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NOT TO BE PUBLISHED

OPINION OF APRIL 27, 2018 WITHDRAWN

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-001496-ME

UPS SUPPLY CHAIN SOLUTIONS, INC.,  
UNITED PARCEL SERVICE, INC. and  
JOHN DOE 1-10

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MITCHELL PERRY, JUDGE  
ACTION NO. 07-CI-009996

MARION E. HUGHES, RAYMOND S. BATTS,  
JAMES A. CRUME, TERRI A. ROGERS and  
PHILLIP L. WESTERN, individually,  
and on behalf of all other persons  
similarly situated

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, KRAMER AND THOMPSON, JUDGES.

COMBS, JUDGE: UPS Supply Chain Solutions, Inc.; United Parcel Service, Inc.; and John Doe 1-10 (referred to collectively as “UPS”) appeal from the order and opinion of the Jefferson Circuit Court entered on August 26, 2014. The court’s order denied the motion of UPS for judgment on the pleadings and granted the motion for class certification filed by Marion E. Hughes, Raymond S. Batts, James A. Crume, Terri A. Rogers, and Phillip L. Western, individually, and on behalf of all other persons similarly situated. Based upon our review of the record and the applicable law, we affirm the decision of the trial court.

Kentucky’s Wages and Hours Act, Kentucky Revised Statutes (KRS) Chapter 337, allows a plaintiff who is not compensated by his or her employer for performing tasks which are compensable to recover payment for the time spent performing such tasks -- along with liquidated damages and attorney’s fees. KRS 337.385. In 2007, the appellees filed a putative class action against UPS. In their complaint, they alleged that they and other employees of UPS were required to enter workplace facilities through mandatory security checkpoints before clocking in and to exit through the security checkpoints after clocking out each day. The appellees alleged that they were not paid wages for time spent at the security checkpoints and that UPS violated Kentucky’s Wages and Hours Act by failing to compensate employees for work time. The appellees filed a motion for class certification. The proposed class was defined as consisting of all nonexempt UPS

employees employed in the Commonwealth during the applicable limitations period.

Kentucky Rules of Civil Procedure (CR) 23.01 and CR 23.02 govern class action certification. CR 23.01 provides as follows:

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 as follows:

An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:

(a) The prosecution of separate actions by or against individual members of the class would create a risk of (i) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or, (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (i) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (iv) the difficulties likely to be encountered in the management of a class action.

A class may be certified only if the legal requirements outlined in both CR 23.01 and CR 23.02 are satisfied. Under the provisions of CR 23.01, four separate prerequisites must be satisfied; under CR 23.02, one of three conditions must be satisfied.

By order entered July 27, 2012, the circuit court denied the purported class representatives' motion for class certification. They filed a notice of appeal.

Thereafter, the purported class representatives filed a motion to amend, seeking to certify a more limited class. The new putative class was defined as all nonexempt UPS employees who worked at the following locations: Elizabethtown, Louisville, Technical & Logistics Center, and Worldport during the applicable limitations period.

By opinion and order entered October 9, 2012, the circuit court concluded that the more limited class also failed to meet the prerequisites and conditions of the rules of procedure governing class actions. Consequently, the court declined to certify the limited class. A second notice of appeal was filed. The appeals were consolidated by an order of this Court entered on November 27, 2012.

In an unpublished opinion rendered on September 6, 2013, this Court held that the circuit court had not erred by denying class certification in its order concerning the more broadly defined class. An affidavit of a UPS Security Director indicated that employees at two UPS facilities in Kentucky were not required to pass through mandatory security checkpoints yet were included in the proposed class. Since employees at these UPS facilities had not suffered an injury common to other putative class members, we concluded that class certification was improper. We affirmed the circuit court's opinion and order with respect to that appeal.

With respect to the more limited putative class, we concluded that the circuit court had erred by concluding that two prerequisites of CR 23.01 (commonality and typicality) of class certification had not been met. From our review of the record, we concluded that the security procedures and measures implemented by UPS were common to each of the identified UPS facilities. We

also concluded that the putative class members had alleged a common wrong and had allegedly suffered the same injury – unpaid work time. Consequently, we rejected the circuit court’s conclusion that the putative class failed to meet the commonality prerequisite of class certification.

