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APPELLANT’S ASSIGNMENTS OF ERROR

- I. The trial court erred in holding that the defense of impossibility does not bar Plaintiff-Appellee’s claims.
- II. The trial court erred in granting Plaintiff-Appellee’s motion for class certification. (See Decision filed March 30, 2022).

APPELLANT’S ISSUES PRESENTED FOR REVIEW

1. Is a trial court required to certify a class where the named plaintiff has not suffered damages due to defenses to a breach of contract claim?
2. Does a trial court fail to conduct a “rigorous analysis” required under Civ.R. 23 when it predetermines it will certify a class action based on its decision in prior cases rather than the facts of the particular case?
3. Is a class identifiable when it includes persons who may not have been injured?
4. May a trial court rely on speculation in holding that common questions predominate over individualized issues under Civ.R. 23(B)(3)?
5. Is a damages method reliable where post-secondary education does not have a similar, unrestricted market such as consumer goods?

INTRODUCTION

This appeal arises from the Court of Claims decision to certify Plaintiff-Appellee Lawrence Keba’s (“**Keba**”) class in his lawsuit against Defendant-Appellant Bowling Green State University (“**BGSU**”).

In general, students choose to attend a university for a variety of specific, individual factors such as a particular program, a particular school, proximity to home, the price of tuition, and other reasons.

BGSU, like most, if not all, universities in the Nation were forced to pause in-person instruction during the height of the COVID-19 pandemic. Pertinently, Keba seeks damages on behalf of himself and his purported class based on a belief that online education without access to BGSU’s campus was less valuable than the in-person counterpart. Keba seeks to generalize the individual nature of a student’s decision to attend a post-secondary educational institution.

BGSU’s decision to move classes online was a proactive one, designed and measured to protect its students from exposure to the then-unknown virus. Additionally, pursuant to Governor Mike DeWine’s

orders in March of 2020, BGSU was legally unable to have its students return to campus after spring break. BGSU undertook extensive measures to be able to transition classes online, including finding ways to make sure its students had access to internet and computers so that they could continue their studies.

Recognizing that certain costs equitably should be returned to students, BGSU refunded, on a pro-rata basis, certain unused specialized course fees, campus housing and dining fees, and parking fees. The instructional fees and general fees were not refunded to students. This litigation followed.

STATEMENT OF THE CASE

Keba filed his Complaint on November 4, 2020, alleging claims for breach of contract, unjust enrichment, and conversion. BGSU filed a Motion to Dismiss on December 2, 2020, which the trial court granted in part, dismissing Keba's conversion claim in a March 10, 2021 Order.

On October 1, 2021 Keba moved for class certification. BGSU filed a memorandum opposing the motion on November 8, 2021. Keba filed a

reply brief on November 29, 2021. The trial court held an oral hearing on March 11, 2022 (the “**Hearing**”). During the twenty-five minute hearing, the trial court indicated it would be certifying the class and instructed the parties to provide it with amended class definition. (Tr., p. 14). An amended class definition was filed on March 17, 2022. The trial court entered its official order certifying the class on March 30, 2022 (the “**Decision**”).

BGSU timely filed its notice of appeal on April 6, 2022.

STATEMENT OF THE FACTS

The effects of the COVID-19 pandemic were felt by the entire country. Universities and their students across the Nation were forced to respond to an unknown and unpredictable situation. By March of 2020, Ohio responded by declaring a state of emergency and issuing a Stay at Home order. *See* Executive Order 2020-01(D); *see also* *Public Health Orders*, Ohio Department of Health, <https://coronavirus.ohio.gov/resources/public-health-orders/public-health-orders>, (last accessed May 9, 2022). Specifically, the Stay at Home

Order only allowed educational institutions to operate “for purposes of facilitating distance learning” among other, limited purposes. BGSU thus was required to swiftly transition its classes from in-person to online delivery.

Keba was an aviation student at BGSU enrolled in one online class and several in-person classes in Spring 2020. (Complaint, ¶ 8). Keba’s classes switched to online learning in mid-March 2020 as a result of the pandemic and the related public health orders which shut down BGSU’s physical campus. (Complaint, ¶ 3). Additionally, BGSU recommended that students who were staying on-campus return to their permanent homes. But students who needed to were able to remain on campus.

BGSU sought to refund certain fees in an equitable and fair manner. Specifically, Keba concedes that BGSU refunded housing, dining, and parking fees on a pro rata basis based on the amount of time remaining in the semester. (Tr., p. 6).

