

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4306

CV 80-1709

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED

JAN 11 1985

ROBERT H. SHEMWELL, CLERK
BY M DEPUTY

RICKEY DALE CONLEY, ET AL.,

Plaintiffs

LAWRENCE H. CONLEY, ET AL.,

Plaintiffs-Appellants,

v.

LAKE CHARLES SCHOOL BOARD,
G.W. FORD, Superintendent
CALCASIEU PARISH SCHOOL BOARD and
H.A. NORTON, Superintendent,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

(December 17, 1984)

Before WISDOM, RANDALL and JOLLY, Circuit Judges.

RANDALL, Circuit Judge:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

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Homer S. Singleton, an attorney purporting to represent the plaintiff class and certain named individuals, brings this appeal from an order of the district court approving a desegregation plan for Calcasieu Parish public schools in Louisiana. Because we find that (1) Singleton has never been enrolled as class counsel and (2) none of the individual appellants has standing to challenge the district court's order, we dismiss this appeal.

I.

This appeal comes before the Court as the latest installment of the ongoing saga of the effort to desegregate the public schools in Calcasieu Parish, Louisiana. In 1970, after five years of litigation, we found a Calcasieu Parish School Board (School Board) desegregation plan unconstitutional, mandated certain changes, and stated that:

The Board is free to devise a different plan, or to seek changes and adjustments, and the District Court has discretion to approve such alternatives, provided that no such different plan or adjustment diminishes the extent of desegregation projected by this opinion

Conley v. Lake Charles School Board, 434 F.2d 35, 40 (5th Cir. 1970).

On November 4, 1980, a Motion for Additional Relief was filed in this action. Two days later, the district court in connection with the motion allowed Louis Berry and P. Spencer Torry, experienced attorneys in desegregation matters, to be enrolled as counsel for the plaintiff class. After nineteen months of negotiation, the School Board and the class submitted to the court a proposed consent decree order and copy of the desegregation plan. The most controversial aspect of this plan was the proposed merger of the virtually all-black Boston High School and the integrated Lake Charles High School, located only three blocks away. On July 15, 1982, the district court in a memorandum order noted the plan but neither approved nor disapproved of it, relying instead on the School Board's own ability to make any changes and adjustments in the original desegregation plan that do not conflict with this Court's 1970 opinion.

On January 20, 1983, Basile Miller, individually and for a class, sued the School Board, presumably in an effort to block the Boston-Lake Charles High merger. Upon suggestion by the district court, Miller converted his complaint into a petition for intervention in the pending desegregation case. On June 1, 1983, after a full hearing, the district court denied intervention. On appeal, we affirmed but held that Miller could resubmit his motion to the district court if a hearing on approval of the plan pursuant to Fed. R. Civ. P. 23(e)¹ were not

held within a reasonable time. Miller v. Calcasieu Parish School Board, No. 83-4402 (5th Cir. Nov. 7, 1983) (unpublished).

On September 1, 1983, Homer Singleton, current counsel for appellants, together with Richard Ieyoub, another attorney, filed a Motion to Enroll as counsel for Lawrence Conley, a black member of the Calcasieu Parish community whose children attended Calcasieu public schools at the time this desegregation case was commenced and were original named plaintiffs therein. The district court on November 30 denied enrollment, but reserved to the movers the right to refile their motion once the rule 23(e) hearing on the proposed plan was held. On December 9, 1983, Singleton requested the district court to reconsider its motion to enroll as counsel, but this request was again denied.

Pursuant to the opinion of this Court, the district court met with the parties on November 30, 1983, to schedule a rule 23(e) hearing date and to set deadlines for filing of the Notice of Proposed Compromise and Settlement. Such notice was submitted on December 12, 1983, and was published in a local newspaper on December 16, 23, and 30. Thereafter, the district court accepted written objections to the proposed consent decree and, at the hearing held on January 30 and 31, 1984, meticulously

¹ Rule 23(e) of the Federal Rules of Civil Procedure provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

provided all interested persons the opportunity to express fully their views in open court. During the course of the testimony, the court also granted all persons in attendance, including Singleton, the opportunity to question all witnesses concerning their views of the proposed plan. After the hearings, the district court approved the compromised plan with modifications on April 3, 1984.

Approximately one month later, a notice of joint appeal from the district court's April 3 ruling was filed by Singleton, purporting to represent himself pro se and Lawrence Conley, Dennis Ware, II, Earl Lawrence Ringo, and Harold L. Lewis, Sr., individually and as class representatives, as well as Basile Miller, Howard Oliver (on behalf of his grandchildren), and Alvin and Rosemary Narcisse (on behalf of their minor son). On appeal, the School Board challenges as an initial matter both the standing of these individual appellants to bring this appeal and Singleton's authority to represent the class. To these contentions of the School Board we now turn.