Furthermore, we concluded that the claims of the putative class representatives and the proposed class members were based upon a substantially similar course of conduct by UPS (mandatory security procedures at the facilities) and upon the same legal theory (violation of the Kentucky Wages and Hours Act). Consequently, we rejected the circuit court’s conclusion that the more limited putative class failed to meet the typicality prerequisite for class action certification.

We vacated the circuit court’s order denying class certification of the more narrowly defined class and remanded the matter for further proceedings. Upon remand, we instructed the circuit court to determine whether the limited class satisfied the remaining prerequisites for class certification pursuant to two other provisions of CR 23.01 -- numerosity and adequacy of representation. We instructed the circuit court to deny class certification if it concluded that the limited class failed to satisfy either the numerosity or adequacy of representation prerequisite. However, if the circuit court determined that the limited class satisfied each additional prerequisite, we instructed it to determine whether the proposed limited class fulfilled any one of three conditions set forth in CR 23.02.

If the circuit court determined that the proposed limited class satisfied any one of the three conditions provided by the civil rule, we directed it to certify the proposed class. In its order remanding, the previous panel of this Court held and instructed as follows:

[W]e hold that the circuit court erred by determining that the limited class did not fulfill the prerequisites of commonality and typicality under CR 23.01(b) and (c). As the circuit court so erred, we vacate the October 9, 2012, opinion and order and remand for the circuit court to determine whether the limited class satisfies the additional prerequisites of CR 23.01(a) and (d). These prerequisites are the numerosity prerequisite of CR 23.01(a) and the adequacy of representation prerequisite of CR 23.01(d). If the circuit court concludes that the limited class fails to satisfy either prerequisite as set forth in CR 23.01(a) or (d), the circuit court shall deny class certification. Conversely, if the circuit court determines that the limited class satisfies both prerequisites of CR 23.01(a) and (d), the circuit court shall then determine if the limited class fulfills any one of the three conditions set forth in CR 23.02. If the circuit court decides that the class fails to satisfy all three conditions of CR 23.02, the class certification shall be denied. However, if the limited class satisfies at least one of the three conditions of CR 23.02, the circuit court shall certify the limited class.

2012-CA-001353-ME, 2013 WL 4779746, at \*6 (Ky. App. Sept. 6, 2013).

Upon remand, UPS filed a motion for judgment on the pleadings.

UPS contended that the unpaid wages claims of the proposed class members could not be pursued through a class action because the provisions of Kentucky's Wages and Hours law did not permit such actions. In support of its position, UPS relied

upon *dicta* included in our unpublished opinion, *Toyota Motor Mfg., Kentucky, Inc., v. Kelley*, 2012-CA-001508-ME, 2013 WL 6046079 (Ky. App. Nov. 15, 2013). In *Kelley*, we observed that if we were required by the facts of the case to decide whether a class action were available for claims brought under the provisions of KRS 337.385, we would conclude that it was not. We read the text of KRS 337.385(1) as a clear expression of the intent of the General Assembly not to permit class actions by employees against employers for unpaid wages.

Following a hearing conducted on August 15, 2014, the Jefferson Circuit Court denied the motion of UPS for judgment on the pleadings. The circuit court dismissed our *dicta* in *Kelley* as nonbinding. It was not persuaded that the provisions of Kentucky's Wages and Hours Act prohibit employees from pursuing relief by way of a class action. Pursuant to our instructions, the circuit court proceeded to consider whether the proposed limited class satisfied the numerosity and adequacy of representation prerequisites for class certification.

With respect to the numerosity requirement, the circuit court observed that the proposed class numbered more than 11,000 employees working at the identified facilities. The court determined that given this large number of potential plaintiffs, joinder was impracticable. It concluded that the proposed class plainly met the numerosity prerequisite of CR 23.01.



Next, the circuit court considered whether the adequacy of representation requirement was met. The circuit court observed that there did not appear to be a conflict between the interests of the representative parties and the interests of the prospective class. It found that counsel for the putative class was qualified and could be expected to prosecute the interests of the class vigorously. Consequently, it concluded that the adequacy of representation prerequisite of CR 23.01 had been satisfied.

Having determined that the putative class satisfied each of these prerequisites, the circuit court next considered whether the proposed limited class fulfilled any one of three conditions established by the provisions of CR 23.02. The circuit court found that the questions of law or fact common to the members of the proposed class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. These findings comported with the requirements of CR 23.02(c). Having determined that the proposed limited class satisfied one of the three conditions provided by CR 23.02, the circuit court certified the putative class on August 15, 2014. UPS then filed this appeal. Hence, the circuit court clearly complied with our directive to it upon remand.

