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IN THE
COURT OF APPEALS OF INDIANA

Keller J. Mellowitz, on behalf of himself and all others similarly situated,

Appellant-Plaintiff,

v.

Ball State University and Board of Trustees of Ball State University,

Appellees-Defendants,

and

State of Indiana,

Appellee-Intervenor

October 5, 2022

Court of Appeals Case No. 22A-PL-337

Interlocutory Appeal from the Marion Superior Court

The Honorable Matthew C. Kincaid, Special Judge

Trial Court Cause No. 49D01-2005-PL-15026

Crone, Judge.

Case Summary

[1] Ball State University student Keller J. Mellowitz filed a putative class-action complaint against Ball State and its board of trustees, asserting claims for breach of contract and unjust enrichment based on Ball State's retention of tuition and fees after it cancelled in-person classes and closed campus facilities as a result of the COVID-19 pandemic. After the complaint was filed, the Indiana General Assembly enacted Public Law 166-2021, part of which was

later codified as Indiana Code Chapter 34-12-5. Indiana Code Section 34-12-5-7 (Section 7) bars class actions against postsecondary educational institutions for claims of breach of contract and unjust enrichment arising from COVID-19. Ball State filed a motion for relief based on Section 7, and the trial court ordered Mellowitz to file an amended complaint eliminating his class allegations. Mellowitz now appeals, arguing that Section 7 is a procedural statute that impermissibly conflicts with Indiana Trial Rule 23, which governs class-action procedures, and thus Section 7 is a nullity. We agree, and therefore we reverse and remand for further proceedings.

Facts and Procedural History

[2] According to Mellowitz's complaint, he was enrolled at Ball State for the spring 2020 academic semester. To enroll, he was required to pay "numerous fees to Ball State[,]" including "in-person tuition, student services fees, university technology fees, student recreation fees, student health fees, and student transportation fees." Appellant's App. Vol. 2 at 24. In March 2020, Ball State sent students home, cancelled in-person classes, and closed campus facilities as a result of COVID-19. On May 1, 2020, Mellowitz filed a putative class-action complaint against Ball State and its board of trustees "on behalf of himself and all others similarly situated[,]" asserting claims of breach of contract and unjust enrichment and seeking "recovery of tuition and fees" for "services that were terminated or otherwise not provided prior to the conclusion" of the semester. *Id*. at 22, 23.

[3] In April 2021, Governor Eric Holcomb signed into law House Enrolled Act 1002, which became Public Law 166-2021. Section 13 of the law was codified as Indiana Code Chapter 34-12-5 and was made effective retroactive to March 1, 2020. Indiana Code Section 34-12-5-7 provides that "[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 claim." For purposes of Chapter 34-12-5, a "covered entity" means "a governmental entity" and "an approved postsecondary educational institution[.]" Ind. Code § 34-12-5-5. A "governmental entity" means, among other things, a "state educational institution" such as Ball State. Ind. Code §§ 34-12-5-5(1), 34-6-2-110(7), 21-7-13-32(b). An "approved postsecondary educational institution" may be either public (such as Ball State) or private (such as amicus University of Notre Dame du Lac). Ind. Code §§ 34-12-5-5(2), 21-7-13-6.[1] And "arising from COVID" means, among other things, "caused by or resulting from … the implementation

[1] The brief filed by amici Notre Dame and Independent Colleges of Indiana prominently features what they characterize as "a nearly identical putative class action" filed by a Notre Dame student in federal district court "seeking relief based on Notre Dame's transition to remote education in March 2020." Br. of Amici Curiae at 7. Amici accuse the plaintiff in that case of "engag[ing] in blatant forum shopping" by "attempt[ing] to turn what, individually, would be less than a $30,000 complaint into one valued at potentially over one hundred million dollars by merely moving *across the street* from St. Joseph County Superior Court to the Northern District of Indiana." *Id*. at 19. This ad hominem attack against a third party is unprofessional and unwarranted, and the references to the federal lawsuit are not "helpful to [this] court" in addressing the issues in this case. Ind. Appellate Rule 41(A) (governing motions to appear as amicus curiae). By separate order, we have granted Mellowitz's motion to strike all references to the federal lawsuit from the amicus brief.

of policies and procedures to … prevent or minimize the spread of COVID-19[.]" Ind. Code §§ 34-12-5-3, 34-6-2-10.4(c)(1)(A).[2]

[4] Relying on Section 7, Ball State filed a motion for relief pursuant to Indiana Trial Rule 23(D)(4), which provides that in the conduct of an action brought as a class action, the court may "requir[e] that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly[.]" Mellowitz filed a response asserting that Section 7 is a procedural statute that impermissibly conflicts with Trial Rule 23, which renders it a nullity. In the alternative, Mellowitz asserted that if Section 7 is substantive rather than procedural, it results in an unconstitutional taking of property without just compensation and an unconstitutional impairment of contract rights. Because Mellowitz questioned the constitutionality of Section 7, the attorney general was permitted to intervene on the State's behalf pursuant to Indiana Code Section 34-33.1-1-1(a).

