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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001329-ME

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 13-CI-00694

DAVID A. COATES AND
BENITA HATFIELD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: Kentucky Farm Bureau Mutual Insurance Company (KFB) appeals from the Nelson Circuit Court's determination that the appellees' claims can proceed as a class action under Kentucky Rules of Civil Procedure (CR) 23. We affirm.

The facts, as summarized by the Nelson Circuit Court, are as follows:

> On or about July 6, 2009, defendant, Kentucky Farm Bureau Mutual Insurance Company ("KFB") began using a "dual-purpose" premium installment/cancellation notice which purported to both notify the policy owner(s) of the due date of their insurance premium installment and notify the policy owner(s) that if the designated premium was not received by the stated due date, their policy would be cancelled effective on a date prior to the premium due date (hereinafter "Dual-Purpose Notice").
>
> Since July 6, 2009, the court finds KFB used a notice identical in form and substance to Dual-Purpose Notice to purportedly cancel hundreds or thousands of policies. Plaintiffs and intervening plaintiffs contend this form notice is not effective to cancel automobile insurance policies under KRS [Kentucky Revised Statutes] 304.20-040 and KFB has illegally and ineffectively claimed cancellation of hundreds or thousands of other such policies.
>
> Plaintiffs and intervening plaintiffs also allege that the mere fact that KFB cancelled the subject policies, in and of itself, has caused and will continue to cause pecuniary loss to named insureds. The intervening plaintiffs, David A. Coates and Benita Hatfield (now Sharp), are two such named insureds allegedly damaged.
>
> The plaintiffs and intervening plaintiffs seek to certify a class of all similarly situated aggrieved KFB insureds.

The circuit court went on to analyze the issues pursuant to CR 23 and ultimately defined the class as:

> For any policy of automobile insurance written by KFB, or any of its affiliated companies, which policy was in effect for at least sixty (60) days, and which policy was

> purportedly cancelled by KFB for non-payment of premium by use of a Premium Notice having the dual purpose of notifying the policy owner(s) and/or insured(s) of the due date of their insurance premium installment and also notifying the policy owner(s) and/or insured(s) that their policy will be cancelled if not received by the stated due date, . . . a class of all persons or entities who are or were named insureds under said policy[.]

The circuit court entered its order on August 23, 2018, granting appellees' motion to certify the class (having also modified its representatives) and appointing counsel. This interlocutory appeal was filed by KFB pursuant to CR 23.06.[1]

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. In the present case, we find no such abuse of discretion and affirm the circuit court's decision.

KFB first argues that the circuit court abused its discretion in adopting the appellees' findings of fact. In support of this argument, KFB cites *Retherford v. Monday*, 500 S.W.3d 229, 232 (Ky. App. 2016), "in which a panel of this Court questioned the propriety of adopting tendered findings[.]" *Keith v. Keith*, 556 S.W.3d 10, 13 (Ky. App. 2018). However, as the *Keith* court aptly points out, "[t]o the extent that *Retherford* holds that adoption of tendered findings is automatically grounds for reversal, this holding conflicts with directly controlling precedent from our Supreme Court." *Id.* at 14 (footnote omitted). *See also Bingham v. Bingham*, 628 S.W.2d 628, 628-30 (Ky. 1982); *Prater v. Cabinet for Human Res.*, 954 S.W.2d 954, 956 (Ky. 1997). Moreover, the current case, unlike *Retherford*, *Keith*, *Bingham*, and *Prater*, does not involve sensitive family court issues, but rather those pertaining to class actions, complete with complicated factual and procedural concerns. "In arriving at judgments, trial courts are generally faced with accepting the views of one party or the other. . . . [T]here is no indication that the trial court failed to make its determinations de novo." *Rockwell Intern. Corp. v.*

Commonwealth, Nat. Resources and Environmental Protection Cabinet, 16 S.W.3d 316, 318 (Ky. App. 1999) (citations omitted). The Nelson Circuit Court committed no abuse of discretion by requiring the parties to submit proposed findings and accepting certain of those findings in its judgment.

