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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001238-ME

SUMMIT MEDICAL GROUP,
INC., d/b/a ST. ELIZABETH
PHYSICIANS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE KATHLEEN LAPE, JUDGE
ACTION NO. 12-CI-02683

LISA COLEMAN — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

LAMBERT, JUDGE: Summit Medical Group, Inc., d/b/a Saint Elizabeth Physicians (SEP) appeals from the Kenton Circuit Court's order certifying appellee's claim as a class action under Kentucky Rule of Civil Procedure (CR) 23. We vacate and remand this matter to the Kenton Circuit Court.

The procedural and factual history, as summarized by the circuit court in its August 10, 2018, order certifying the class, is as follows:

Procedural Posture:

> This case has a rather tortured procedural history. The original Complaint was filed on October 25, 2012. On November 15, 2012 Defendants, Saint Elizabeth Medical Center, Inc. ("SEMC") and Summit Medical Group, Inc., d/b/a St. Elizabeth Physicians ("SEP") filed a Motion to Dismiss Pursuant to CR 12.02 and CR 41.02. On December 10, 2012, Plaintiff, Lisa Coleman ("Coleman") filed an Amended Complaint, to which Defendants answered on December 19, 2012. Since then, the following motions have been filed and are pending:
>
> 1. 1/29/2013 – Defendants' Motion to Deny Class Certification.
>
>   2/1/2013 – Plaintiff filed a Response.
>
>   4/13/2013 – Defendants replied.
>
> 2. 1/29/2013 – Motion to Dismiss, SEMC.
>
> 3. 4/1/2013 – Plaintiff filed a Voluntary Dismissal of SEMC.
>
>   5/23/2013 – Plaintiff's Motion to Reopen Claims Against SEMC and Set Aside the Dismissal.
>
>   5/29/2013 – SEMC Memorandum in Opposition to Plaintiff's Motion to Reopen Claims Against SEMC and to Set Aside the Dismissal.
>
> 4. 4/1/2013 – Plaintiff's Motion to File a Second Amended Complaint.

4/16/2013 – Defendants' Response to Plaintiff's Motion For Leave to File Second Amended Complain[t].

5/3/2013 – Plaintiff's Reply in Support of Her Motion For Leave to File Second Amended Complaint.

5. 4/15/2013 – Motion to Dismiss Defendant, SEMC, With Prejudice and for Sanctions.

   5/3/2013 – Plaintiff's Response to Motion for Sanctions.

   5/15/2013 – Reply Memorandum in Support of Motion to Dismiss Defendant, SEMC, With Prejudice and for Sanctions.

6. 4/16/2013 – Defendants' Motion for Summary Judgment on All Claims.

   5/3/2013 – Plaintiff's Response to Defendants' Motion for Summary Judgment.

   5/16/2013 – Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment.

7. 5/23/2013 – Motion for Rule 11 Against Mark Guilfoyle.

   5/23/2013 – Rule 11 Verified Motion Against Defendants' Counsel Mark Guilfoyle.

   5/29/2013 – Defendants' CR 12.06 Motion to Strike.

This case was originally assigned to the First Division, Judge Martin Sheehan upon filing in 2012. By Order entered August 16, 2013, Judge Sheehan recused from this matter. Judge Sheehan having retired, on October 29, 2015, it was reassigned to Judge Kathleen Lape. However, it was not until 2017, when a CR 77.02(2) Notice to Dismiss for Lack of Prosecution was filed that this file actually found its way to Judge Lape's chambers. Plaintiff objected to the dismissal and the matter was remanded to the docket. Then on March 21, 2017, Defendants filed a Re-Notice of Hearing on Defendants' Motion for Summary Judgment on all Claims. It should be noted that it does not appear that the parties have taken any discovery or filed any motions (other than the re-notice of motion for summary judgment) since 2013.

Facts:

Plaintiff is seeking class action certification in an action against SEP for deceptive or misleading billing practices in violation of the Kentucky Consumer Protection Act [KCPA] (KRS [Kentucky Revised Statutes] 367.170). Plaintiff alleges that SEP charged an "office fee" in addition to a preventative medical examination fee for same-day visits where patients raised medical concerns which necessitated some type of further action by the physician. Plaintiff alleges that SEP did not inform her, or others similarly situated, that an additional office fee could be added to their preventative exam bills under such circumstances.