[5] In February 2022, after a hearing, the trial court issued an order granting Ball State's motion, finding that Section 7 does not conflict with Trial Rule 23 and does not result in an unconstitutional taking or an unconstitutional impairment of contract rights. The court ordered Mellowitz to file "an amended complaint

[2] Chapter 34-12-5 "applies to a claim arising from COVID-19 during a period of a state disaster emergency declared under IC 10-14-3-12 to respond to COVID-19, if the state of disaster emergency was declared: (1) after February 29, 2020; and (2) before April 1, 2022." Ind. Code § 34-12-5-2.

excising allegations as to [his] representation of absent persons" within thirty days. Appealed Order at 3. This interlocutory appeal ensued.

Discussion and Decision

[6] Mellowitz contends that the trial court erred in granting Ball State's motion for relief because Section 7 is a procedural statute that impermissibly conflicts with Trial Rule 23. "[W]hen a trial court's ruling involves a pure question of law, such as the interpretation or constitutionality of a statute, our standard of review is de novo." *Church v. State*, 189 N.E.3d 580, 585 (Ind. 2022).

[7] "[T]he power to make rules of procedure in Indiana is neither exclusively legislative nor judicial." *State ex rel. Blood v. Gibson Cir. Ct.*, 239 Ind. 394, 399, 157 N.E.2d 475, 477 (1959). "Before the Indiana Rules of Trial Procedure, including Rule 23, came into force in 1970, rules of pleading and procedure in this State were largely governed by statute." *Budden v. Bd. of Sch. Comm'rs of City of Indpls.*, 698 N.E.2d 1157, 1162 n.8 (Ind. 1998). But, as Mellowitz correctly observes, the power to make procedural rules "is not a power equally shared." Appellant's Br. at 27. "It is a fundamental rule of Indiana law that when a procedural statute conflicts with a procedural rule adopted by the supreme court, the latter shall take precedence." *Key v. State*, 48 N.E.3d 333, 339 (Ind. Ct. App. 2015) (citing *Bowyer v. Ind. Dep't of Nat. Res.*, 798 N.E.2d 912, 916 (Ind. Ct. App. 2003)). "Thus, when a procedural statute conflicts with the Indiana Rules of Trial Procedure, the trial rules govern, and phrases in statutes that are contrary to the trial rules are considered a nullity." *Id*. "To be 'in conflict,' it is

not necessary that the rule and the statute be in direct opposition." *Id*. (quoting *Bowyer*, 798 N.E.2d at 917). "The rule and statute need only be incompatible to the extent both could not apply in a given situation." *Id*.

[8] In *Church*, our supreme court reaffirmed the supremacy of its procedural rules but acknowledged that its "rules 'cannot abrogate or modify substantive law.'" 189 N.E.3d at 588 (quoting *State ex rel. Zellers v. St. Joseph Cir. Ct.*, 247 Ind. 394, 401, 216 N.E.2d 548, 553 (1966)). "If the statute is a 'substantive law, then it supersedes [our Trial Rules], but if such statute merely establishes a rule of procedure, then [our Trial Rules] would supersede the statute.'" *Id*. (quoting *Blood*, 239 Ind. at 399, 157 N.E.2d at 477) (alterations in *Church*). The court noted that it had "long held that laws are substantive when they establish rights and responsibilities, and laws are procedural when they 'merely prescribe the manner in which such rights and responsibilities may be exercised and enforced.'" *Id*. (quoting *Blood*, 239 Ind. at 400, 157 N.E.2d at 478).

