IN THE SUPREME COURT OF OHIO

BROOKE SMITH, individually and on behalf of all others similarly situated,	:	**Supreme Court Case No.: 2023-00009**
Plaintiff-Appellee,	:	**On Appeal from the Tenth District Court of Appeals, Case No.: 22AP-125**
v.	:	
THE OHIO STATE UNIVERSITY,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT THE OHIO STATE UNIVERSITY

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INTRODUCTION

On March 14, 2023, this Court accepted an appeal on the following proposition of law:

> The Court of Claims does not have subject matter jurisdiction to hear claims against the State that are subject to discretionary immunity.

The resolution of this issue follows directly and inevitably from two settled principles. First, the Court of Claims' jurisdiction is limited to "civil actions against the state ***permitted by the waiver of immunity contained in section 2743.02***," R.C. 2743.03(A)(1) (emphasis added); *see also Cirino v. Ohio Bureau of Workers' Comp.*, 153 Ohio St.3d 333, 2018-Ohio-2665, 106 N.E.3d 41, ¶ 19. Second, ***R.C. 2743.02 did not waive the State's discretionary function immunity*** for "essential acts of governmental decisionmaking." *Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, ¶ 34. These two principles are readily apparent from this Court's prior decisions.

It is equally clear from this Court's prior decisions that "essential acts of governmental decisionmaking" are those "basic policy decision[s]" by the State and its instrumentalities that can be "characterized by the exercise of a high degree of official judgment or discretion." *Risner v. ODOT*, 145 Ohio St.3d 55, 2015-Ohio-4443, 46 N.E.3d 687, ¶¶ 11-12. Any claim seeking to impose "liability ***arising from*** the decisions made pursuant to [the state's] discretionary function" is barred. *See id.* at ¶ 24 (emphasis added).

The "basic policy decision" at issue here is the one made by The Ohio State University ("OSU") on March 9, 2020 to temporarily transition the in-person instruction components of classes at its Columbus campus to online instruction[1] and to temporarily limit access to many

[1] Initially, the transition to online classes was to last from March 16, 2020, when Spring break ended, to March 30, 2020. On March 12, 2020, however, the transitionary period was extended to the end of the Spring 2020 semester, which was April 24, 2020.

campus facilities for the remainder of the Spring 2020 semester. It is undisputed on the record below that this decision was taken, after much deliberation, to protect the health and safety of OSU's faculty, staff, and students in the face of the spreading COVID-19 pandemic, while continuing to maintain OSU's educational mission. (R. 91 (Deposition of Dr. Bruce McPheron ("McPheron Dep.")) at 44-45.)[2] A better example of an "exercise of a high degree of official judgment or discretion" can hardly be imagined and its implication for this case is unmistakable: OSU, as an instrumentality of the State, simply "cannot be sued" for that discretionary function decision in the Ohio Court of Claims. *Wallace* at ¶ 35; *Reynolds v. State*, 14 Ohio St.3d 68, 471 N.E.2d 776 (1984), paragraph one of the syllabus; *Risner* at ¶¶ 10-12. Discretionary function immunity attaches to OSU's decision because of its character and precludes the Ohio Court of Claims from exercising subject matter jurisdiction over Plaintiff's claims.

OSU raised discretionary function immunity as a defense in its Answer (R. 26 at ¶ 65) but did not raise it specifically in the initial class certification phase of the case before the Court of Claims. The Court of Claims certified a class and OSU appealed that class certification decision to the 10th District Court of Appeals. In the Court of Appeals, OSU challenged the class certification decision on multiple grounds and also argued that OSU was entitled to immunity from suit regarding its March 9, 2020 discretionary function decision. On November 17, 2022, the 10th District reversed the Court of Claims as to class certification (OSU does not challenge that decision here) but determined that OSU's argument as to discretionary function immunity "lacks merit as to its assertion of a jurisdictional bar, and additionally [is] inappropriate to decide, in the first instance …" (Appx. at 18.)

[2] Dr. McPheron was OSU's Executive Vice President and Provost at that time. As Provost, Dr. McPheron was OSU's Chief Academic Officer. As he explained, he was responsible for "what most people think of [as] the operation of a university." (McPheron Dep. at 23.)

