COMMONWEALTH OF KENTUCKY
KENTUCKY COURT OF APPEALS
COURT OF APPEALS NO. 2023-CA-0767
FAYETTE CIRCUIT COURT NO. 20-CI-00332

ROGER QUARLES, ET AL. APPELLANTS

V.

HAYNES PROPERTIES, LLC APPELLEES

Response to Burley Tobacco Growers Cooperative Association's Motion to Dismiss

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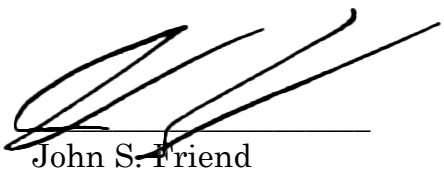
Submitted by:

John S. Friend
Friend Law, PSC
908 Minoma Ave.
Louisville, KY 40217
Counsel for Appellants

CERTIFICATE REQUIRED BY CR 5.03

The undersigned does hereby certify that, on August 14, 2023, this response was served on all counsel of record.



John S. Friend

Response to Motion

May it please the Court, Appellants, Roger Quarles, Rick Horn, Ian Horn, Campbell Graddy, David Lloyd, and Gary Wilson hereby respond to Burley Tobacco Growers Cooperative Association's ("BTGCA") Motion to Dismiss Appeal.

Nature of the Action

It is not necessary to engage in any lengthy factual recounting of the underlying case to decide this motion. Quarles generally agrees with the overall picture Burley paints of the proceedings below but will reserve a more detailed recounting for merits briefing.

The following facts are all that matters here:

1. On November 17, 2020, Judge Julie M. Goodman preliminarily certified a settlement class. This proposed settlement included a $1.5 million payment to a newly created non-profit as opposed to going to class members.
2. Quarles objected to the $1.5 million payment, arguing that class members should receive that money.
3. Judge Goodman held fairness hearings in late February 2021.
4. During those hearings, Quarles proposed that, at the very least, the class members should have the ability to vote as to whether to claim their pro rata share of the $1.5 million or allow it to go to the new non-profit.
5. In an order entered July 28, 2021, Judge Goodman ruled that one of two things would happen: if the new non-profit could be self-sustaining within two years, the entire $1.5 million would be paid to the class. If not, then class members would be allowed to vote on where their money went. This

number eventually became $1.325 million for reasons not germane to the motion or the merits.

6. On August 5, 2021, Quarles filed a fee petition asking for 24% of the $1.325 million. On August 24, 2021, Judge Goodman denied that motion.
7. The non-profit did not become self-sustaining in two years. Notice was sent to 2,603 class members who then voted where their money would go.
8. Approximately 1,881 class members responded that they wanted their shares. 38 wanted their shares to go to the non-profit. The others did not respond one way or the other.
9. On March 17, 2023, Quarles filed a new motion for fees, asking for 7.5% of the $1.325 million. This 7.5% was the same common fund award given to class counsel as to the larger common fund in the case.
10. On April 5, 2023, the trial court denied that motion. Quarles filed a CR 59.05 motion which was denied on June 1, 2023. Quarles filed the notice of appeal on June 26, 2023.

Argument

a) The Notice of Appeal was timely.

Burley first argues that Quarles should have appealed the August 24, 2021, denial of attorney fees. This is incorrect for a simple reason: Quarles is not maintaining any entitlement to 24% of the $1.325 million. Given that, the August 24, 2021, ruling is not at issue on the appeal. The issue here is whether he is entitled to 7.5%. That ruling became final and appealable on June 1, 2023, and Quarles filed his Notice of Appeal within the thirty days provided.

