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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000364-ME

JOHN YOUNG AND
NICHOLAS BROWN — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 16-CI-001924

SULLIVAN UNIVERSITY SYSTEM, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: John Young and Nicholas Brown bring this interlocutory appeal from a February 23, 2018, order of the Jefferson Circuit Court denying certification of a class action against Sullivan University System, Inc. (Sullivan). We affirm.

On April 27, 2016, John Young and Nicholas Brown, for themselves and for a class of other individuals similarly situated, filed a complaint in the

Jefferson Circuit Court against Sullivan. Young and Brown sought class certification under Kentucky Rules of Civil Procedure (CR) 23 on behalf of all individuals who were students in the culinary arts program at Sullivan since 2004. It was alleged that Sullivan engaged in "unfair, false, misleading, and deceptive" representations mainly concerning career success in relation to its culinary arts program that induced Young, Brown, and others similarly situated to enroll in such program. Complaint at 4. Due to Sullivan's wrongful acts, it was claimed that Young, Brown, and others similarly situated incurred significant damages, mainly student debt. In particular, it was alleged:

FACTS

4. Since 2004, Sullivan has represented to the public and prospective students, among other things:

- That it is a student success focused institution;
- An unmatched 98-99% graduate employment success record year after year[];
- If you want to get on the fast track to a great career, there's no better way than Sullivan University. Our programs are designed to get you the classes you need for the career you want. From culinary. . . [;]
- 100% employment success rate for graduates;
- There are four to five job openings for each qualified candidate with a culinary arts degree[;]
- It is a private institution of higher learning dedicated to providing educational enrichment opportunities for the professional development of its students;
- Offers career focused curricula with increasing rigor;
- Facilitates identification of student goals and the means to achieve those goals;

- Provides the ability to find success as an Executive Chef, Corporate Chef, Food and Beverage Manager, and Sous Chef, among other positions; and
- A culinary arts degree positions students to achieve a food service manager position earning over $40,000 per year as of 2006.

5. However, Sullivan's own statistics show that the vast majority (in excess of 80% and potentially up to or greater than 95%) of graduates of its culinary arts program do not achieve a job in culinary arts that is any better than one they could have received without a degree, including most graduates still being entry level cooks or kitchen staff, waiters or being unemployed.

6. Without even factoring in the large numbers of Sullivan graduates with zero income (typically about one third), Sullivan graduates who become employed historically make an average of less than $25,000 per year (and approximately $20,000 per year when removing the outliers) in their first post graduate year according to Sullivan's statistics.

7. Historically, only approximately 50% of Sullivan's students even graduate.

8. Based on the representations above and/or substantially similar representations, John decided to attend Sullivan's culinary arts program.

9. John attended Sullivan from 2012 through May 2014.

10. John obtained an Associate's Degree in Culinary Science from Sullivan.

11. John paid and incurred debt of approximately $60,000 to obtain his degree.

12. John spent 2.5 years of his life (and incurred significant debt) to obtain a degree of little to no monetary benefit in the job market.

13. Sullivan solicited Nicholas, and based on the representations above and/or substantially similar representations, Nicholas decided to leave his home town of St. Louis to attend Sullivan's culinary arts program.

14. Nicholas obtained three (3) degrees from Sullivan in the culinary arts program, including general culinary arts, catering, and personal private chef.

15. Nicholas (and his mother) incurred debt of approximately $80,000 to obtain these degrees.

16. Nicholas spent three years of his life (and incurred significant debt) to obtain degrees of little to no monetary benefit in the job market.

17. If permitted to retain John and Nicholas's money, Sullivan will be unjustly enriched.

18. The contracts failed in consideration.

19. Sullivan's practices are unfair, false, misleading, and deceptive.

20. Sullivan's conduct violates Kentucky's Consumer Protection Act, KRS § 367.170, *et seq.* and constitutes breach of contract, breach of fiduciary duty, unjust enrichment, and fraud.

21. In addition to compensatory damages, interest, and court costs, John and Nicholas should be awarded punitive damages and their attorney's fees in prosecuting this action.