The question before this Court now, on the proposition of law accepted, is whether the Ohio Court of Claims has subject matter jurisdiction over claims which challenge "a basic policy decision," such as the one made here by OSU in the face of a once-in-a-lifetime pandemic, that can fairly be "characterized by the exercise of a high degree of official judgment or discretion" and amounted to an "essential act of governmental decisionmaking." *Risner* at ¶ 12; *Wallace* at ¶ 35.

The Court's answer to this question is of paramount importance. It will not only directly affect this case, but also *McDermott v. Ohio State Univ.*, 10th Dist. Franklin No. 22AP-76, 2022-Ohio-4780, which is now pending before this Court on OSU's Memorandum In Support Of Jurisdiction. *McDermott* also involved OSU's March 9, 2020, decision, and the 10th District Court of Appeals in that case, albeit a different panel, also held that discretionary function immunity does not implicate the subject matter jurisdiction of the Ohio Court of Claims. In addition, there are cases currently pending against seven other Ohio public universities in the Court of Claims, all of which involve similar claims. All of them will be affected by this Court's resolution of the discretionary function immunity question pending here.

Perhaps most important of all, the answer to the question whether discretionary function immunity implicates the jurisdiction of the Court of Claims will define the boundaries of this State's broader ability to react and adapt to changing circumstances, emergencies, and unforeseen situations that impact the health and safety of its citizens, without fear of immediate litigious reprisal. As a jurisdictional defense, it provides the State with the ability to use its resources in the interests of its citizens, rather than consuming the State's time and resources with gratuitous litigation challenging core governmental health and safety decisions. The shield of discretionary

function immunity is and should be limited in scope, but is also critical to a proper and effective exercise of the State's police power in appropriate circumstances.

STATEMENT OF FACTS

The events relevant to this case focus on a few critical weeks in March 2020, when the world, the country, and the State of Ohio were all responding to the novel and rapidly-changing threat presented by COVID-19.

A. The State of Ohio's Response to COVID-19.

At the beginning of March 2020, the State of Ohio was on edge. COVID-19 had arrived in the United States. The number of new COVID cases was rising exponentially each day. (R. 94 (OSU Motion for Summary Judgment ("MSJ")) Ex. 1.) Little was known about the virus at the time other than that it was lethal, highly contagious, and spreading fast. These circumstances presented a daunting task for Ohio's public officials, who were trying to carry out their usual responsibilities consistent with the State's paramount obligation to protect the health and safety of its citizens.

On March 9, 2020, Governor DeWine declared a State of Emergency "to justify the authorization of personnel of State departments and agencies as are necessary, to coordinate the State response to COVID-19, and to assist in protecting the lives, safety, and health of the citizens of Ohio." (MSJ Ex. 4.) In addition, the State of Emergency directed state agencies to "develop and implement procedures, including suspending or adopting temporary rules within an agency's authority, consistent with recommendations from the Department of Health designed to prevent or alleviate this public health threat." (*Id.*)

OSU is located in one of the State's largest cities and was in the midst of providing more than 7,000 courses with over 14,000 class sections to over 44,215 Columbus-based undergraduates when the Governor declared the State of Emergency. (MSJ Ex. 4; R. 67 (Opposition to Plaintiff's

Motion for Class Certification ("Class Opp'n")) Ex. A (Affidavit of Adrienne Bricker ("Bricker Aff.")) at ¶ 4; McPheron Dep. at 111.) A substantial number, but not all, of OSU's courses and sections included some component of in-person instruction. In addition, the Columbus campus contained many facilities where faculty, staff, and students congregated for educational, social, and recreational purposes.

In view of the evolving nature and rapid spread of COVID-19, OSU's administrators determined that they needed to act quickly and decisively to "ensure the health of the faculty, staff and students" in a way that would allow OSU to safely continue "to deliver on the [educational] mission of the university" for the remainder of the Spring 2020 semester. (McPheron Dep. at 44.) As Dr. McPheron stated in his deposition, the Spring of 2020 "was a challenging time in terms of understanding what this pandemic was going to become. We were looking at maintaining the mission of the university to deliver … education through coursework." (*Id*. at 56.) In addition, this period was also "a … very unsettled time in terms of what we were anticipating federal, state and local governments were going to do in response to the pandemic[.]" (*Id*. at 57.)