II.

At the outset we make two observations about the nature of the plaintiff class that will be helpful in resolving the issues before us. First, we point out that, while the district court treated the case as a class action, there is nothing in the record indicating that the case was ever certified as such. No

doubt the absence of a certification order resulted from the fact that the instant case was instituted in 1964, at which time rule 23 of the Federal Rules of Civil Procedure did not require certification. Nonetheless, it is clear that the amendment of 1966 instituting the requirement of certification² applied to actions pending on its effective date. Jones v. Caddo Parish School Board, 735 F.2d 923, 925 n.1 (5th Cir. 1984) (en banc). We have held, however, that in certain circumstances a district court's implicit determination and certification of a class can satisfy rule 23 as amended:

[A] class action may exist in the absence of a formal, explicit determination of class action status by the district court. If the record indicates that the district court conducted the litigation before it as a class action ..., its technical failure to enter an order formally certifying the class does not prevent the suit from so proceeding[.]

Johnson v. General Motors Corp., 598 F.2d 432, 435 (5th Cir. 1979); see also Graves v. Walton County Board of Education, 686 F.2d 1135, 1139-40 (5th Cir. 1982); Gore v. Turner, 563 F.2d 159, 166 (5th Cir. 1977); Bing v. Roadway Express, Inc., 485 F.2d 441, 447 (5th Cir. 1973).

² Rule 23(c)(1) of the Federal Rules of Civil Procedure provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

The Graves case, which also involved desegregation of public schools, is similar to the one at bar. In Graves, the district court had never certified the class action, and the claims of the original plaintiffs were mooted by their graduation. We nevertheless held that the case was in fact a class action on the ground that it was specifically described and treated as one by the parties and the trial court throughout its long history. 686 F.2d at 1140. The class action status of the instant case likewise was never questioned during its twenty years of pendency by either the trial court or the parties, all of whom consistently described the case in class action terms. Indeed, we ourselves in Miller v. Calcasieu Parish School Board, supra, treated without hesitation the case as a class action. Under these circumstances, "[t]o state at this late date that this was not a class action, 'would be to ignore the substance of the proceeding below in favor of an excessively formalistic adherence to the Federal Rules of Civil Procedure.'" Senter v. General Motors Corp., 532 F.2d 511, 522 (6th Cir.) (quoting Bing v. Roadway Express, Inc., supra, at 447), cert. denied, 429 U.S. 870 (1976).

Second, we note the scope of membership in the class. The original complaint was filed in 1964 by the plaintiffs as next friend to their children and "on behalf of other Negro children and their parents similarly situated" in the City of Lake Charles and in Calcasieu Parish. Defendant's Offer of Proof

#2, at 1. That the composition of the class has not been changed in the intervening twenty or so years was made clear by the district court's affirmation during the rule 23(e) hearing that the action "is a suit by black named individuals and black children against the Calcasieu Parish School Board." Record Vol. 5, at 10. Indeed, the appellants concede as much.³ There thus appears to be no question that class membership in this case is confined to those black children eligible to attend public school in Calcasieu Parish and their parents.

III.

The School Board asserts that Singleton is not entitled to prosecute this appeal on behalf of any of the appellants he purportedly represents. In addressing this contention, we consider in turn the ability of Singleton to maintain the appeal on behalf of each appellant.

A. The Class Itself. It is axiomatic that a class as a whole has standing to appeal an order of the district court entered in the class action. It is also clearly established, however, that only counsel properly enrolled can represent the class before the court. This requirement results from the obligation of the court to ensure that "the representative

³ Brief of Appellants, at 13.

parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). As we have observed previously with respect to making such a determination, "[courts] focus on the attorney, as well as the named parties because they realize the important role the attorney plays in protecting the interests of the class." North American Acceptance Corp. Securities Cases v. Arnall, Golden & Gregory, 593 F.2d 642, 644 n.4 (5th Cir.), cert. denied, 444 U.S. 956 (1979); see also Cullen v. New York State Civil Service Comm'n, 566 F.2d 846, 848 (2d Cir. 1977) ("court's review of adequacy of counsel ... is central to a finding of adequacy of representation"); 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.07[1.-1] (Supp. 1983-84) (in deciding adequacy of named parties, courts examine the qualifications of the class attorney).