Regardless, "[w]here an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable."[1] The question is "whether, absent an appeal [the ruling would] become the law of the case…"[2] The August 2021 ruling was interlocutory, even taking a "wait and see" approach to class member payouts:

> While the class members may, upon the conclusion of two years, withdraw their contribution, this is entirely dependent on the individual and is consistent with a member's right to withdraw their contribution. Therefore, the amount potentially granted to the class is speculative, as it is possible that all or most class members will choose to donate their share to [the non-profit] and remain members of said organization.[3]

As the fund's disposition was entirely up in the air, the order was inherently interlocutory.

b) If the Court believes the Graddy firm is the real party in interest, it should order that it be joined under RAP 10(B)(1)

As an initial matter, Quarles does not agree that the Graddy firm has to be a party to this appeal. None of Burley's case law supports that notion. Burley cites several family law cases involving courts *ordering* direct payment to attorneys being appealed by those *opposing* payment.[4] But those cases also recognize that "unless the fee is awarded directly to the attorney, the client, as the primary obligor of the

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[1] *Hook v. Hook*, 563 S.W.2d 716, 717 (Ky. 1978)
[2] *Hampton v. Flav-O-Rich Dairies*, 489 S.W.3d 230, 233 (Ky. 2016)
[3] Exhibit A at 2
[4] *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 518 (Ky. 2001)(*overruled in part on other grounds by Smith v. McGill*, 556 S.W.3d 552, 555 (Ky. 2018) *Fink v. Fink*, 519 S.W.3d 384, 384 (Ky. App. 2016)

fee, is the real party in interest and the only indispensable party to the appeal."[5] This is also true of the other cited cases.

In the class action context, by contrast, common fund fee denials are pursued in the party's name.[6] This is true whether it is an objector or a class representative because the fee requested is derived from a recovery to the class, not a recovery solely to the attorney.[7]

Regardless, this is an issue of first impression in Kentucky and no cases cited by Quarles nor Burley are binding on this specific issue. Quarles does not categorically object to the idea of joining the Graddy firm as an Appellant. Quarles' only real concern with that notion is creating unnecessary traps for the unwary on appeal. If this Court feels that joining the Graddy firm is appropriate, Quarles will gladly do so. What would be inappropriate, however, is dismissing the appeal.

Kentucky has moved away from strict compliance regarding indispensable parties. CR 73.03(1) stated, "[t]he notice of appeal shall specify by name all appellants and appellees." This rule has been repealed and replaced by RAP 2(A)(2), which states that "[u]pon timely filing of the notice of appeal from a final and appealable order on all claims in an action, all parties to the proceedings from which the appeal is taken, except those who have been dismissed in an earlier final and appealable order, shall be parties before the appellate court."

The Kentucky Supreme Court just discussed how this new rule should operate. In *Mahl v. Mahl*, an appellant failed to name an indispensable party.[8] The

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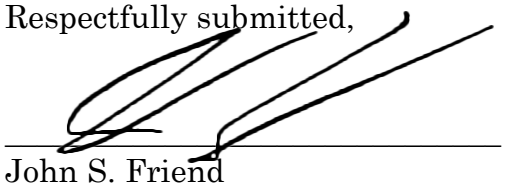
[5] *Neidlinger*, 52 S.W.3d at 519
[6] *See e.g., Levitt v. Soutwest Airlines Co. (In re Sw. Airlines Voucher Litig.),* 898 F.3d 740, 742 (7th Cir. 2018)
[7] *See e.g., Lott v. Louisville Metro Gov't*, No. 3:19-CV-271-RGJ, 2023 U.S. Dist. LEXIS 45228, at *7 (W.D. Ky. Mar. 17, 2023)
[8] 2023 Ky. LEXIS 109 (Ky. 2023)

Court first noted that the rule changes showed "strict compliance for naming an indispensable party should no longer be required."[9] Instead, the Court looked to the record to see if the indispensable party had notice. Because the indispensable party "was listed in the distribution list and thus had adequate notice of the appeal," dismissal was inappropriate.[10]

The Graddy firm has adequate notice of this appeal. They represent the appellants. Dismissing this appeal for failing to join the Graddy firm would reinstate the strict compliance the Kentucky Supreme Court specifically rejected. If the Court feels the Graddy firm should be joined, Quarles asks that it order joinder, but passes on the issue of whether it should be required in every similar case. Given there is no real potential for harm to Quarles in joining some of his attorneys on this appeal, there is not really any reason to protest. There may, however, be situations in the future where such a posture could be a problem for the client.

Respectfully submitted,



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[9] *Id.* at 27
[10] *Id.* at 26