Keba filed the instant case seeking damages as a result of fees that, he alleged, were not refunded to him and his proposed class when they should have been.

SUMMARY OF THE ARGUMENT

The trial court's decision granting class certification should be reversed because the defenses of impossibility and substantial performance bar Keba's claims and certification of the class because, absent a breach of contract, there is no class-wide injury. The trial court did not conduct a rigorous analysis because it merely recited the Civ.R. 23 requirements and summarily stated Keba met them. The class definition is overbroad because it includes students who were not injured. Individual issues predominate any common questions where determining the existence of an implied-in-fact contract necessarily requires a subjective inquiry into the mind of each student. The proposed damages model is not adequate to determine whatever market price differential found in the mode of educational instruction, if any.

ARGUMENT

I. Standard of Review.

A trial court generally has broad discretion in determining whether a class action may be maintained. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 19, citing *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987).

However, such discretion is not unlimited and a trial court abuses its discretion when its decision is “unreasonable, arbitrary, or unconscionable.” *Id.*, quoting *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 30. “[E]vidence must still exist on each element (sufficiency) and the evidence on each element must satisfy the burden of persuasion (weight).” *Id.* at ¶ 20, quoting *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 19.

II. The Trial Court Erred in Holding the Defense of Impossibility Was Not a Complete Bar to Keba’s Claims.

At the Hearing, counsel for BGSU noted that its case was different than the other COVID university cases because it had pled and argued the

defense of impossibility. (Tr., p. 12), (see also Decision, p. 4). At the Hearing, the trial court responded:

I perfectly agree that you couldn't perform because of the mandates. That's not the issue. If – the issue is, yes, you didn't perform. I know that you'll never admit that you didn't perform. But you didn't perform, and thus they paid for something that they didn't get. ***Impossibility is a defense to failure to perform.*** Impossibility is not a defense to the damages that resulted from the failure to perform.

(Tr., p. 12) (emphasis added). Putting aside for a moment the point that the trial court had made up its mind as to the merits of all of the university COVID cases, its analysis above sounds in quasi-contract and does not accurately apply the law.

A Civ.R. 23 analysis will necessarily overlap with the merits of a plaintiff's underlying claim. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Here, the trial court erred when it failed to consider certain defenses to a breach of contract resulting in the absence of damages to Plaintiff.

The occurrence of an unforeseen event, after execution of a contract, which renders performance impossible excuses that performance. *Arlington Hous. Partners, Inc. v. Ohio Hous. Fin. Agency*, 10th Dist. Franklin No. 10AP-764, 2012-Ohio-1412, ¶ 39, citing *J.J.O. Constr., Inc. v. Baljak*, 10th Dist. Franklin No. 06AP-1300, 2007-Ohio-4126, ¶ 13. For example, performance becomes impossible in the event of direct governmental intervention or mandate. See *London & Lancashire Indem. Co. of Am. v. Bd. of Commrs. of Columbiana Cty.*, 107 Ohio St. 51, 140 N.E. 672 (1923), syllabus. When performance is excused because of impossibility, there can be no recovery for a breach of contract. *Mitchell v. Thompson*, 4th Dist. Gallia No. 06CA8, 2007-Ohio-5362, ¶ 23.

The State of Ohio's orders, discussed above in the statement of facts, directly intervened in BGSU's performance. This Court can, and should, take judicial notice of these orders. See *State v. Mays*, 83 Ohio App.3d 610, 614, 615 N.E.2d 641 (4th Dist.1992) ("Pursuant to Evid.R. 201(F), judicial notice may be taken at any stage of the proceeding, including on appeal."). See also *Wiseman v. Cambria Prods. Co.*, 61 Ohio App.3d 294,

300, 572 N.E.2d 759 (4th Dist.1989) (holding same); *State v. Bradford*, 2018-Ohio-1417, 101 N.E.3d 710 (8th Dist.), ¶ 68 (“Generally, an appellate court may take judicial notice of any fact of which the trial court could have taken notice, even when the trial court failed to do so.”).

Here, the trial court implicitly if not explicitly took judicial notice of the foregoing public health orders by acknowledging their impact at the Hearing. (See Tr., p. 12) (“I perfectly agree that you couldn’t perform because of the mandates.”). Thus, the trial court found Governor Mike DeWine and the Ohio Department of Health’s shutdown orders rendered BGSU’s performance legally impossible. See *London & Lancashire Indem. Co. of Am., supra*. As such, no breach of contract occurred, and no class-wide injury exists on that basis as a matter of law.