This is not to say, of course, that the class counsel who is currently enrolled when an appealable order or judgment is entered by a district court possesses the authority to determine whether to appeal. Clearly, "at least as an initial matter, the decision to appeal a class action judgment must rest with the class plaintiffs." Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1177-78 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979). Thus, we held in Pettway that, if the named plaintiffs wish to appeal on behalf of the class contrary to the best judgment of the class counsel, "the district court must exercise its discretion in deciding whether to substitute class counsel to

allow the named plaintiffs to maintain the appeal." Id. at 1178. In Pettway, we listed a number of factors that should inform the exercise of that discretion.

In the instant case, the district court never had the opportunity to exercise its discretion since the named plaintiffs never moved the district court to substitute class counsel.⁴ In the absence of a ruling on such a motion, we are powerless to permit this appeal. Indeed, one of the purposes for requiring the district court to make the initial decision as to substitution is to ensure that the determination and our subsequent review thereof are made upon a sufficient factual predicate. On the present state of the record, we have no way of knowing, for example, to what degree the named plaintiffs or absent class members consider the appeal to be in their interest or the adequacy of the proposed new class counsel. Under such circumstances, we find that this appeal cannot be maintained by Singleton as counsel for the class.

B. Nonclass Members. Singleton also prosecutes this appeal on behalf of several persons, including himself, who are not named plaintiffs or even absent members of the class.⁵ In

⁴ Singleton did seek to enroll as counsel for Lawrence Conley, one of the named plaintiffs who originally brought this suit as next friend to his children. In his reply brief on the motion to enroll, however, Singleton explicitly stated that he sought to enroll as counsel only for Conley, not for the class. Record Vol. 2, at 192.

his brief, Singleton recognizes the fact that these persons are not named plaintiffs or class members, but contends that their participation in the rule 23(e) hearing conferred upon them intervenor status by implication.⁶ We find this claim to be meritless.

It is firmly established that the proper course for parental groups or other affected citizens seeking to present complaints arising out of desegregation litigation is a petition for intervention. Graves v. Walton County Board of Education, *supra*, at 1140; Pate v. Dade County School Board, 588 F.2d 501, 503 (5th Cir.), cert. denied, 444 U.S. 835 (1979). The purpose of such a petition is to "bring to the attention of the district court the precise issues which the new group [seeks] to represent and the ways in which the goal of a unitary system had allegedly been frustrated." Hines v. Rapides Parish School Board, 479 F.2d 762, 765 (5th Cir. 1973). Intervention is thus properly denied if the issues presented by the new group were already considered or "if the existing parties were aware of those issues and were

⁵ These appellants are Basile Miller, Howard Oliver (on behalf of his grandchildren), Alvin and Rosemary Narcisse (on behalf of their minor son), and Homer C. Singleton. Miller is black but childless; the other appellants apparently are white with children enrolled in the Calcasieu Parish School system.

⁶ Singleton alternatively asserts that these appellants were properly before the court as amici curiae. We reject this argument out of hand. Such a status -- even assuming it to have been conferred -- would not provide the appellants with the authority to bring an appeal in their own right.

completely competent to represent the interests of the new group." Davis v. East Baton Rouge Parish School Board, 721 F.2d 1425, 1441 (5th Cir. 1983).

The appellants here have failed to file a petition for intervention in district court and rely instead on their participation in the rule 23(e) hearing as to somehow entitle them to intervenor status. We think it clear from the principles articulated above, however, that at least in the class action context intervention can only be accomplished through formal compliance with rule 24 of the Federal Rules of Civil Procedure. The requirement of intervention performs a screening function vital to the manageability of class actions. It would be inimical to this function to allow a party to avoid the obstacle of formal intervention by simply participating in a general fact-finding hearing such as the one conducted in the instant case by the district court. Thus, because the nonclass member appellants have failed properly to intervene according to rule 24, we find that they lack standing to maintain this appeal.⁷

⁷ We add parenthetically that, even if the appellants listed in supra note 5 were absent class members, they would still be required to intervene before directly participating in this litigation. See Lelsz v. Kavanagh, 710 F.2d 1040 (5th Cir. 1983); Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324 (5th Cir. 1982).

C. Named Plaintiffs. The last group of appellants allegedly represented by Singleton are certain named plaintiffs of the original action.⁸ Although Singleton filed a notice of appeal on behalf of these individuals, our review of the record reveals that Singleton has never been enrolled as counsel for any of them and has previously sought enrollment only for Lawrence Conley.⁹ We find moreover that each named plaintiff except for Conley agreed in writing to be represented by the class counsel¹⁰ and apparently has never revoked or sought to revoke this agreement. Based on these facts, we conclude that Singleton is without authority to represent the named plaintiffs with the exception of Conley.

With respect to Conley, we assume arguendo that Singleton is authorized to represent him for purposes of this appeal. For the following reasons, however, we conclude that Conley lacks standing to prosecute this appeal.