To meet this challenge, OSU convened "a task force of senior leadership and subject matter experts" to determine what steps it needed to take in response to the pandemic. (*Id*. at 39, 42-43, Ex. 10.) Their discussions covered a lot of "different issues that [had] to be simultaneously considered." (*Id*. at 45-46, 57.) In that process, OSU was guided by two overarching themes: "First of all, deliver the education. And second, offer that in as safe manner as possible." (*Id*. at 102.) In both respects, OSU "focused on finding a solution that [it] felt worked best for … 68,000 [graduate and undergraduate] students, all of whom were different in their trajectories through [their] academic pathways." (*Id*. at 132.)

The task force discussions involved consideration of everything from cleaning campus facilities (McPheron Dep. at 46 ("We didn't know at the time what level of cleaning and other sorts of—of COVID responses really were the most reasonable things to do.")), to coordinating and implementing the vacation of student dormitories and continuing to house those students who needed to remain on campus (*id*. at 46, 56-59), to pivoting the in-person instructional components of many classes to online (*id*. at 46, 48-49), to planning for the resumption of in-person instruction in the future (*id*. at 44, 102), and to adjusting the academic calendar to allow for a full presentation of the remaining coursework and finals in the last five weeks of the Spring 2020 semester. (McPheron Dep. at 63-68.) This meant OSU would have to "work with thousands of faculty and instructional personnel to enable them to offer their … coursework online" (*id*. at 46), all the while continuing to deliver on OSU's mission of delivering a quality education through coursework. (*Id*. at 56.) In addition, OSU administrators planned to create and maintain a website to keep students, faculty, staff, and families informed about the details of OSU's response to the pandemic. (*Id*. at 62.)

On March 9, 2020, after taking into account the complexity of all the different issues that OSU needed to address, OSU came to the "hard decision" to temporarily suspend the in-person component of instruction at its Columbus campus in the Spring 2020 semester. (McPheron Dep. at 45, Ex. 12.) At this point, eight weeks of instruction in the Spring 2020 semester had already been completed and Spring break was about to begin. The suspension of in-person instruction was first scheduled to last from March 16, after Spring break, to March 30 (*id*. at 43, Ex. 10), but then, on March 12, was extended to the end of the semester. (*Id*. at 51-53, Ex. 12.) As a result of this decision, the in-person component of classes that were all or partially in-person transitioned to all online instruction for the remaining four weeks of classes. In temporarily transitioning the mode

of instruction to online and limiting access to campus, it is important to recognize that, on March 9, OSU chose not to close OSU entirely and wait to restart all the classes until after COVID abated. As Dr. McPheron said, "[w]e did not go that way in large part because it would have disrupted the academic progress of … tens of thousands of students, and it wasn't necessary." (*Id*. at 135-136.)

OSU also made other changes to the academic calendar in response to the pandemic. Spring break that semester was originally scheduled to run from March 9 to March 13, but was extended to March 23 to "facilitate the move-out of students living in residence halls." (McPheron Dep. at 59-60.) To accommodate the extension of Spring break, OSU moved the last day of classes from April 20 to April 24, and moved the final exam week from April 22-28 to April 27-May 1. (*Id* at 67-69, Exs. 4, 15.) The originally scheduled graduation date for the Spring 2020 semester, May 3, 2020, did not change. (*Id*. at 69.)

While OSU implemented its decision to continue to provide educational opportunities through coursework in altered instructional modalities, to ensure the health of its own faculty, staff, and students, the Ohio Department of Health ("ODH") took additional steps to try to limit the spread of COVID-19 throughout the State. On March 14, 2020, after OSU's decision, ODH ordered the closure of K-12 school buildings to students. (MSJ Ex. 6.) On March 17, again after OSU's decision, ODH issued an order prohibiting mass gatherings of fifty or more persons and requiring the closure of health clubs, fitness centers, gyms, movie theaters, and indoor sports facilities. On March 22, 2020, two weeks after OSU's decision, ODH issued a Stay-at-Home Order, mandating that all persons residing in Ohio stay at their place of residence, with exceptions for "essential" work or activities. (MSJ Ex. 7.)