Alternatively, to recover restitutionary damages pursuant to a theory of unjust enrichment, Keba would need to show that BGSU unfairly benefitted from the retention of fees he alleges he is owed. *Brainard v. Toledo*, 118 Ohio Misc.2d 158, 159, 770 N.E.2d 153, (C.P.2001). However, the right of a person to receive damages based on a theory of

unjust enrichment is terminated or diminished if, after the receipt of a benefit, circumstances have so changed that it would be inequitable to require the other party to make full restitution. *Oakley Bldg. & Loan Co. v. Murphy*, 84 Ohio App. 539, 543, 84 N.E.2d 749 (1st Dist.1948), citing Restatement (First) of Restitution § 142 (1937). A principal who receives no net benefit from payment would not have a duty to make restitution. *Id.*, citing Restatement (First) of Restitution § 142 (1937), cmt b.

Here, there clearly was a change of circumstances – namely, the COVID-19 pandemic. BGSU expended significant funds into information technology in order to support the transition to online instruction. It received no net benefit from students’ fees that Keba is demanding be refunded. Additionally, costs allocated to the support of campus facilities, paid in part through the general fee, were still incurred by BGSU regardless of the COVID-19 shutdowns. *See Chong v. Northeastern Univ.*, D.Mass No. 20-10844-RGS, 2020 WL 7338499, at *4 (Dec. 14, 2020) (“Because students pay the student activity fee, the student center fee, and the undergraduate student fee to ‘support’ certain facilities during

terms for which those students are enrolled in classes, and not to gain admission to any on-campus facility or access to a given resource (or even to support the operation of any specific service at an on-campus facility), plaintiffs have not stated a claim for breach of contract with respect to these fees.”).

Keba argued below that the defense of impossibility merely postpones performance until a time where performance may resume. (Tr., p. 21). While generally true, see *State v. Scherer*, 108 Ohio App.3d 586, 595, 671 N.E.2d 545 (2d Dist.1995), it does not require restitution (*i.e.*, the remedy Keba seeks) where, as here, retention is not unjust.

Had BGSU halted performance altogether in March of 2020, tens of thousands of students’ educational goals would have been delayed. Surely, “the ultimate benefit of attending college is receiving an education and a degree. A degree is earned by receiving a certain number of credit hours, indicating the successful completion of the required coursework.” *Hiram College v. Courtad*, 162 Ohio App.3d 642, 2005-Ohio-4331, 834 N.E.2d 432, ¶ 18 (11th Dist.). In *Hiram College*, the court found that the

school could not prevail on an unjust enrichment claim against a former student who only attended a couple weeks of classes, and he thus, “did not receive a benefit.” *Id.* Additionally, in *Leiby v. Univ. of Akron*, 10th Dist. Franklin No. 05AP-1281, 2006-Ohio-2831, a student sued the University of Akron alleging breach of contract for allowing professors to re-use exams, thus allegedly devaluing his education. This Court held the student had no damages because he received the credits and his degrees to which he was contractually entitled, and even relied on those degrees while seeking employment. *Id.* at ¶ 26.

Thus, the consideration given between student and university is money for an education. The true benefit of the bargain students receive is a degree. BGSU provided its students the legal benefit they contracted for – the ability to continue their education and ultimately receive their degrees to which Keba and the class were contractually entitled.

Keba has attempted to distinguish *Leiby* by arguing that Keba is not alleging he did not receive the credits he paid for, but that “what he received was worth less than what he bargained for.” (Reply in Support

of Class Certification, p. 3). However, *Leiby* stands for the proposition that a student bargains for an education (credits and a degree from a university) – not subjective satisfaction with the method that education is delivered.

BGSU therefore substantially performed its obligations under its individual contracts with its students, if they existed. *See Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 177 Ohio App.3d 7, 2008-Ohio-148, 893 N.E.2d 866, ¶ 24 (10th Dist.) (“The long and uniformly settled rule as to contracts requires only a substantial performance in order to recover upon such contract. Merely nominal, trifling, or technical departures are not sufficient to breach the contract”), quoting *Ohio Farmers’ Ins. Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 537 (1922), paragraph two of the syllabus. To be entitled to apply the doctrine of substantial performance, the value or purpose of the contract must remain intact despite the nonperformance of another part thereof. *Id.*

If “the ultimate benefit of attending college is receiving an education and a degree,” then there can be no doubt that BGSU substantially

performed its obligations by providing online instruction, despite government mandates closing the campus. *See Hiram College, supra*. Students were able to continue their education, receive grades and credits for their classes, and make progress toward their degrees.

