Officers employed by Sullivan since February 2005. McCann's complaint, originally filed in Jefferson Circuit Court, alleged that Sullivan violated Kentucky's wage and hour laws and the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (FLSA) by (1) misclassifying Admissions Officers as exempt employees; and (2) failing to pay Admissions Officers overtime compensation. McCann sought compensatory and liquidated damages, as well as injunctive relief. Sullivan removed the action to federal court on March 12, 2010.

On March 1, 2010, Hilda Solis, then Secretary of the United States Department of Labor (DOL), filed a complaint against Sullivan in federal court seeking injunctive relief and back wages under the FLSA on behalf of Admissions Officers, including McCann, and High School Representatives. Sullivan settled the DOL's FLSA claims against it pursuant to the Agreed Order and Permanent Injunction entered on February 28, 2012. As part of the settlement, although Sullivan disputed the DOL's allegations, Sullivan agreed to treat its Admissions Officers as non-exempt employees and to pay Admissions Officers overtime wages in accordance with the FLSA. Sullivan also paid back wages to specified Admissions Officers for the time period August 1, 2007, through November 13, 2011.

In the meantime, McCann voluntarily moved to dismiss her FLSA claims against Sullivan. McCann's FLSA claims were dismissed by agreed order on October 15, 2010. McCann's remaining Kentucky state law claims were remanded to the Jefferson Circuit Court on October 3, 2011. McCann did nothing further to prosecute those claims or certify a class until she filed her motion for class certification on October 24, 2013.

On February 27, 2014, the circuit court denied McCann's motion, stating:

> The Plaintiffs have brought this action pursuant to [Kentucky Revised Statutes (KRS)] 337.385. Citing the Kentucky Court of Appeals decision in *Toyota Motor Manufacturing Kentucky, Inc.v. Kelley*, 201-CA-001508-ME, 2013 WL 6046079 (Ky. App., Nov. 15, 2013) [],

> Defendant the Sullivan University System maintains KRS 337.385 does not permit certification of class actions. The Court agrees.

This appeal now follows.

On appeal, McCann argues that class certification is appropriate and that KRS 337.385 does not prohibit class certification. Further, she argues that she has adequately shown that her potential class satisfies all the prerequisites required for certification under the Kentucky Rules of Civil Procedure (CR) 23 *et seq.* McCann asks this Court to reverse the circuit court's order denying her motion for class certification and remand to the circuit court for further proceedings.

Sullivan argues that the circuit court properly denied McCann's motion for class certification in this action for unpaid overtime under KRS 337.385. Sullivan cites to this Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Kelley*, *supra*, for the proposition that KRS 337.385 does not permit individuals to pursue claims for unpaid wages and overtime as class actions. In the alternative, Sullivan argues that even if the statute were interpreted to allow class actions, the trial court properly denied McCann's motion to certify a class because McCann failed to demonstrate that she met the stringent requirements of CR 23.

Questions concerning class certification are generally left to the sound discretion of the trial court. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986). However, McCann argues that the circuit court did not deny McCann class certification upon the merits of the issue but instead denied class certification by finding that KRS

337.385 prohibits any plaintiff from certifying a class under said statute. McCann asks that we utilize the standard of review applicable to exercises of statutory interpretation, the *de novo* standard of review. *United States v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir. 2002). Because statutory interpretation is involved, we agree with McCann that our review will be *de novo*. *Id*.

McCann first argues that the plain language of KRS 337.385(2) does not preclude class actions or otherwise change the general availability of class relief under CR 23 to McCann and others similarly situated. CR 23.01 states:

> Subject to the provisions of Rule 23.02, 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.

CR 23.02 provides that "[a]n action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied," along with other enumerated considerations. McCann acknowledges that the construction and operation of these rules indicate that CR 23 provides the procedures, requirements, and availability of class actions in all civil cases, unless relevant legislation has otherwise created a special statutory proceeding.

Sullivan argues, and we agree, that relevant legislation has otherwise created a special statutory proceeding in the instant case. KRS 337.385(2)[1] states that

[1] We note that this statute was amended in 2013, and became effective on June 25, 2013. The previous version took effect July 15, 2010, after McCann's claim was filed in February 2010.

actions for violations of Kentucky's wage and hour laws may only be maintained by one or more employees "for and in behalf of himself, herself, or themselves." This statute was before this Court in the recent case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Kelley*, *supra*.[2] McCann correctly points out that this Court did not ultimately reach the issue of class action relief under KRS 337.385; however, the panel noted that if the Court were to reach the issue, it would hold that KRS 337.385 "does not permit class actions." *Id.* at 9. The instant case requires this Court to directly address whether KRS 337.385 authorizes class actions. We hold that it does not.