In Sosna v. Iowa, the Supreme Court held that, "[w]hen the District Court certifie[s] the propriety of the class action,

⁸ These are Lawrence Conley, Dennis Ware, II, Earl Lawrence Ringo, and Harold L. Lewis, Sr.

⁹ See supra note 4. Conley was also the sole named plaintiff to testify against the consent decree at the rule 23(e) hearing.

¹⁰ See Plaintiff's Offer of Proof #1 (affidavit signed by named plaintiffs affirming their retention of class counsel for representation "in all matters pertaining to and arising from this litigation").

the class of unnamed persons described in the certificate acquire[s] a legal status separate from the interest asserted by the appellant." 419 U.S. 393, 399 (1975); see also United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). Thus, the mootness of a named plaintiff's individual claim does not render a class action moot. A corollary of this principle is that the continued vitality of the stake shared by members of the class in the class action does not save a named plaintiff's claim from becoming moot. Once a named plaintiff's claim is mooted, therefore, his involvement in the class action would be confined to representing the class.

Based on the foregoing, we find that Conley lacks the ability to bring this appeal. As described above, the plaintiff class consists of those black children enrolled in the Calcasieu Parish school system and their parents. Conley, however, conceded at the rule 23(e) hearing that his children had long since graduated. Thus, Conley's claim has become moot. See Laurenzo v. Mississippi High School Activities Ass'n, 662 F.2d 1117, 1120-21 (5th Cir. 1981); Johnson v. City of Opelousas, 658 F.2d 1065, 1068-69 (5th Cir. 1981). As a result, we conclude that Conley lacks standing to bring this appeal.

III.

Because Singleton has not been enrolled as class counsel, he has no authority to bring this appeal on behalf of

the class. In addition, we find that none of the individual appellants represented by Singleton has standing to appeal. Accordingly, this appeal is dismissed.

DISMISSED.

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A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By

Deputy

New Orleans, Louisiana

United States Court of Appeals

FIFTH CIRCUIT

GILBERT F. GANUCHEAU
CLERK

OFFICE OF THE CLERK
600 CAMP STREET
NEW ORLEANS, LA 70130
January 9, 1985

COMM.
(504) 589

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CASE INQUIRIES
East. & Mid. LA
No. & West. TX
So. & East. TX
MS., Agency & West. LA
Other

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RECEIVED

JAN 11 1985

Mr. Robert H. Shemwell, Clerk
U.S. District Court
Shreveport, LA, 71101

ROBERT H. SHEMWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

No. 84 4306-CONLEY -vs- LAKE CHARLES SCHOOL BD.
(CA 80 1709)

- ☒ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.
- ☐ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.
- ☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.
- ☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.
- ☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

- ☒ Copy of the Court's opinion.
- ☒ Original record on appeal or review. -6 volumes
- ☒ Original exhibits. (1 Box-Exhibits & Record on Appeal under same cover)
- ☒ Bill of Costs approved by this Court. ☒ Copy enclosed to counsel.

cc: (Letter Only)

Hon. Earl E. Veron

Mr. Homer C. Singleton, Jr.

Mr. Stephen J. Katz

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By:

A. J. Rendon
Deputy Clerk

U.S. COURT OF APPEALS
FILED

DEC 28 1984

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILL OF COSTS

NOTE: The Bill of Costs is due for filing in this office *within 14 days from the date of the opinion*, in accordance with Rule 39 F.R.A.P. If a bill of costs is not timely filed in this office, processing can be accomplished only by the filing of a formal motion for leave to file same out of time.

GILBERT F. GANUCHEAU
CLERK

Rickey Dale Conley, et al v. Lake Charles School Bd, et al No. 84-4306

The Clerk is requested to tax the following costs against: Appellants, Homer C. Singleton, JR. et al

COSTS TAXABLE UNDER FRAP & LOCAL RULES 39	REQUESTED				ALLOWED (If different from amount requested)			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket fee (\$65.00)								
Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief	14	36	3.70	133.20	14	36	.25	129.50
Appellant's Reply Brief								
Other: Cover; Bind Tax Postage				25.00 14.24 7.10				14.24 7.10
See attached A B letter Invoice #26456				Total \$ 179.54	Costs are taxed in the amount of \$ 150.84			

Costs are hereby taxed in the amount of \$ 150.84 this 9th day of January, 1985.

State of Louisiana
County of Morehouse

GILBERT F. GANUCHEAU, Clerk

By Margaret Stetson
Deputy Clerk

I, Stephen J Katz

, do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This 26 day of December, 1984.

*SEE REVERSE SIDE FOR LOCAL & FRAP RULES GOVERNING TAXATION OF COSTS

Attorney for

Appellees

(Signature)