The trial court erred by refusing to acknowledge the above contractual doctrines bar Keba's contract and quasi-contract theories of recovery.

III. The Trial Court Erred in Certifying the Class.

a. The trial court failed to conduct a "rigorous analysis."

The general rule provides that litigation must be conducted on behalf of the individually named parties only. *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 25. Class actions are the exception, and the procedure for certifying a class is governed by Civ.R. 23. *Id.* at ¶ 24. Because the Ohio Rules of Civil Procedure are modeled after the corresponding Federal Rules, Ohio courts are permitted to consider persuasive federal authority interpreting the federal rule. *Id.* The party bringing the class action must affirmatively show that they meet

the requirements necessary to be so certified. *Id.* at 25, citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 158 L.Ed.2d 515 (2013).

There are seven requirements that must be satisfied in order to maintain a class action:

(1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met.

Hamilton v. Ohio Sav. Bank, 82 Ohio St.3d 67, 71, 694 N.E.2d 442 (1998).

Rule 23 is more than “a mere pleading standard” and a party seeking certification “must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” (Emphasis sic.) *Dukes*, 564 U.S. at 351, 131 S.Ct. 2541, 180 L.Ed.2d 374. A trial court

must undergo a “rigorous analysis” when determining whether to certify a class pursuant to Civ.R. 23. *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 16. A trial court’s rigorous analysis involves an examination of enmeshed legal and factual issues that are part of the merits of a plaintiff’s underlying claim(s). *Felix* at ¶ 26, citing *Dukes* at 352.

A decision to certify a class must be exercised within Civ.R. 23’s framework. *Assn. for Hosp. & Health Sys. V. Ohio Dept. of Human Serv.*, 10th Dist. Franklin No. 04AP-762, 2006-Ohio-67, ¶ 16, citing *Baughman v. State Farm Mut. Ins. Co.*, 88 Ohio St.3d 480, 487, 727 N.E.2d 1265 (2000). The rigorous analysis required by Civ.R. 23, however, does not permit a trial court to certify a class merely because it has certified other classes in similar, yet unrelated cases.

To that end, the trial court stated as follows at the hearing:

You know, we’ve been through this. I don’t know how many times you’ve been through this hearing process. Obviously, ***I’ve been through it. I don’t know how many we have, eight, nine, whatever.***

So, you know, I want you to bear in mind what I'd like you to do is I know you're going to – if I certify the class, ***and you know what the probability is.***

(Emphasis added.) (Tr., p. 12, 14). Even counsel for Keba did not waste more time than he thought he needed based on the trial court's rulings in other, unrelated COVID university refund cases.

Good morning, again, your Honor. I don't have a whole lot to say up front beyond what's in our – our papers. I know we've been through this half a dozen times already.

(*Id.*, p. 5). Consistent with its statement at the hearing, the trial court's order certified the class in conclusory fashion. It merely recited the requirements of Civ.R. 23 with no analysis whatsoever and concluded that Keba satisfied those requirements. (*Id.*, p. 11-14). *See Robinson v. Johnston Coca-Cola Bottling Gp., Inc.*, 153 Ohio App.3d 764, 2003-Ohio-4417, 796 N.E.2d 1 (1st Dist.), ¶ 3.

In *Robinson*, the court of appeals reversed a trial court's certification of plaintiff's class where "[t]he court merely recited each of the rule's requirements and stated '[t]he plaintiffs . . . have met each of the above requirements'" *Id.* The appellate court recognized that while Civ.R.

23 does not explicitly require a trial court to make formal findings, there are sound policy reasons for doing so. *Id.* at ¶ 5. Specifically, other than the obvious practical importance, the articulation of reasons for a decision provides a basis in which an appellate court can determine whether the trial court exercised its discretion within Civ.R. 23. *Id.*

This case is strikingly similar. Having been through the class certification hearing “eight, nine, whatever” amount of times (Tr., p. 12), the trial court merely recited the requirements of Civ.R. 23 and, in conclusory fashion, found that Keba had met them. (See Decision, p. 11-14). This unarticulated decision provides no adequate basis for this Court to review it. *See id.* at ¶ 11, *see also Isaak v. Trumbull Sav. and Loan Co.*, 11th Dist. Trumbull No. 99-T-0077, 2000 WL 1114830, at *2 (Aug. 4, 2000) (“We are unable to determine, from examining the record and the appealed judgment entry, whether or not the trial court carefully and correctly applied the class action requirements and conducted a rigorous analysis to determine whether the prerequisites of Civ.R. 23 were satisfied.”).