CLASS ALLEGATIONS

1. Plaintiffs reassert all prior paragraphs as if fully set forth herein.

2. Plaintiffs bring this action as a class action on behalf of all individuals who attended Sullivan's culinary arts program since 2004.

3. This action has been brought and may properly be maintained as a class action pursuant to Kentucky Rule of Civil Procedure 23 on behalf of the Plaintiffs and all others similarly situated with the Class.

4. Members of the Class are so numerous that their individual joinder is impracticable. Upon information and belief, the proposed Class includes hundreds (if not thousands) of members.

5. There is a well-defined community of interest among members of the Class. The claims of the representatives are typical of the claims of the Class. The factual basis of Sullivan's conduct is common to all Class members and resulted in injury to Class members.

6. The core questions of law and fact in this case are common to Plaintiffs and Class members and include whether Sullivan misrepresented or engaged in other unfair, false or misleading conduct, or breached its agreements, and/or was unjustly enriched regarding its misleading and unfair career focus and success representations and rates.

7. Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs retained counsel with substantial experience in consumer protection, fraud and contract litigation and class action claims. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Class they represent and have the

financial resources to do so. Neither the Plaintiffs nor counsel have any interest adverse to those of the Class.

8. Plaintiffs and members of the Class have suffered harm and damage as a result of Sullivan's conduct. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Class treatment of common questions of law and fact is superior to multiple individual actions or piecemeal litigation in that class treatment will conserve the resources of the courts and litigants and promote consistency and efficiency of adjudication.

Complaint at 2-5. By order entered February 23, 2018, the circuit court denied the motion to certify the class and concluded that neither the commonality or typicality requirements of CR 23.01 were satisfied. This appeal follows.[1]

Young and Brown contend that the circuit court erred by determining that the commonality and typicality requirements necessary for class certification under CR 23.01 were not satisfied. Young and Brown maintain that "[t]he common core of the case is – does Sullivan mislead prospective students regarding the prospects of career success for its graduates?" Young and Brown's Brief at 12. In particular, Young and Brown assert that Sullivan's marketing campaign and advertisements induced students to pay tuition for a culinary arts degree by misrepresenting the actual career success of graduates. Additionally, Young and

[1] An interlocutory appeal may be taken from an order granting or denying certification of a class action. *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430, 436 (Ky. 2018).

Brown believe that the circuit court improperly judged the merits of the claims in determining not to certify the class action.

CR 23.01 provides:

> Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

Under CR 23.01, a party seeking certification must demonstrate the following four requirements:

> (a) the class is so numerous that joinder of all members is impracticable,
>
> (b) there are questions of law or fact common to the class,
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> (d) the representative parties will fairly and adequately protect the interests of the class.

Nebraska Alliance Realty Company v. Brewer, 529 S.W.3d 307, 311 (Ky. App. 2017).

At issue in this appeal are the commonality and typicality requirements. Under the commonality requirement of CR 23.01(b), the central

analysis is "[w]hether the class plaintiffs' claims depend upon a common contention . . . that is capable of class wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430, 447 (Ky. 2018) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). Under the typicality requirement of CR 23.01(c), "the claims and defenses are considered typical if they arise from the same event, practice, or course of conduct that gives rise to the claims of other class members and if the claims of the representative are based on the same legal theory." *Hensley*, 549 S.W.3d at 443 (quoting 6 Kurt A. Philipps, Jr., David V. Kramer and David W. Burleigh, *Kentucky Practice Rules of Civil Procedure*, 23.01, Comment 7 (2017)).

In determining commonality or typicality, the circuit court should engage in a "rigorous analysis" that "will often entail some review of the merits of the plaintiff's underlying claim." *Hensley*, 549 S.W.3d at 445 (quoting 6 Kurt A. Philipps, Jr., David V. Kramer and David W. Burleigh, *Kentucky Practice*, CR 23.01 Comment 4 (2017). And, it must be emphasized that the burden is on the party seeking class certification to demonstrate compliance with CR 23.01.