In *Toyota*, the plaintiff filed a putative class action alleging that Toyota violated Kentucky's wage and hour laws by failing to compensate assembly line workers for time spent donning and doffing required protective clothing. The trial court initially dismissed the case, but later reopened it and certified a class of assembly line workers currently or formerly employed by Toyota. On appeal, Toyota argued that the case should not have been reopened and that the plaintiffs did not meet CR 23's requirements for class certification.

When addressing Toyota's argument against class certification, this Court stated: "the text of KRS 337.385[(2)] provides a clear expression of intent that class actions are not permitted." *Id*. at 9. As this Court observed, the language of

---

Thus, there are discrepancies with citations to the statute in the briefs and in this Court's opinion in *Toyota, supra*.

[2] CR 76.28(4)(c), which formerly prohibited citation of all unpublished opinions, was amended, effective January 1, 2007, to permit reference to unpublished opinions rendered after January 1, 2003, when no published opinion addressed the issue raised.

KRS 337.385 states that actions for violations of Kentucky's wage and hour laws may only be maintained by one or more employees "for and in behalf of himself, herself, or themselves." *Id*.

> The statute permits more than one person to bring a cause of action under KRS 337.385[(2)] in the same case, but they may do so not in a representative capacity. Further, the effect of the "for and in behalf of of" language is to limit the individuals who may participate in an action under the Act to those who actually bring the action.

Id. Based on this limiting language, this Court stated that even if the trial court had properly reopened the case, the trial court improperly certified a class because KRS 337.385 does not permit class actions. *See id.*

Sullivan argues, and we agree, that the language in KRS 337.385 contrasts sharply with the FLSA's language, which expressly permits plaintiffs to bring claims for wage and hour violations "on behalf of himself or themselves or **other employees similarly situated**." 29 U.S.C. § 216(b) (emphasis added). When Kentucky's General Assembly enacted KRS 337.385, it did not include any language allowing representative or collective actions. Instead, it plainly expressed that an action may be only brought by one or more employees on behalf of himself, herself, or themselves. *See* KRS 337.385(2). It did not permit actions to be brought on behalf of employees who are similarly situated.

Despite KRS 337.385's limiting language, McCann argues that class actions are available because CR 1 states that Kentucky's Rules of Civil Procedure govern procedure and practice in all civil actions. The language in KRS 337.385

specifying who has standing to pursue an action for unpaid wages, however, is not a mere procedural provision. *See Harris v. Reliable Reports, Inc.*, 2014 WL 931070 at *8 (N.D. Ind. 2014) (holding that an opt-in provision enacted as part of state wage and hour laws conferred substantive rights). In any event, under CR 1, procedural requirements in a statute take precedence over a conflicting rule. *See Batts v. Illinois Cent. R.R. Co.*, 217 S.W.3d 881, 884 (Ky. App. 2007). CR 23 cannot override KRS 337.385's limitation on who may bring claims for unpaid wages.

McCann relies heavily on the United States Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S.393, 130 S. Ct. 1431, 176 L.Ed.2d 311 (2010), arguing that *Shady Grove* somehow suggests that class actions are available in all civil actions. *Shady Grove*, however, addressed the question of whether a state statute prohibiting class actions in suits seeking penalties or statutory minimum damages precluded a federal district court sitting in diversity from entertaining a class action under Federal Rule of Civil Procedure 23. *Id*. It involved a federal court's application of its procedural rules to a seemingly conflicting state statute. Here, in contrast, the Court is asked to consider the intersection of a state statute governing claims for unpaid wages and a state procedural rule. Even if this Court were to apply *Shady Grove's* diversity jurisdiction analysis, *Shady Grove* does not compel the conclusion that CR 23 authorizes a class action under KRS 337.385.

In *Bearden v. Honeywell Int'l, Inc.*, 2010 WL 3239285 (M.D. Tenn 2010), the court considered whether *Shady Grove* required a federal district court to allow plaintiffs to bring class actions under Tennessee's Consumer Protection Act (TCPA), which has been interpreted to preclude class actions. The court concluded that because the TCPA's restriction on class actions "is a part of Tennessee's framework of substantive rights and remedies, Rule 23 does not apply." *Id*. at * 10 (footnote omitted). Noting *Shady Grove*'s fractured majority and the 4-1-4 split in the opinions, the *Bearden* Court reasoned:

> Under the rule announced in *Marks v. United States*, 430 U.S. 188, 975 S.Ct. 990, 51 L.Ed.2d 260 (1977),"'[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009) (quoting *Marks*, 430 U.S. at 193)…. Here, that means that Justice Stevens' concurrence is the controlling opinion.