Because the trial court failed to analyze and articulate its findings beyond merely reciting the Civ.R. 23 requirements, this Court is “unable to discern whether the trial court conducted a thorough analysis into whether the prerequisites of Civ.R. 23 had been satisfied before certifying the class.” *Robinson* at ¶ 12. Moreover, the record indicates that the trial court always intended on certifying Keba’s class, not based on his satisfaction of the Civ.R. 23 requirements, but rather because the trial court had done so in every other Ohio university tuition refund case.

It cannot be said “that the court’s decision was ‘consistent with the sound exercise of discretion.’” *Id.*, quoting *Hamilton*, 82 Ohio St.3d at 71, 694 N.E.2d 442.

b. The proposed class definition is overbroad.

“‘[A] class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.’” *Hamilton*, 82 Ohio St.3d at 71-72, 694 N.E.2d 442, quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* (2

Ed.1986) 120-121, Section 1760. “[T]he class definition must be precise enough ‘to permit identification within a reasonable effort.’” *Id.*, quoting *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988). Additionally, class action plaintiffs must make some showing that all members were, in fact, injured. *Felix*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, at ¶ 33.

In its Decision, the trial court further modified the amended class definition, and defined the class as:

All undergraduate students enrolled in classes at the Main Campus of Bowling Green State University during the Spring 2020 semester who (a) paid tuition or fees, or both, but only to the extent that such tuition or fees, or both, were not refunded, and who (b) did not withdraw from classes before March 13, 2020.

(Decision, p. 6). This amended class definition remains overbroad because it still includes individuals who took online, or other, courses and might never set foot on campus.

Plaintiff’s theory of recovery is based on the difference in value of online versus in-person instruction, and the loss of access to campus

facilities. However, the amended class definition feasibly includes students who were not injured because they either (i) performed better in online classes than they would have in person, and/or (ii) took online, or other, classes that were never going to be in-person or on campus.

First, the argument that online education is somehow worth less than in-person instruction is outdated and, moreover, represents a claim for educational malpractice, which is not recognized in Ohio. *See Lawrence v. Lorain Cty. Community College*, 127 Ohio App.3d 546, 549, 713 N.E.2d 478 (9th Dist.1998), citing *Matulin v. Academy of Court Reporting*, 9th Dist. Summit No. 14947, 1992 WL 74210, at *5 (April 8, 1992). Additionally, students who received their grades and credits, and made progress toward their degrees were not injured by whatever subjective difference in value between in-person and online instruction. *See Leiby*, 2006-Ohio-2831, at ¶ 25-26.

Next, the amended class definition includes students who took online, or other off-campus instruction, and were not injured by the shutdown of campus. As Plaintiff's graphic in his Motion for Class

Certification below makes clear, students had a multitude of options regarding course instruction. (Motion for Class Certification, p. 2). All of these options would technically be at the “main campus” as provided in the amended class definition. Students who registered for these alternative course options that did not necessarily require in-person attendance (*i.e.*, “100% Web Based,” “Independent Study,” “Off Campus Instruction,” etc.) would not have been injured when BGSU transitioned in-person learning to online, and further, would not necessarily have expected¹ to set foot on campus. Moreover, the variety of course options a student can select from, only further supports the individualized nature of the pursuit of an education. *See Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508, 2006-Ohio-2957, 855 N.E.2d 909, ¶ 57.

¹ Whether or not a given student “expected” something from BGSU necessarily requires an individualized assessment and, as discussed in section III(c), further supports the conclusion that class certification was improper. *See Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508, 2006-Ohio-2957, 855 N.E.2d 909, ¶ 57 (“[T]he question of the existence of an implied-in-fact contract requires crucial factual determinations regarding the intent and thought processes of the parties.”).

Thus, the amended class definition is overbroad. *See Felix*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, at ¶ 37 (holding class fails absent showing that all members suffered an injury).

c. Individualized issues predominate any common claims of the class.