Our standard of review of the circuit court's decision to certify or to not certify a class action is for an abuse of discretion. *Hensley*, 549 S.W.3d 430,

444. It has been recognized that "[i]mplicit in this differential standard . . . of the certification inquiry [is] the [trial] court's inherent power to manage and control pending litigation." *Id.* at 444 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998)). To that end, "[a]s long as the [trial court's] reasoning stays within the parameters of [CR] 23's requirement for certification of a class, the [trial court's] decision will not be disturbed" on appeal. *Hensley*, 549 S.W.3d at 444 (quoting *Hines v. Widnall*, 334 F.3d 1253, 1255 (11th Cir. 2003)).

In its order denying certification, the circuit court thoroughly analyzed the issue and concluded that Young and Brown failed to demonstrate the requirements of CR 23.01 for commonality and typicality. The court reasoned:

> Here, [Young and Brown] estimate that Sullivan has induced hundreds, if not thousands, of students to pay for a worthless education by making false and deceptive representations regarding the value of its culinary arts program. A class of that size is certainly "so numerous" as to make joinder of its individual members impracticable, a proposition that not even Sullivan disputes. The problem for [Young and Brown], however, is that they have not "bridged the gap" between their own individual claims and the existence of a class of persons who have suffered the same injury and, therefore, have not satisfied the prerequisites of commonality and typically. *See Dukes*, 564 U.S. at 352 (citing *Gen. Tel Co. of Sw. v. Falcon*, 457 U.S. 147, 157-58 (1982)); *see also Wiley v. Adkins*, 48 S.W.3d 20, 23 (Ky 2001) (regarding the requirement that a plaintiff show a "common nucleus of operative facts" tying together his own alleged injury and that purportedly suffered by the proposed class). Though [Young and Brown] have put together a hodgepodge of allegedly false and deceptive

representations made by Sullivan going all the way back to 2004 (*e.g.* statements boasting of a "98-99% graduate employment success record," of a "100% employment success rate for graduates," or that there were "four to five jobs openings for each qualified graduate with a culinary arts degree"), nothing in the record shows that all members of their proposed class were likely exposed to those representations "during the applicable limitations period." The other evidence relied upon by [Young and Brown] – such as Sullivan's failure to compile employment reports in select years, Sullivan's internal employment reports for 2011 and 2012, or the statements allegedly made to them by Sullivan's representatives prior to admission – does not necessarily show that Sullivan engaged in any common or general fraudulent scheme that likely affected all members of their proposed class. *Cf. Makaeff v. Trump University, LLC*, 2014 WL 688164 at *3 (S.D. Cal. Feb. 21, 2104) (finding that the plaintiff had satisfied the requirements of commonality and typicality by identifying "common misrepresentations" in "all of the marketing materials" used by Trump University to promote its business with prospective customers). The Court will not infer that such a class of persons exists simply because Sullivan has made a concerted effort to promote itself as a "career focused educational institution" or a "student success focused institution" over the years. Putting aside the Court's skepticism as to whether those labels really guarantee, as [Young and Brown] assert, that graduates of the culinary arts program will be able to "obtain a job that is any better than [the] one they could have received without spending or incurring debt of tens of thousands to obtain a Sullivan degree," the record lacks sufficient evidence to indicate how widespread Sullivan's use of them was in the promotional materials that it sent to prospective students of its culinary arts program "during the applicable limitations period." Because [Young and Brown] have not established a sufficient nexus between their own claims and the existence of a class that has suffered the same injury, they have not demonstrated the

> requirements of commonality or typicality necessary to certify their proposed class. *See Dukes*, 564 U.S. at 352.

Order at 6-8 (footnote omitted).

We believe the circuit court's reasoning is sound and cannot conclude that an abuse of discretion occurred. In fact, the circuit court's reasoning was well "within the parameters of [CR] 23's requirements for certification of a class." *Hensley*, 549 S.W.3d at 444 (citation omitted). And, we reject Young and Brown's contention that the circuit court improperly judged the merits. Rather, the circuit court properly undertook a rigorous analysis that necessarily required an examination of the facts beyond the pleadings. *See Hensley*, 549 S.W.3d at 446; *Dukes*, 564 U.S. at 351. Accordingly, we are of the opinion that the circuit court did not abuse its discretion by denying Young and Brown's motion to certify a class action.