On Monday March 23, 2020, as noted above, OSU's Spring 2020 semester classes resumed with online instruction components instead of in-person instruction components and with restricted

access to most campus facilities. (McPheron Dep. at 67-70, Ex. 15.) After that, classes continued to April 24, final exams were conducted from April 27 to May 1, and Spring semester commencement took place as originally scheduled on May 3. (*Id*.) During those last five weeks of instruction and exams, OSU's students, faculty, and staff adapted to learning safely and virtually, staying home, social distancing, and wondering when—or if—the pandemic would end.

B. Plaintiff Brooke Smith's Final Semester At OSU.

In the Spring 2020 semester, Plaintiff was in the last semester of her senior year at OSU. She enrolled in two classes. Her first class was a 10-credit student teaching internship that was designed to satisfy the Ohio Department of Higher Education's ("ODHE") requirement for students to complete twelve weeks of student teaching before they can be recommended for initial teacher licensure. (MSJ Ex. 23 (Smith Academic Transcript); Class Opp'n Ex. C (Aff. of Deborah Zurmehly ("Zurmehly Aff.")) at ¶¶ 5-6.) Plaintiff was assigned to a kindergarten classroom at Glendening Elementary School, in the Groveport Madison School District in central Ohio. (MSJ Ex. 19 (Advanced Field Placement Syllabus).) During the student teaching internship, Plaintiff followed the academic calendar of Groveport Madison—not OSU. (Class Opp'n Ex. D (Aff. of Tami Augustine ("Augustine Aff.")) at ¶¶ 10-11.) While OSU set general responsibilities and expectations for the internship, Plaintiff's day-to-day tasks and responsibilities at the school—including the amount, volume, and format of her tasks—were established entirely by Groveport Madison and the cooperating teacher at Glendening Elementary School. (*Id.* at ¶ 11; MSJ Ex. 28 (Aff. of Nicole Mays ("Mays Aff.")) at ¶ 4, 6, 12.)

Plaintiff's second class in the Spring 2020 semester was a 2-credit hour seminar. (MSJ Ex. 23.) This was a reflective seminar with an OSU professor where Plaintiff and her classmates would discuss and digest their student teaching experiences. (MSJ Ex. 18 (Reflective Seminar Syllabus).)

The first eight weeks of the Spring 2020 semester passed without incident. In her internship with Groveport Madison, Plaintiff created lesson plans, interacted with students daily, and ran group activities with the students. (Mays Aff. at ¶ 6.) She also participated in the reflective seminar with other student teachers. (Zurmehly Aff. at ¶ 19.)

In March 2020, however, the advent of COVID-19 changed the format of the remainder of her semester. As a result of OSU's March 9, 2020 decision to transition to online instruction, the remainder of Plaintiff's reflective seminar through OSU was conducted in an online modality. (MSJ Ex. 21 (Dr. Zurmehly Revised Syllabus for Spring 2020).) OSU's March 9, 2020 decision to transition to online instruction did not directly impact Plaintiff's student teaching internship because her day-to-day student teaching activities were set by Groveport Madison and the cooperating teacher at Glendening Elementary School. (Augustine Aff. at ¶¶ 10-11; Mays Aff. at ¶¶ 4, 6, 12.) However, Groveport Madison was subject to ODH's March 14, 2020 order closing all K-12 school buildings throughout the State. (Mays Aff. at ¶ 7; MSJ Ex. 6.) As a result, Glendening Elementary shifted to online instruction on March 17, 2020. (Mays Aff. at ¶¶ 7-10; Zurmehly Aff. at ¶ 16.)

By the time Glendening Elementary transitioned to online learning, Plaintiff had completed approximately ten weeks out of the then-applicable twelve-week requirement for student teaching. (Zurmehly Aff. at ¶ 10.) Around this same time, ODHE announced that it was reducing the twelve-week student teaching requirement to six weeks and authorized student teachers to complete alternative activities in lieu of traditional student teaching arrangements. (*Id.* at ¶ 11.) Plaintiff's cooperating teacher at Glendening Elementary—who was also working remotely—made the decision about what specific activities to assign to Plaintiff. (Mays Aff. at ¶ 12.) During the remote

portion of her internship, Plaintiff prepared read-a-louds (pre-recorded story readings) and completed various ODHE-approved alternative assignments. (*Id*. at ¶ 10; Zurmehly Aff. at ¶ 16.)