Plaintiff moved for, and the trial court granted, certification under Civ.R. 23(B)(3), under which a court must find that “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.” *Hamilton*, 82 Ohio St.3d at 79, 694 N.E.2d 442. The simple existence of such questions will not suffice, rather, they must present a substantial aspect of a plaintiff’s case. *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 30, citing *Marks*, 31 Ohio St.3d at 204, 509 N.E.2d 1249. Specifically, it must be shown that “issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof.” *Id.*, quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 544 (6th Cir.2012).

The relationship between a university and a student enrolled in that university has been described by Ohio courts as being “contractual in nature.” *Bleicher v. Univ. of Cincinnati College of Med.*, 78 Ohio App.3d 302, 308, 604 N.E.2d 783 (10th Dist.1992), citing *Behrend v. State*, 55 Ohio App.2d 135, 139, 379 N.E.2d 617 (1977). The terms of such a contract are found in the college guidelines supplied to students. *Id.*

There is no express contract in existence between BGSU and Keba, so his claim for breach of contract must proceed under an implied contract theory. An implied-in-fact contract arises from parties’ conduct or surrounding circumstances that show the parties entered into a contractual relationship despite the absence of any formal agreement. *Union Sav. Bank v. Lawyers Title Ins. Corp.*, 191 Ohio App.3d 540, 2010-Ohio-6396, 946 N.E.2d 835 (10th Dist.), ¶ 21. The meeting of the minds, normally exhibited in express contracts through offer and acceptance, “is shown by surrounding circumstances which make it inferable that the contract exists as a matter of tacit understanding.” *Id.*, quoting *Waffen v. Summers*, 6th Dist. Ottawa No. OT-08-034, 2009 Ohio-2940, ¶ 31. Parties’ conduct

and declarations are typically examined to determine an intent to be bound. *Fouty*, 167 Ohio App.3d 508, 2006-Ohio-2957, 855 N.E.2d 909, at ¶ 57. It follows that “the existence of an implied-in-fact contract requires *crucial factual determinations regarding the intent and thought processes of the parties.*” (Emphasis added.) *Id.*

Here, individualized issues certainly predominate. Determining the existence and terms of an alleged implied contract will require the court to delve into the factual circumstances of every student in the class. Ascertaining the “intent” and “thought processes” of the class is not a task that may be accomplished in “one stroke.” *Dukes*, 564 U.S. at 350, 131 S.Ct. 2541, 180 L.Ed.2d 374, *see also Fouty, supra*. Additionally, Ohio courts have recognized the inherently specific and individual nature of damages allegedly resulting from the actions of a university. *See Behrend* at 141 (“The damages to these students will necessarily vary dependent upon whether or not they were able to transfer credits and, if not, the additional time and expense of taking other courses . . . All of such must be proven by the individual claimant based upon the facts of his or her

given case.”), see also *Habegger v. Owens Community College*, 10th Dist. Franklin No. 17AP-297, 2017-Ohio-8180, ¶ 8, 9 (recognizing that different groups of students suffered different types of damages in breach of contract action against public institution for failing to maintain accreditation). Some students, like Keba himself, registered for some online courses before the spring semester of 2020 began. (Complaint, ¶ 8). Under Keba’s damages theory, certainly students who had already registered for online courses were “less damaged” than those who registered all in-person instruction. Apportioning an award here would require a review of each students’ schedule and a corresponding reduction if they registered for online course(s). This is not the task that can be performed in “one stroke.”

Additionally, and while generally the terms of the contractual relationship between university and student can be shown by “handbooks, catalogs, policies, and brochures,” *Cleveland State Univ. v. Simpson*, 2019-Ohio-2240, 137 N.E.3d 739, ¶ 15 (8th Dist.), neither Keba nor his counsel have pointed to a specific promise from BGSU to provide access

to facilities supported by the general fee. Thus, they did not satisfy their burden. *See Fedele v. Marist College*, S.D.N.Y. No. 20 CV 3559, 2021 WL 3540432, at *7 (Aug. 10, 2021) (“[P]laintiffs rely on conclusory allegations that the fees [students] paid were intended to support and provide access to in-person, on-campus experiences, facilities, and events *without identifying a specific promise to provide those services in exchange for the alleged fees.*”) (emphasis added).