[9] The court observed, however, that "[e]xcept at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Id*. at 589 (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)). The court noted that "even if statutes establishing substantive rights are 'packaged in procedural wrapping,' that does not alter their true nature." *Id*. (quoting *State ex rel. Lloyd v. Lovelady*, 840 N.E.2d 1062, 1064 (Ohio 2006)). The court further noted that "[i]n upholding a statute limiting disclosure of prescription records notwithstanding its alleged conflict

with their trial rules, the Kentucky Supreme Court distinguished procedural laws which 'predominantly foster accuracy in fact-finding' from substantive laws which 'predominantly foster other objectives.'" *Id*. (quoting *Cabinet for Health & Fam. Servs. v. Chauvin*, 316 S.W.3d 279, 285 (Ky. 2010)). The court agreed with what it characterized as "this predominant purpose distinction" and adopted what it deemed to be "a more thoughtful test that looks at the statute's predominant objective." *Id*. at 589, 590. The test is this: "If the statute predominantly furthers judicial administration objectives, the statute is procedural. But if the statute predominantly furthers public policy objectives 'involving matters other than the orderly dispatch of judicial business,' it is substantive." *Id*. at 590 (quoting *People v. McKenna*, 585 P.2d 275, 277 (Colo. 1978)).

[10] Here, the procedural rule that Section 7 allegedly conflicts with is Trial Rule 23, entitled "Class Actions." "The class action was an invention of equity" and was

> originally developed in the English Court of Chancery as a device to enable the equity court to decide actions brought by or against representatives of a group where the plaintiff could establish that the number of people involved was sufficiently large to make joinder impracticable, the group shared a joint interest in the issue to be adjudicated, and the named parties adequately represented the absent class members.

22 Stephen E. Arthur, *Indiana Practice Series: Civil Trial Practice* § 18.1 (2d ed. July 2022 Update). "Class actions subsequently were adopted and approved as part of the American legal system, and initially were authorized as actions in

equity." *Id*. "Indiana Revised Statutes of 1852 provided a mechanism for suing on behalf of a class …. which was intended to codify 'the old equity rules on the subject of parties[.]'" *Budden*, 698 N.E.2d at 1162 n.8 (quoting *Tate v. Ohio & Miss. R.R. Co.*, 10 Ind. 174, 175 (1858)).[3] "Over one hundred years later it was still on the books and remained essentially unchanged." *Id*. (citing Burns Ind. Stat. Ann. § 2-220 (1967)).

[11] "In 1969, the General Assembly, following the recommendations of a Civil Code Study Commission created in 1967, repealed a variety of antiquated trial procedural statutes and enacted 'rules of civil procedure' that were modeled substantially on the Federal Rules of Civil Procedure." *Id*. at 1163. "A virtual carbon copy of Federal Rule 23 was included." *Id*. (citing 1969 Ind. Acts ch. 191, § 1). "These rules recognized that rules of civil procedure would ultimately be adopted by [our supreme court]." *Id*. (citing 1969 Ind. Acts ch. 191, § 2). "Four months after the legislative rules were passed, [our supreme court] promulgated the Indiana Rules of Trial Procedure, including Rule 23 …." *Id*.

[12] Since September 2018, Trial Rule 23 has read in relevant part as follows:

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[3] The foregoing belies the appellees' assertion that "class actions derived from common law" and thus "the General Assembly maintains the ability to modify" the right to bring a class action. State's Br. at 13; Ball State's Br. at 23-26. *See* Black's Law Dictionary (11th ed. 2019) (defining "common law" in pertinent part as "[t]he body of law deriving from law courts as opposed to those sitting in equity": "The common law of England was one of the three main historical sources of English law. The other two were legislation and equity. The common law evolved from custom and was the body of law created by and administered by the king's courts. Equity developed to overcome the occasional rigidity and unfairness of the common law. Originally the king himself granted or denied petitions in equity; later the task fell to the chancellor, and later still to the Court of Chancery.").

(A) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

> (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory

relief with respect to the class as a whole; or

(3) the court finds that the 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. The matters pertinent to the findings include:

> (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (d) the difficulties likely to be encountered in the management of a class action.

(C) Determination by Order Whether Class Action to be Maintained--Notice--Judgment--Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court, upon hearing or waiver of hearing, 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.

….

(D) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:

> (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;
>
> (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;
>
> (3) imposing conditions on the representative parties or on intervenors;
>
> (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;
>
> (5) dealing with similar procedural matters.
>
> The orders may … be altered or amended as may be desirable from time to time.