On November 17, 2015, UPS filed a motion to hold the appeal in abeyance pending the decision of the Supreme Court of Kentucky in *McCann v.*

*Sullivan Univ. Systems Inc.*, 2014-CA-000392-ME, 2015 WL 832280 (Ky. App. Feb. 27, 2015), *discretionary review granted* (Ky. Oct. 21, 2015) (2015-SC-000144). In *McCann*, we held again that the provisions of KRS 337.385 do not permit class actions or representative claims by employees against employers for unpaid wages. The issue to be decided by the Supreme Court of Kentucky upon its review was whether the language of KRS 337.385 foreclosed an action against employers under the procedure outlined by the provisions of CR 23. UPS contended that depending upon its outcome, the decision in *McCann* might be dispositive of its appeal. We agreed. In an order entered on February 10, 2016, we granted the motion of UPS to hold the matter in abeyance.

The opinion of the Supreme Court of Kentucky in *McCann* was rendered on August 24, 2017. The abatement was lifted, and this appeal has now proceeded to this merits panel.

The only issue on appeal is whether the circuit court properly granted the motion for class certification. A trial court's decision to certify a class action is subject to immediate -- though limited -- review. CR 23.06; *Sowers v. Atkins*, 646 S.W.2d 344 (Ky. 1983). Ordinarily, the decision can be reversed only if we determine that the trial court has abused its discretion. *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004). However, in this matter we are confronted with a

preliminary issue of law as well: whether the circuit court erred by concluding that class actions are not prohibited by the provisions of KRS 337.385.

KRS 337.385(2) provides, in part, as follows:

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.)

In *McCann v. Sullivan Univ. Systems, Inc.*, 528 S.W.3d 331 (Ky. 2017), the Supreme Court of Kentucky observed that the language of the statute does not expressly permit the use of a class action, nor does it expressly prohibit it. However, it noted that the “statute fails to create the comprehensive, wholly self-contained procedural process necessary to constitute a recognized special statutory proceeding.” *Id.* at 335. Having concluded that the cause of action created by KRS 337.385 does not constitute a special statutory proceeding, the Supreme Court determined that the provision did not displace our ordinary rules of civil procedure.

It held as a matter of law that the class action remains an available procedural mechanism applicable to causes of action brought pursuant to the provisions of KRS 337.385. Thus, the Jefferson Circuit Court did not err by concluding that a class action was not prohibited as a matter of law.

Next, we consider whether the circuit court abused its discretion by certifying the class action pursuant to the provisions of CR 23.

A class action is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S.Ct. 2541, 2550, 180 L.Ed.2d 374, (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). To justify a departure from that rule, “a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” *Wal-Mart*, 564 U.S. at 348-49, 131 S. Ct. at 2550 (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977)). “The Rule’s four requirements—numerosity, commonality, typicality, and adequacy of representation—‘effectively “limit the class claims to those fairly encompassed by the named plaintiff’s claims.”’” *Id.* at 349, 131 S.Ct. at 2550 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

The trial court must undertake a “rigorous analysis” to determine whether the prerequisites have been satisfied. *Id.* at 350, 131 S.Ct. at 2551 (quoting *Falcon*, 457 U.S. at 160, 102 S.Ct. 2364). This analysis requires a “probe behind the pleadings” often touching upon the merits of the proceeding. *Id.* We are particularly mindful of the strict parameters of interlocutory appeals, however. Consequently, we carefully limit our analysis to the narrow question of whether, as a procedural matter, the trial court properly certified the class action. In accordance with the recent holding of the Supreme Court of Kentucky in *Hensley v. Haynes Trucking, LLC*, 2016-SC-000180-DG, 2018 WL 2979580, at \*3 (Ky. June 14, 2018), we “scrupulously respect the limitations of the crossover between (1) reviewing issues implicating the merits of the case that happen to affect the class-certification analysis and (2) limiting our review to the class-certification issue itself.”