Here, counsel for Keba argued:

[T]he [] handbooks, catalogs, policies, and brochures *will provide* the basis for any contractual terms across the board on a classwide basis. Accordingly whether BGSU and class members were parties to a contract, and whether that contract contained a requirement that BGSU would provide in-person classes, are questions that can be answered for all class members

(Emphasis added.) (Motion for Class Certification, p. 12). However, Keba provided no specific terms to have allowed the trial court, or this Court, to determine whether individual issues predominate. *See Fedele, supra*, *see also Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 30 (“The class determination

generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.”). Because Keba failed to produce evidence that BGSU promised access to its facilities as may or may not be found in its handbooks, catalogs, etc., in exchange for fees, *see Fedele*, the trial court must have assumed the presence of such a promise. Such speculation is improper on the part of both Plaintiff and the trial court. *See Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1126 (6th Cir.2016) (“[A]llowing such speculation to dictate the outcome of a class-certification decision would afford litigants in future cases ‘wide latitude to inject frivolous issues *to bolster* or undermine *a finding of predominance.*’”) (emphasis added), citing Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1269 (2002).

Finally, a trial court is certainly permitted to consider potential defenses in deciding whether individual issues predominate. *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 468-70 (6th Cir.2017). In *Sandusky Wellness Center*, the Sixth Circuit

upheld the Northern District of Ohio’s denial of class certification where the defendant had presented evidence of consent of class members to receive “junk faxes” containing prescription drug advertisements. *Id.* at 470. The court found that “identifying which individuals consented would undoubtedly be the driver of the litigation.” *Id.* at 468. Thus, in *Sandusky Wellness Center* “the predominant issue of fact [was] undoubtedly one of individual consent.” (Emphasis sic.) *Id.*, quoting *Gene & Gene, LLC v. BioPay, LLC*, 541 F.3d 318, 327 (5th Cir.2008). Considering both the individualized inquiry required by Ohio law of implied-in-fact contracts, discussed above, coupled with the defenses analyzed in section II of this Brief, reveal that individualized issues predominate. Whether an individual student had an implied-in-fact contract with BGSU requires ascertaining the “intent,” “thought processes,” and individual educational decisions and choices of the purported class members. *See Fouty*, 167 Ohio App.3d 508, 2006-Ohio-2957, 855 N.E.2d 909, at ¶ 57. Additionally, whether BGSU’s performance was impossible, or whether

BGSU substantially performed for a given student requires an analysis of that individual student's circumstances and expectations.

Because "[t]he ultimate benefit of attending college is receiving an education and a degree," *Hiram College*, 162 Ohio App.3d 642, 2005-Ohio-4331, 834 N.E.2d 432, at ¶ 18, any other benefits ancillary to receiving an education must therefore be shown by the intent and thought processes of the parties. *Fouty, supra*. Thus, the trial court erred by holding that common questions predominated over the individualized issues of the class.

d. Keba has not shown that damages are ascertainable on a class-wide basis.

In order to certify a class, a plaintiff must establish that damages are capable of measurement on a class-wide basis. *Comcast Corp.*, 569 U.S. at 35, 133 S.Ct. 1426, 185 L.Ed.2d 515.

In his motion Keba offered declarations of Steven Gaskin and Colin Weir, who purported to design a conjoint analysis survey to ascertain an alleged reduction in market value as a result of the closure of BGSU's campus. (Motion for Class Certification, p. 13). The trial court's Decision

did not quite address the issue of calculation of damages, however, it did note BGSU's objection to Plaintiff's proposed methodology. (Decision, p. 3). The trial court did briefly discuss damages in the Hearing.

But anyway, you know, we're going to get down to a point in which our Ohio Supreme Court is going to get all these cases and the Supreme Court's going to make a decision of whether I should go forward or somebody else should go forward and try the case on the merits *and get to the very, very difficult issue of damages. And everybody knows that that's my difficult issue with respect to this case is the damages.*

(Emphasis added.) (Tr., p. 13). The trial court did not elaborate further, if it did at all, regarding Keba's proposed damages model. Regardless, the proposed conjoint analysis is not without its flaws, such flaws that warrant reversal of the trial court's class certification.

Keba's proposed survey only considers how a consumer's willingness to pay tuition would be impacted by the administration of courses online without access to campus. However, Keba's experts fail to take into account BGSU's willingness to sell. *See In re General Motors LLC Ignition Switch Litig.*, 407 F.Supp.3d 212, 234-35 (S.D.N.Y.2019)

(proposed conjoint analysis rejected because it focused only on how a consumers' willingness to pay would be affected by disclosure of a vehicle defect). ““Market value is the fair and reasonable cash price which can be obtained in the open market . . . between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so.”” *In re Kaufman’s Estate*, 53 Ohio St.2d 231, 232, 374 N.E.2d 142 (1978), fn. 2.

