

STATE OF INDIANA )  
 ) SS:  
COUNTY OF MARION )

IN THE MARION SUPERIOR COURT I  
  
CAUSE NO. 49D01-2005-PL-015026

KELLER J. MELLOWITZ, on )  
behalf of himself and all others )  
similarly situated, )  
Plaintiff, )

v. )

BALL STATE UNIVERSITY )  
and BOARD OF TRUSTEES OF )  
BALL STATE UNIVERSITY, )  
Defendants. )

MATTHEW C. KINCAID  
Special Judge

**FILED**  
February 11, 2022  
CLERK OF THE COURT  
MARION COUNTY  
SW

**ORDER ON HEARING OF FEBRUARY 10, 2022**

On February 10, 2022, this matter came on for hearing on Defendants’ Motion for Relief Under Trial Rule 23(D)(4) and the responses filed thereon. Plaintiff appeared by Eric Pavlack and Colin Flora. Defendants appeared by Jane Wilson. The State of Indiana (Attorney General) appeared by Chris Anderson. The Court heard argument and took the Motion under advisement. The Court being duly advised in the premises now finds Defendant’s Motion for Relief Under Trial Rule 23(D)(4) to be meritorious and that it should be granted.

1. Plaintiff, a Ball State student, filed his Complaint seeking damages for Defendant’s alleged breach of contract or disgorgement of unjust enrichment from Defendant’s suspension of in-person learning at Ball State University the second semester of the 2019-2020 academic year.
2. Plaintiff also pleads that pursuant to Trial Rule 23 he should be allowed to proceed on behalf of similarly situated Ball State students; that this case proceed as a class action.
3. Defendant has denied that it breached a contract with Plaintiff, denied that it has been unjustly enriched by retaining the tuition paid by Plaintiff (and others like) and asserted affirmative defenses to Plaintiff’s Complaint.

4. The Plaintiff has not (yet) sought an order of the trial court certifying this suit as a class action and the Court has not (yet) made a determination by order of whether a class action is to be maintained pursuant to Trial Rule 23(C).

5. Indiana Rule of Trial Procedure 23(D)(4) provides that

[T]he court may make appropriate orders:

...

(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly.

6. I.C. 34-12-5-7 (Public Law 166-2021 Section 13, effective March 1, 2020, provides as follows:

A claimant may not bring, and a court may not certify, a class action lawsuit against a covered entity for loss or damages arising from COVID-19 in a contract, implied contract, quasi-contract, or unjust enrichment.

7. The Plaintiff asserts that I.C. 34-12-5-7 violates the Indiana Constitution (1) as encroaching on the rule-making authority of the Indiana Supreme Court thus violating the constitutional provision for the separation of powers of the three co-equal branches of government, (2) as an unconstitutional taking of property without just compensation, and (3) as an unconstitutional impairment of contracts between its students and the university.

8. I.C. 34-12-5-7 is not unconstitutional as a violation of separation of powers and encroachment upon the rule-making authority of the Indiana Supreme Court which promulgated the Indiana Rules of Trial Procedure. I.C. 34-12-5-7 and Indiana Trial Rule 23 are capable of being applied harmoniously and there is not, therefore, a conflict between the Indiana Statute and the Supreme Court Rule.

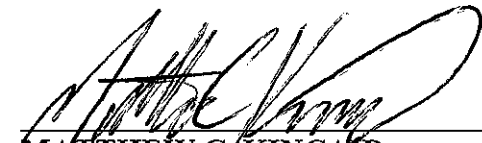
9. I.C. 34-12-5-7 is not an unconstitutional taking of property of the Plaintiff without just compensation. A class action is not a vested property right capable of being taken.

10. I.C. 34-12-5-7 is not an impermissible unconstitutional impairment of contract rights that exist between Plaintiff and Ball State. Mr. Mellowitz's individual claim for breach of implied contract (alternatively unjust enrichment) remains and has not been impaired by the statute.

**IT IS THEREFORE ORDERED** that Plaintiff, Keller J. Mellowitz, pursuant to Trial Rule 23(D)(4) **SHALL FILE**<sup>1</sup> (within thirty (30) days) file an amended complaint excising allegations as to the Plaintiff's representation of absent persons.

**IT IS FURTHER ORDERED** that the putative class is **NOT** certified and this action **SHALL NOT** be permitted to proceed as a class action.

**SO ORDERED** this February 11, 2022.

  
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**MATTHEW C. KINCAID**  
Special Judge  
Marion Superior Court 1

**DISTRIBUTION:**

**Counsel of Record**  
**Odyssey**

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<sup>1</sup> Indiana Trial Rule 11 requires “[e]very pleading [including an amended complaint] or motion of a party represented by an attorney shall be signed [executed] by at least one [1] attorney of record. . . .” Indiana Rule of Appellate Procedure 14(A) provides that an interlocutory order . . . “[t]o compel the execution of any document” may be appealed as of right. Plaintiff may, if so inclined, appeal this interlocutory order without seeking leave of court pursuant to Indiana Rule of Appellate Procedure 14(B).