By the end of the semester, Plaintiff had completed the course objectives for her reflective seminar, satisfied all her student teaching requirements, and fulfilled all her credit requirements for graduation. She graduated on time on May 3, 2020, found a job, and began her career as a teacher that fall. (Zurmehly Aff. at ¶ 6; R. 61 (Deposition of Brooke Smith ("Smith Dep.")) at 325-326.)

C. Procedural History

Plaintiff filed her Complaint on May 21, 2020, 18 days after her graduation. (R. 1.) In it, she asserted breach of contract and unjust enrichment claims against OSU, both for herself and on behalf of a putative class of undergraduate students enrolled at OSU's Columbus campus in the Spring 2020 semester. Plaintiff alleged that OSU owed her and the putative class refunds of tuition and certain fees because of OSU's decision in response to the COVID-19 pandemic to temporarily transition to online instruction and restrict access to its Columbus campus for the remaining four weeks of instruction and the final exam week of the Spring 2020 semester (which commenced on January 9, 2020). (McPheron Dep. Ex. 14, 15.) Her core contention in the Complaint was that she was contractually entitled to in-person instruction and full access to OSU's facilities no matter the circumstances and that online instruction and any limitations on her access to campus facilities rendered her education "subpar." (R. 4 at ¶¶ 6, 26-27.)[3]

[3] Before the Court of Appeals below, Plaintiff dramatically changed her theory of recovery. She argued that her alleged injury had ***nothing to do with the quality of the education she or other OSU students received in the Spring 2020 semester***. Nothing to do with the "modes of instruction" for classes or with the extent of "access to campus." She contended instead that she and the other students were "overcharged" because online instruction and limited access to campus for the last five weeks of the semester "was not worth as much" as a full semester of in-person instruction and full access to OSU's facilities. (Appellee's Br. at 46-49.)

On June 30, 2020, OSU filed a Motion to Dismiss, arguing that Plaintiff's claims amounted to nothing more than allegations of educational malpractice, which Ohio does not recognize as a cause of action. (R. 13.) The Court of Claims denied that motion on September 9, 2020. (Appx. at 44.) OSU subsequently filed an Answer on September 23, 2020, asserting, among other defenses, that Plaintiff's claims were barred by the doctrine of discretionary function immunity.[4] (R. 26 at ¶ 65.) Plaintiff filed her Motion for Class Certification on June 25, 2021. Eight depositions were taken, including those of Dr. McPheron, Plaintiff, and both parties' experts. Without remotely conducting the "rigorous analysis" required by Civ.R. 23 (*see Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 26; *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St 3d 373, 2013-Ohio-4773, 999 N.E. 2d 614, ¶¶ 15, 16), the Court of Claims certified Plaintiff's class in its January 21, 2022 Decision. (Appx. at 26.)

OSU subsequently appealed the Court of Claims' Decision to the 10th District Court of Appeals. OSU challenged the Court of Claims' unjustified certification of a class and also argued that the Court of Claims lacked subject matter jurisdiction over Plaintiff's claims due to OSU's immunity from suit concerning its discretionary function decision to transition to online instruction and temporarily restrict access to parts of the Columbus campus. (R. 122.)

On November 17, 2022, the 10th District Court of Appeals rendered its Decision and held that the Court of Claims had improperly certified Plaintiff's class on multiple grounds. (Appx. at 6.) However, the 10th District declined to consider the issue of discretionary function immunity. The Court determined that discretionary function immunity did not implicate the Court of Claims'

[4] Because OSU pled discretionary function immunity as a defense in its Answer, there is no suggestion that OSU waived this defense in any context regardless of the Court's determination here of whether discretionary function immunity limits the subject matter jurisdiction of the Court of Claims.

subject matter jurisdiction and that, as an affirmative defense, discretionary function immunity needed to be considered in the first instance by the Court of Claims. (Appx. at 18.) In doing so, the 10th District erroneously equated the jurisdictional defense of discretionary function immunity with the statutory public duty defense set forth in R.C. 2743.02(A)(3). (*Id.*)

On January 3, 2022, OSU timely filed this jurisdictional appeal with two propositions of law: (1) whether OSU's decision to transition to online instruction in the face of the pandemic is entitled to discretionary function immunity; and (2) whether the Court of Claims has subject matter jurisdiction to hear claims against the State that are subject to discretionary function immunity. (Appx. at 1.) This Court accepted OSU's appeal on the second question on March 14, 2023.