Moreover, this type of survey is not adequate for determining market value of public university tuition prices. It is unlike a market for ordinary consumer goods. *See Saavedra v. Eli Lilly and Co.*, C.D.Cal. No. 2:12-cv-9366-SVW, 2014 WL 7338930, at *5 (Dec. 18, 2014) (finding conjoint analysis inadequate to determine market price of pharmaceuticals where “the prescription drug market is heavily regulated and restricted”). Similarly here, the operation of a public university is subject to regulation as to both content and cost. Various degree programs are subject to different accrediting standards, course requirements, etc. Additionally, given financial aid, scholarships, and other sources of funding, the actual

cost to a student is not a proxy for the value of the mode of instruction and/or access to campus. *See id.* (“[A] consumer’s out-of-pocket cost for a drug is not a proxy for the drug’s value to the consumer.”).

The proposed damages method fails to address its obvious bias. The choice task example proposed by Steven Gaskin provides an option for “class and campus format.” (Gaskin Decl., Figure 1). The two options consist of “[c]lasses are in person; have access to campus and facilities” or “[c]lasses held virtually; no access to campus or facilities.” (*Id.*). BGSU fails to see how potential respondents of the survey would not be quite aware of what this survey is testing. Prior to COVID, online classes were referred to primarily as just that – “online classes.” The classification of instruction as “virtual” became far more prevalent once COVID altered the method of instructional delivery. Thus, the survey’s objectivity will be destroyed.

Further, the survey fails to account for a multitude of other reasons students choose to attend a given university. While it does provide for “undergraduate teaching ranking” as a factor, it ignores the fact that

certain, specific programs are ranked differently in schools. Students choose specific universities for their specific programs, not just their undergraduate ranking generally. For example, while in general BGSU is ranked 249th nationally,² their sports management program is ranked 37th.³ Consider another example, BGSU's aviation program, for which Keba himself came to BGSU. It is one of the only programs nationally that has an airport on campus.⁴ So, for example, a prospective survey respondent interested in aviation or sports management might be likely to choose BGSU in the survey. However, a student who prefers a different program that BGSU is not necessarily known for would likely choose a different school in the survey. Additionally, the survey does not take into

² *Bowling Green State University Rankings*, U.S. News and World Report, <https://www.usnews.com/best-colleges/bowling-green-state-university-3018/overall-rankings>, (last accessed May 9, 2022).

³ *Bowling Green State University*, Niche, <https://www.niche.com/colleges/bowling-green-state-university/>, (last accessed May 9, 2022).

⁴ *Aviation Home*, Bowling Green State University, <https://www.bgsu.edu/technology-architecture-and-applied-engineering/schools-and-departments/engineering-technologies/bgsu-aviation.html>, (last accessed May 9, 2022).

account other factors such as influence of parents and proximity to a student's home, both of which certainly impact a student's choice of an undergraduate institution.

Finally, in 2019 Ohio enacted a tuition guarantee program, R.C. 3345.48. *See Tuition & Fees*, Ohio Department of Higher Education, <https://www.ohiohighered.org/educators/tuition-fees>, (last accessed May 9, 2022) (listing public universities in Ohio that have department-approved tuition guarantee programs). This program dictates public universities shall set a tuition price per cohort, meaning, if Student 1 enrolls in an Ohio public university in 2020, their tuition is set for all four years. If Student 2 enrolls in 2021, their tuition will not necessarily be the same price as Student 1, but Student 2's tuition will also be set for all four years. Therefore, not every undergraduate student pays the same tuition price. Keba's proposed model does not take this fact into account.

Because damages are not ascertainable on a class-wide basis, this Court should reverse the trial court's grant of class certification.

CONCLUSION

For the foregoing reasons, the trial court failed to consider the enmeshed legal issues which dictate that the doctrines of impossibility and substantial performance bar Keba's claims. Further, the trial court failed to conduct the rigorous analysis required under Civ.R. 23, such an analysis would have revealed the amended class is overbroad, individualized issues predominate over common questions, and damages are not capable of measurement on a class-wide basis. Accordingly, this Court should reverse the trial court's Decision granting class certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on May 11, 2022, a copy of the foregoing Brief of Defendant-Appellant Bowling Green State University was served via email to Scott D. Simpkins (sdsimp@climacolaw.com) and Joshua D. Arisohn (jarisohn@bursor.com), Attorneys for Plaintiff-Appellee Lawrence Keba.

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