

1991 WL 126724

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United States District Court, D. Kansas.

Thomas PORTER, et al., Plaintiffs,
v.
Governor Joan FINNEY, et al., Defendants.

No. 77-3045-R. | June 28, 1991.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

ROGERS, District Judge.

*1 This case is now before the court upon pleadings docketed at Nos. 356, 357, 358 and 359. Pleading # 356, which is captioned “In The United States Court of Appeals for the Tenth Circuit Denver Colorado”, appears to request leave to appeal this court’s order dated May 17, 1991 insofar as that order makes rulings regarding the doctrine of *res judicata*, the appointment of counsel for the plaintiffs’ class, and a motion to intervene by certain members of the class. Pleading # 357, which is also captioned as a Tenth Circuit pleading, addresses the same issues. Pleading # 358 is a motion for permission to file an out of time notice of appeal. This motion was filed on June 20, 1991. Pleading # 359 is a timely notice of appeal of an order of this court dated June 10, 1991.

The court shall rule as follows. The court shall treat pleadings ## 356 and 357 as a notice of appeal of the court’s May 17, 1991 order denying the motion for intervention. These pleadings are captioned as Tenth Circuit pleadings. They address the intervention issue as well as other issues decided in the May 17, 1991 order. The pleadings were also filed within 30 days of the May 17, 1991 order. The court believes it is proper to permit an appeal of the part of the order denying intervention because that represents a “collateral order” which may be appealed immediately, even though it is interlocutory. Our order denying intervention: conclusively determines a

disputed question; resolves an important issue completely separate from the merits of the action; and would be effectively unreviewable on appeal from a final judgment. Therefore, it qualifies for the “collateral order” exception to 28 U.S.C. § 1291. See *Eng v. Coughlin*, 865 F.2d 521, 525 (2d Cir.1989); see also, *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir.1987) (denial of a motion to intervene in a class action is appealable).

Given the court’s treatment of pleadings ## 356 and 357, it may be unnecessary to decide movants’ request to file an appeal out of time, pleading # 358. However, as an alternative method of appealing the intervention question, the court is willing to grant movants the right to file the notice of appeal out of time. The court does not believe it is proper for movants to bring an appeal on any other issue than intervention and the court shall not certify any other issue as proper for an interlocutory appeal. The movants are non-named class members who have failed to demonstrate or adequately allege good cause for permitting an appeal of a matter, other than intervention, which counsel for the class and the named class representatives have chosen not to appeal. As the court stated in *Guthrie v. Evans, supra*, 815 F.2d at 628:

A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits. [cite omitted] A class cannot even be certified unless its members are so numerous that joinder is impracticable. FED.R.CIV.P. 23(a)(1). If each class member could appeal individually, the litigation could become unwieldy. Thus, allowing direct appeals by individual class members who have not intervened in the district court would defeat the very purpose of class action lawsuits.

*2 Movants’ other notice of appeal, pleading # 359, also addresses an order which is unsuitable for an interlocutory appeal in the court’s opinion.

In conclusion, the court holds that movants’ pleadings ## 356 and 357 should be considered as a notice of appeal. The court further holds that the motion for leave to file an appeal out of time (pleading # 358) should be granted so that movants have the opportunity to appeal this court’s order dated May 17, 1991 on the issue of the denial of the motion to intervene. But, as to pleadings ## 356, 357, 358, and 359, to the extent movants request this court to certify that the order of the court on any issue other than intervention is proper for interlocutory appeal, their request is denied.

IT IS SO ORDERED.