Bearden, 2010 WL 3239285 at * 10. In *Shady Grove*, Justice Stevens determined that

> "federal rules cannot displace a State's definition of its own rights or remedies." [*Shady Grove*, 130 S.Ct. 1t 1449.] Under Justice Stevens' approach, whether a state law displaces a federal rule "turns on whether the state law actually is part of a State's framework of substantive rights or remedies," *id*. at 1449, which requires a court to carefully interpret the state and federal provisions at issue, *id*. at 1450. He concluded that a state procedural rule "may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *Id*. "Such laws, for

> example, may be seemingly procedural rules that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim." *Id*. Thus, Justice Stevens held that, under the Rules Enabling Act, "[a] federal rule…cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id*. at 1452; *see also id.* at 1456.

Bearden, 2010 WL 3239285 at *9. In contrast to the state statute considered in *Shady Grove*, which was designed as a procedural rule and which applied not only to claims based on New York law, but also to claims based on federal law or the law of other states, *see Shady Grove*, 130 S.Ct. at 1457, the *Bearden* Court found that

> the class-action limitation contained in the TCPA is so intertwined with that statute's rights and remedies that it functions to define the scope of the substantive rights. Unlike in *Shady Grove*, the limitation here is contained in the substantive statute itself, not in a separate procedural rule. The very statutory provision that authorizes a private right of action for a violation of the TCPA limits such claims to those brought "individually."

Bearden, 2010 WL 3239285 at *10 (quoting Tenn. Code Ann. §47-18-109(a)(1)).

The same is true here. KRS 337.385's limitation on the parties that may bring claims for unpaid wages is contained in a substantive statute and is intertwined with the statute's rights and remedies. Just as Fed. R. Civ. P. 23 does not apply to a claim under the TCPA in federal court, CR 23 does not apply to claims brought under KRS 337.385.

Although McCann cites cases that have certified classes under KRS 337.385, until this Court's decision in *Toyota*, no Kentucky case appears to have considered the issue of whether the limiting language in KRS 337.385 precludes class actions. McCann argues, with no support in case law or legislative history, that Kentucky's Wage and Hour Act was intended to protect plaintiffs from "predatory employers" and that class actions achieve this goal by providing employees who may have small individual claims with the easiest access possible to the courts through class actions.[3] However, we note that McCann ignores the fact that Kentucky law provides effective and inexpensive administrative remedies to resolve claims for unpaid wages. Kentucky's wage and hour law authorizes the Kentucky Labor Commissioner to investigate and remedy wage payment violations. *See* KRS 335.050, 337.310, and 337.385. The Commissioner may also bring civil actions on behalf of employees with valid wage claims. *See* KRS 37.385 (4). Class actions are not necessary to achieve any legislative goal under Kentucky's wage and hour statutes. The plain language of KRS 337.385 limits who may maintain an action for unpaid wages. It does not permit representative actions.

Because we have held that KRS 337.385 does not allow class actions or representative claims, we need not address Sullivan's remaining arguments that

[3] McCann cites to *Beattie v. CenturyTel, Inc.*, 511 F.3d 554 (6th Cir. 2007), in support of her contention that class actions should be allowed so that plaintiffs can aggregate claims and prevent employers from defeating the central purpose of Kentucky's wage and hour laws by cheating employees out of the rightfully earned wages. *Beattie* is not a wage and hour case. It is a suit involving claims under the Federal Communications Act, the Truth-in-Billing Act, and Michigan's Consumer Protection Act.

McCann's claims should not be certified under Kentucky law. We note that the trial court did not reach the merits of class certification, and thus the issue would have to be remanded for the trial court's consideration had we reached a different conclusion on the first issue.

Based on the foregoing, we affirm the Jefferson Circuit Court's February 27, 2014, order denying McCann's motion for class action certification.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Theodore W. Walton
Garry R. Adams
Louisville, Kentucky

BRIEF FOR APPELLEE:

Grover C. Potts, Jr.
Michelle D. Wyrick
Emily C. Lamb
Louisville, Kentucky