Specifically, Lisa Coleman regularly visited Dr. Jennings for several years for annual preventative exams. On June 26, 2012, Coleman visited Dr. Jennings at his SEP office for a preventative exam. During the exam she mentioned that she was having issues with menopausal tiredness and stress. She had raised these issues before,

> but on this occasion she was prescribed medication. For this exam she received the following charges:
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> | | |
> |---|---|
> | Preventative Exam | $160.00 |
> | Urinalysis | 6.00 |
> | Vaccine | 70.00 |
> | EKG | 47.00 |
> | Venous Collection | 17.00 |
> | Immunization Administration | 30.00 |
> | Office Outpatient Visit | 158.00 |
>
> After her insurance company processed the bill, the Office Outpatient Visit charge remained and was billed to Coleman in the amount of $104.69. On December 11, 2012, in response to a phone call from SEP threatening to refer her account to collection, Coleman paid $54.69 toward her outstanding balance.
>
> The Office Outpatient Visit fee is generated through SEP's billing program. SEP uses the "Epic" electronic record keeping and billing program. It is a computerized database which compiles and analyzes records submitted by a treating physician in conjunction with corresponding CPT [current procedural terminology] codes which are maintained by the American Medical Association.

The circuit court went on to analyze the issues pursuant to CR 23 (holding that its requirements had been met) and ultimately defined the class of plaintiffs as: "All current and former patients of St. Elizabeth Physicians who went to St. Elizabeth Physicians for preventative exams and who were subsequently charged a fee for a preventative exam as well as an additional office outpatient visit fee for same-day service and who incurred a debt for or paid out-

of-pocket for the additional fee." The circuit court order ruled on all outstanding motions and appointed class counsel.

This interlocutory appeal was filed by SEP pursuant to CR 23.06.[1] SEP's challenge to certification is twofold: (1) that Coleman failed to meet her burden under CR 23.01 (namely, commonality, typicality, and adequacy) of showing that the class should be certified; and (2) that, because the circuit court's analysis under CR 23.01 was insufficient, it thus erred in applying its analysis pursuant to CR 23.02.

Our standard of review of the circuit court's decision whether to certify a class action is stated succinctly in *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430 (Ky. 2018):

> A trial court's determination as to class certification is reviewed on appeal for an abuse of discretion. Under an abuse-of-discretion standard, this Court may reverse a trial court's decision only if "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." "Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the [trial] court's inherent power to manage and control pending litigation." Importantly, "As long as the [trial] court's reasoning stays within the parameters of [CR] 23's requirements for certification of a class, the [trial court's] decision will not be disturbed."

[1] CR 23.06 states: "An order granting or denying class action certification is appealable within 10 days after the order is entered."

Id. at 444 (footnoted citations omitted). "[T]he only question that is before us is: Was the trial court's decision to certify the class in this case 'arbitrary, unreasonable, unfair, or unsupported by sound legal principles?'" *Id.* at 445.

CR 23.01 ("Prerequisites to class action") states in its entirety:

> 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.

The circuit court's order "must address the four prerequisites of CR 23.01 (numerosity, commonality, typicality, and adequacy) and one of the three requirements of CR 23.02." *Nebraska Alliance Realty Company v. Brewer*, 529 S.W.3d 307, 317 (Ky. App. 2017). The party seeking certification bears the burden of proof. *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012) (citation omitted). *See also Manning v. Liberty Tire Services of Ohio, LLC*, 577 S.W.3d 102, 110 (Ky. App. 2019) (citing *Young*, 693 F.3d at 537).

SEP's first argument is that Coleman failed to prove that "there are questions of law or fact common to the class[.]" CR 23.01(b).[2] In this vein, SEP

[2] SEP does not challenge the circuit court's finding that the numerosity requirement of CR 23.01(a) was met; therefore, no discussion is necessary regarding that prerequisite.

maintains that there was no company-wide policy regarding disclosures to patients about the possibility of additional charges incurred during a preventative examination. Accordingly, SEP continues, resolution of these claims would require individualized analyses because there was no common injury.

We disagree. The circuit court made the following findings concerning commonality: (1) the common question of law was "whether it was an unfair, false, misleading or deceptive practice for SEP" to charge twice for a single same-day examination that resulted in additional treatment; (2) "[a]ll 714 class members had out-of-pocket responsibility for the additional charge of which they were allegedly unaware[;]" therefore, their injuries were "the result of the same procedure employed" by SEP; and (3) all 714 plaintiffs were "charged the same fee for similar circumstance[s] by the same doctors' office [which] had no policy to inform patients of the additional charge."

Review under CR 23.01(b) should focus on whether "the defendant's conduct was common as to all of the class members." *Nebraska Alliance*, 529 S.W.3d at 312 (quoting *In re Community Bank of Northern Virginia Mortg. Lending Practices Litigation*, 795 F.3d 380, 399 (3d Cir. 2015)). "And even if 'some individualized determinations may be necessary to completely resolve the claims of each putative class member ... those are not the focus of the commonality inquiry.'" *Id.* (quoting *In re Community Bank*, 795 F.3d at 399). The circuit court

did not abuse its discretion in determining that SEP's "conduct was common . . . to all of the class members." *Id.* (quoting *In re Community Bank*, 795 F.3d at 399); *see also Hensley*, 549 S.W.3d at 444.