Several months after the opinion and order of the Jefferson Circuit Court were entered after our remand, the Supreme Court of the United States decided the case of *Integrity Staffing Solutions, Inc. v. Busk*, \_\_\_\_ U.S. \_\_\_\_, 135 S.Ct. 513, 190 L.Ed.2d 410 (2014). In *Integrity Staffing*, the Supreme Court considered the compensation claims of employees of a company that provided warehouse staff to Amazon’s fulfillment centers. These employees were hired to retrieve inventory and to package it for shipment. In their putative class action, the

plaintiffs alleged on behalf of similarly situated employees that Integrity Staffing had violated provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §201 *et seq.* (as amended by the Portal-to-Portal Act of 1947 §251 *et seq.*), by failing to compensate them for time they spent waiting to undergo and undergoing security screenings following their scheduled shifts.

On appeal, UPS contends that the holding of *Integrity Staffing* means that the representative members of the putative class have not suffered a compensable injury. Thus, it argues that the purported class cannot be certified upon the same bases as announced by the circuit court following our remand.

On the other hand, the putative class representatives argue that the Supreme Court's holding in *Integrity Staffing* is irrelevant for three reasons. First, they contend that the court's opinion did not directly address the prerequisites for class certification and that it is not appropriate to consider the substance of the court's holding at this preliminary stage of the proceedings. Next, they contend that the Supreme Court's holding concerning the compensability of off-the-clock time spent at security screenings pertains only to claims arising under federal law. Finally, the putative class representatives argue that UPS cannot present an issue never raised or decided by the trial court.

Whether *Integrity Staffing* applies to a Kentucky wage and hour claim and whether a claim can survive on its merits are not the issues that we are

asked to resolve or that we should address at this juncture. The United States Supreme Court did not discuss class certification and addressed its opinion solely to the merits of the federal claim. Even if applicable to state law claims, the holding of *Integrity Staffing* goes to the merits of a wage and hour claim and not to whether a class was properly certified. As noted by the United States Supreme Court in *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459, 133 S.Ct. 1184, 1191, 185 L.Ed.2d 308 (2013), class certification “requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.”

Moreover, remanding this case for reconsideration of the class certification violates the law-of-the-case doctrine. In this Court’s prior decision, the panel concluded that the limited putative class met the prerequisites of commonality and typicality under CR 23.01. We then instructed the trial court to confine its decision on remand to determining whether any one of the three conditions set in CR 23.02 were met. The trial court performed its duty precisely as instructed. This Court cannot now hold that the trial court erred in doing so.

The law-of-the-case doctrine provides for finality and prevents “the drain on judicial resources that would result if previous decisions were routinely subject to reconsideration.” *Wright v. Carroll*, 452 S.W.3d 127, 130 (Ky. 2014). “A final decision of this Court, *whether right or wrong*, is the law of the case and

is conclusive of the questions therein resolved.” *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky. 1989) (emphasis added) (quoting *Martin v. Frasure*, 352 S.W.2d 817, 818 (Ky. 1962)).

A rare exception to the law-of-the-case doctrine is that it will not be applied when “the former decision [appears] to be clearly and palpably erroneous.” *Union Light, Heat & Power Co. v. Blackwell’s Adm’r*, 291 S.W.2d 539, 542 (Ky. 1956). After examining Kentucky law, in *Ragland v. DiGiuro*, 352 S.W.3d 908, 915 (Ky. App. 2010), the Court concluded that “appellate courts hold fast to the law-of-the-case doctrine in the interest of maintaining the integrity of prior appellate rulings.”

The former decision of this Court was not clearly and palpably erroneous -- particularly where the theory that class certification requires proof of a compensable injury was never presented until this appeal. If this Court were to engage in the practice of remanding cases based on legal theories developed after a first appeal and remand, “[f]urther litigation would be interminable, and a decision of the appellate court, which is supposed to put the issue to rest between the same parties, would only be a starting point for new litigation.” *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982).

This Court cannot ignore its decision on issues previously decided between the same parties based on intervening interpretations of the law. While



wage and hour law is evolving substantively, it is neither fair nor just to further postpone a decision on class certification and, consequently, a resolution on the merits. That resolution remains the purview of the circuit court.

Finally, we note that this case has been making a tortuous journey through the court system for more than eleven years – a shocking reality in and of itself. It is long overdue that this matter be resolved on its merits at last.

We affirm the opinion and orders of the Jefferson Circuit Court in all respects.

ALL CONCUR.

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