We next address the substantive issues pertaining to the class certification. 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); *Manning v. Liberty Tire Services of Ohio, LLC*, 577 S.W.3d 102, 110 (Ky. App. 2019) (citing *Young*).

KFB contends that the commonality requirement was not sufficiently satisfied under CR 23.01(b). In this vein, KFB asserts that "[t]here are simply too

many additional questions that would have to be answered before any one individual's claim would be fully adjudicated[.]"

We disagree. 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 KFB's "conduct was common . . . to all of the class members." *Nebraska Alliance*, 529 S.W.3d at 312; *Hensley*, 549 S.W.3d at 444.

KFB further maintains that the typicality requirement (CR 23.01(c)) was not met because resolution of the claims of Coates and Hatfield "will not advance the claims of other class members." But *Hensley* states that the focus when resolving the typicality issue should be on whether "all [claims were] based on the same legal theory[.]" *Hensley*, 549 S.W.3d at 448. Here, the Nelson Circuit Court ruled that "[t]he claims of the Modified Class Representatives arise out of the same course of conduct as the other class members' claims and are based upon the same legal theory. The same alleged unlawful conduct – use of the Dual-

Purpose Notice – is directed at the entire class." This analysis comports with *Hensley*, and we find no abuse of discretion in holding that the typicality requirement was met. *Id.* at 444; CR 23.01(c).

Next, KFB 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)). In its finding of adequacy, the circuit court stated that the representatives' and putative class members' interests are "co-extensive and not in conflict" and that they "have the common interest of determining whether KFB's Dual-Purpose Notice violates KRS § 304.20-040." Thus, "[t]he named representatives share a common interest with other class 5members and are strongly pursuing these interests through appropriate legal counsel." *Manning*, 577 S.W.3d at 116. We find no error in the circuit court's determination of the adequacy of the class representatives and their retained counsel. *Id.*

We move on in our analysis to the certification requirements enunciated in CR 23.02(c), which mandates that the circuit court find "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." We are aware of this Court's language in *Manning* which states: "[I]n contrast to CR 23.01's commonality requirement, CR 23.02(c)'s predominance criterion is far more demanding." *Manning*, 577 S.W.3d at 118 (citation omitted).

The circuit court identified the central legal question as this: "Did KFB's Dual-Purpose Notice violate the provisions of KRS 304.20-040, thus rendering that notice ineffective to cancel the subject insurance contracts, and therefore resulting in KFB's breach of its insurance contract with the class members upon cancellation of the policy and/or denial of their claims purportedly on the basis that their insurance contract(s) had been cancelled?" KFB concedes that this question is common to all class members but argues that it does not predominate over questions affecting individual members, especially when it comes to assessing damages.

However, the circuit court made the appropriate decision to bifurcate the issues of liability and damages, with the intent to address the latter question only after the resolution of the central legal question, stating:

> To this end, the court reserves the right to employ any methods authorized by CR 23, including, but not limited to: the appointment of a special commissioner, pursuant to CR 53.01 and 53.02, for individualized damages hearings, the establishment of damages sub-classes, or the transfer of individual cases to the appropriate circuit court for further proceedings consistent with this court's liability determination.

KFB fails in its burden to demonstrate that this determination was an abuse of discretion, and we decline to set it aside.

"CR 23.02(c) requires that the questions of law or fact that are common to the members of the class predominate over the questions which affect individual members. . . . **It is not necessary that there be a complete identity of facts relating to all members as long as there is a common nucleus of operative facts."** *Wiley v. Adkins*, 48 S.W.3d 20, 23 (Ky. 2001) (emphasis added).

We likewise find no abuse of discretion in the circuit court's finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CR 23.02(c). The circuit court based its superiority determination on factors such as the geographic dispersal of the class, the avoidance of duplication of actions, the ability to process claims more quickly, and the ability to eliminate inconsistent outcomes. These are all valid considerations. "We . . . fail to see how a class action in this case would not be 'superior to other available methods for the fair and efficient adjudication of the

controversy.' Allowing this case to proceed as a class action consolidates all claims[.]" *Hensley*, 549 S.W.3d at 448; CR 23.02(c).

The class certification order of the Nelson Circuit Court is affirmed.

MAZE, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

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