We view any remaining contentions of error as moot.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

MAZE, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS, AND FILES SEPARATE OPINION.

JONES, JUDGE, DISSENTING. Respectfully, I dissent. I believe the circuit court abused its discretion as related to the requirements of commonality and typicality under CR 23.01. I believe, based on the record, the Appellants satisfied

the requirements for class certification as related to CR 23.01. However, because the circuit court concluded that the elements of commonality and typicality were not met, it did not undertake an analysis of whether the class was maintainable under CR 23.02. Accordingly, I would vacate the denial of class certification and remand this matter with instructions for the circuit court to conduct the required analysis for maintainability under CR 23.02.

With respect to commonality, we have held that review under CR 23.01(b) should focus on whether "the defendant's conduct was common as to all of the class members." *Nebraska All. Realty Company v. Brewer*, 529 S.W.3d 307, 312 (Ky. App. 2017). "And even if 'some individualized determinations may be necessary to completely resolve the claims of each putative class member . . . those are not the focus of the commonality inquiry.'" *Id.* (quoting *In re Community Bank of Northern Virginia Mortg. Lending Practices Litigation*, 795 F.3d 380, 399 (3d Cir. 2015)).

In *Indiana Business College v. Hollowell*, 818 N.E.2d 943 (Ind. App. 2004), the Indiana Court of Appeals affirmed certification of a class similar to the one proposed by Appellants. In discussing the element of commonality, it explained why common questions of law and fact existed despite the existence of some individual questions regarding what materials the students may have seen and relied upon.

> Plaintiffs argued to the trial court that IBC's written materials about the program were the same, regardless of the IBC campus involved, and that the plaintiffs had all attended the Medical Coding program, spending time and money thereon, but them found themselves not qualified for the employment indicated by the IBC's materials. These factual allegations portray a "common nucleus of operative fact" and "a common course of conduct by" IBC.
>
> . . .
>
> There may be some difference among class members as to whether they received certain materials and when they received them; as to whether they were able to find employment and if so, how and in what areas. Nevertheless, there are substantial common facts here: each class member graduated from IBC's Medical Coding program after incurring considerable expense in order to attain that graduation and having done so relying upon misrepresentations by IBC as to the program.

Id. at 950-51.

Like the plaintiffs in the Indiana case, Appellants presented evidence consisting of various marketing materials Sullivan used to promote its culinary programs. Appellants alleged that the marketing materials were false and/or misleading with respect to the employment future graduates could expect after graduating from Sullivan's culinary programs. The common question is whether the materials used by Sullivan to promote its programs were false and/or misleading. The circuit court ignored the existence Sullivan's fairly uniform marketing materials, and instead focused on the "individualized determinations"

necessary to determine which class members might have seen the marketing materials at issue. I do not believe that the individual questions identified by the circuit court are relevant under the CR 23.01(b) analysis as to whether "there are questions of law or fact common to the class." In fact, it seems impossible to conclude that Appellants did not identify at least some common questions of law and fact.

I believe the circuit court committed a similar error with respect to the requirement of typicality. "While commonality examines the group characteristics of the class as a whole, typicality examines the individual characteristics of the named parties in relation to the class." *Nebraska All. Realty Company*, 529 S.W.3d at 312-13. "As with commonality, the claims need not be identical, and 'cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims.'" *Id.* (quoting *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994)). "The claims and defenses are considered typical if they arise from the same event, practice, or course of conduct that gives rise to the claims of other class members and if the claims of the representative are based on the same legal theory." *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430, 443 (Ky. 2018).

Here again, I fail to see how one could conclude that typicality was not satisfied in this case. The named plaintiffs graduated from Sullivan's culinary programs and claim that they were damaged by Sullivan's alleged misleading materials. The class they proposed consisted of other Sullivan graduates from the culinary programs allegedly damaged by the same materials.

The issues the trial court raised may be barriers to class certification under CR 23.02; however, I do not believe that the trial court's denial of certification should have been predicated on the failure to satisfy the elements of CR 23.01. Accordingly, I would vacate and remand with instructions to undertake step-two of the class certification inquiry, *i.e.*, whether plaintiff's proposed class is maintainable.

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