[13] We recently stated that "[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only" and that "[t]he principal purpose of … class action certification is promotion of efficiency and economy of litigation." *Ind. Univ. v. Thomas*, 167 N.E.3d 724, 730 (Ind. Ct. App. 2021) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011), and *LHO Indpls. One Lessee, LLC v. Bowman*, 40 N.E.3d 1264, 1269 (Ind. Ct. App. 2015)). Moreover, our supreme court has remarked that

> [o]ne of the privileges our system of justice confers on every citizen is the ability to assert claims in the form of a class action if the requirements of Rule 23 are met. As a practical matter, this is often essential to the assertion of any claim at all. The cost and difficulty of pursuing only an individual claim may render it uneconomic from the point of view of any capable attorney, and financing such an enterprise on a pay as you go basis is often beyond the means of the aggrieved parties ….

Budden, 698 N.E.2d at 1162.

[14] Trial Rule 23 is a purely procedural rule, and the right to bring a class action is a purely procedural right. *See* Ind. Trial Rule 1 ("Except as otherwise provided, these rules govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin."); *Ryan v. Ryan*, 972 N.E.2d 359, 370 (Ind. 2012) ("Like all of our Trial Rules, Trial Rule 60(B) [which allows a trial court to grant a party relief from a judgment] is a rule of *procedure*; it does not confer any substantive right on a party that invokes it. While courts sometimes say that Trial Rule 60(B) 'gives courts equitable power,' that is not strictly true. Rather, Trial Rule 60(B) gives the court a procedural mechanism to exercise power that it derives from substantive law …."); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ [Federal] Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."). Section 7 is a purely procedural statute, in that it does not affect a plaintiff's existing substantive right to sue a postsecondary educational institution for breach of contract or unjust enrichment. Instead of furthering judicial administrative

objectives, however, it frustrates them by encouraging a multiplicity of lawsuits from similarly situated plaintiffs. In the parlance of our supreme court's long-standing precedent, Section 7 does not "establish rights and responsibilities[,]" but "merely prescribe[s] the manner in which" a plaintiff's contractual and quasi-contractual rights "may be exercised and enforced[,]" i.e., individually and not as a representative of a class. *Blood*, 239 Ind. at 400, 157 N.E.2d at 478.[4]

[15] Citing *Church*, Ball State suggests that mandating judicial inefficiency predominantly furthers public policy objectives by protecting Indiana's postsecondary educational institutions "from widespread legal liability arising out of their efforts to combat and mitigate the spread of COVID-19." Ball State's Br. at 21 (citation to appendix omitted). We find this reasoning unpersuasive because, as already mentioned, Section 7 does not abrogate the existing substantive right to sue those institutions for breach of contract or

[4] Ball State asserts that Section 7's codification in Indiana Code Article 34-12, entitled "Prohibited Causes of Action," "underscores its substantive nature." Ball State's Br. at 22. The meritlessness of this assertion is underscored by the fact that Section 7 itself does not prohibit any cause of action.

unjust enrichment, so it does not reduce the institutions' potential legal liability in the slightest.[5]

[16] Finally, the conflict between the rule and the statute at issue could not be more stark: Trial Rule 23 says that a claimant "may" bring a class action, and Section 7 says that a claimant "may not" do so. Ball State and the State attempt to harmonize the two by noting that Trial Rule 23(D)(4) allows a court to require that pleadings be amended to eliminate class allegations. But Section 7's blanket prohibition of class actions effectively dictates that a pleading with class allegations may not be filed in the first place. In sum, both Trial Rule 23 and Section 7 "could not apply in a given situation." *Key*, 48 N.E.3d at 339. Accordingly, we conclude that Section 7 is a nullity, and therefore we reverse and remand for further proceedings consistent with this decision.[6]

[17] Reversed and remanded.

Vaidik, J., and Altice, J., concur.

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[5] Ball State argues that "the class action vehicle allows defendants to be liable to absent persons who have not sued them—a substantive consequence that affects rights and responsibilities." Ball State's Br. at 21. This argument overlooks the existence of Ball State's liability in the first instance. Ball State also complains that "the class action vehicle …. also allows absent persons to be bound by a judgment—favorable or unfavorable—in a case they have not initiated or prosecuted—another substantive consequence that affects rights and responsibilities." *Id*. at 21-22. We note that Trial Rule 23(C)(2) requires the trial court to "direct to the members of the class the best notice practicable under the circumstances" and that a member may request to be excluded from the class and thus excluded from the preclusive effect of any judgment.

[6] Ball State notes that the General Assembly enacted two other COVID-related class-action bars in Senate Enrolled Act 1/Public Law 1-2021 (Indiana Code Sections 34-30-32-10 and 34-30-33-8), and it frets that accepting Mellowitz's "extreme position" would require the invalidation of those bars. Ball State's Br. at 29. Those bars are not before us in this appeal, and we express no opinion on them.