We next address the issue of whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class." CR 23.01(c). SEP argues that Coleman's claim is not typical of the class because: (1) she had a long history as a patient and had notice of the billing practices; (2) she (but not perhaps all patients) had signed an authorization for payment; (3) there was conflicting evidence of record concerning the typicality of discussions among physicians and patients regarding the possibility of additional charges and patient responsibility for same; (4) not all class members' insurance policies were the same; (5) not all class members have typical KCPA claims; and (6) some claimants have had satisfactory resolutions to their complaints.

But *Hensley* states that the focus when resolving the typicality issue should be on whether all claims were "based on the same legal theory[.]" 549 S.W.3d at 448. Here, the Kenton Circuit Court ruled:

> There were no convoluted interactions between SEP and the class members. They initially scheduled a preventative exam, during which a new issue was raised for which, presumably, some type of treatment was carried out. An additional charge for that treatment was added to the bill. They were all coded the same. This charge was different from other typically added charges such as X-Rays, medicine or injections. It was akin to a

> service fee provided beyond the preventative examination. Coleman called SEP and inquired about the charge. SEP resubmitted her bill. Coleman was left with an out-of-pocket balance, as [were] approximately 714 others who were billed for this service. Coleman's conduct with SEP does not take her out of the similar situation on which this action is based. Despite her efforts she was still in the same situation as those 714 others she seeks to represent. They were all similarly damaged by the same billing policy of SEP.

This analysis conforms with *Hensley*, and we find no abuse of discretion in the circuit court's holding that the typicality requirement was met. *Id.* at 444; CR 23.01(c).

Next, SEP questions the circuit court's finding of adequacy of the class representatives, *i.e.*, whether the "representative parties will fairly and adequately protect the interests of the class." CR 23.01(d). "The adequacy prong has two separate criteria: '1) the representative[s] must have common interests with unnamed members of the class[;] and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Nebraska Alliance*, 529 S.W.3d at 313 (quoting *Senter v. General Motors Corp*., 532 F.2d 511, 525 (6th Cir. 1976)). SEP specifically contests the circuit court's appointment of Stephanie Collins as class counsel, arguing that she had not "submit[ted] any background regarding [her] experience in class action litigation," nor was SEP afforded the opportunity to challenge counsel's qualifications.

Coleman responds to this argument by stating that Collins is no longer with the firm that represents the class members, that in fact substitute counsel had filed notice of intent to replace Collins shortly after the date that SEP filed its notice of appeal. Appellate counsel for Coleman attached their Notice of Intention to Request Substitution of Lead Counsel and their resumes to the brief before this Court, but SEP moved to strike the appended documents as not part of the record on appeal. Coleman's counsel filed for leave to supplement the record with (and take judicial notice of) these items. These motions, as well as the parties' responses thereto, have been passed to this panel for consideration.

We agree with SEP that the issue regarding appointment of counsel requires further analysis by the circuit court. "[The adequacy] prong necessarily requires an analysis of class counsel's ability to adequately protect the class's interests. 'It tests the qualifications of class counsel and the class representatives. It also aims to root out conflicts of interest within the class to ensure that all class members are fairly represented in the negotiations.'" *Nebraska Alliance*, 529 S.W.3d at 315 (citation omitted). Here there was no such analysis, and, even if there had been, the issue would need revisiting because of the proposed substitution of current counsel in place of Collins. "[W]e would be usurping the trial court's discretionary power if we were to make factual findings and legal conclusions[.]" *Id.*

"[B]ecause the typicality, commonality, and adequacy prongs overlap in analysis, the trial court should revisit all prongs on remand to determine whether to certify a class. *Cf.* CR 23.03(3) ('An order that grants or denies class certification may be altered or amended before final judgment.')." *Id.* (citation omitted). Therefore, we vacate the circuit court's appointment of counsel and remand the matter for full consideration under CR 23.01 and CR 23.07 ("Class counsel"). Accordingly, SEP's motion to strike and Coleman's motions to supplement the record and to take judicial notice are deemed moot and will be denied in a separate order issued with this opinion.

We decline to examine the circuit court's CR 23.02 findings until such time as the CR 23.01 issues are addressed on remand. *Nebraska Alliance*, 529 S.W.3d at 316 ("[I]f the trial court finds the CR 23.01 prerequisites are met, it must then examine whether one of the three requirements of CR 23.02(a)-(c) is met.").

The class certification order of the Kenton Circuit Court is vacated and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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