D. Related Proceedings

As noted above, this case is one of several filed in the Ohio Court of Claims since March 2020 involving an Ohio public university's decision to transition to online instruction in the Spring of 2020 in the face of the global COVID-19 pandemic. In addition to two cases brought against OSU, cases were brought against Bowling Green State University, the University of Cincinnati, Miami University, the University of Akron, Ohio University, Kent State University, Wright State University, and the University of Toledo. In each of these cases, the universities exercised their discretion to take the different actions they deemed necessary to protect the health and safety of their students while supporting continued academic progress.

These other cases are in various procedural postures. However, as noted above, the other OSU case presents the same discretionary function immunity issue as the instant case. *McDermott v. Ohio State Univ.*, Ct. of Cl. No. 2020-00286JD. In *McDermott,* the plaintiff sought to have the Court of Claims certify a class (all students who paid the Student Union fee) and a subclass (all students in the College of Dentistry who paid an Educational Support Fee). The Court of Claims granted certification as to both. OSU appealed to the 10th District Court of Appeals on the ground

that the Court of Claims failed to conduct the required rigorous analysis of the Civ.R. 23 factors. OSU also appealed the Court of Claims' Decision on the ground that the doctrine of discretionary function immunity deprived the Court of Claims of subject matter jurisdiction over all of the Plaintiff's claims.

In its December 29, 2022 Decision in *McDermott*, a different panel of the 10th District Court of Appeals held erroneously that discretionary function immunity is not a jurisdictional defense but rather an affirmative defense falling under the statutory public duty rule (R.C. 2743.02(A)(3)), and that OSU was obligated to raise that defense in the first instance before the Court of Claims. *McDermott v. Ohio State Univ.*, 2022-Ohio-4780, at ¶¶ 69-71. Compounding that error, the *McDermott* panel went on to decree that "because the existence of public duty immunity is an issue of liability, it may not be determined in the context of class certification." *Id.* at ¶ 71.

On February 10, 2023, OSU filed a Memorandum in Support of Jurisdiction in this Court in the *McDermott* case and presented the same two propositions of law as in the instant case concerning discretionary function immunity. *See McDermott v. Ohio State Univ.*, Case No. 2023-0202. OSU also presented two additional propositions of law concerning specific standards for class certification as to which the Court of Claims and the 10th District Court of Appeals had significantly misinterpreted and misapplied the prior pronouncements of this Court. The latter two propositions of law are not mirrored in the instant case before this Court. The *McDermott* Memorandum in Support of Jurisdiction is still pending at this time.

The two Decisions by the 10th District Court of Appeals, in *McDermott* and in the instant case, have clearly eliminated discretionary function immunity as a jurisdictional defense to suits involving core "governmental decisionmaking" in spite of the prior decisions of this Court in *Reynolds*, *Wallace*, and *Risner*, among others, which expressly, and with equal clarity, upheld and

defined it as such. The Court of Appeals' parallel conclusions in both of the OSU cases is inexplicable and unjustifiable. Discretionary function immunity is a viable, if limited, residual aspect of historical sovereign immunity which was abrogated in other respects only by the enactment of the Ohio Court of Claims Act in 1974. *See* R.C. 2743.01 et seq. It has a place in the law of this State and, respectfully, should be confirmed and reinstated by this Court. The hard decisions that OSU and other Ohio public universities made in the face of the COVID-19 pandemic are clearly discretionary function decisions and worthy of that jurisdictional protection in the once-in-a-lifetime circumstances that exist here.

PROPOSITION OF LAW AND ARGUMENTS IN SUPPORT

Proposition of Law II: The Court of Claims does not have subject matter jurisdiction to hear claims against the State that are subject to discretionary immunity.

Two settled principles control the issue before this Court. First, the Court of Claims' jurisdiction is limited to "civil actions against the state ***permitted by the waiver of immunity contained in section 2743.02***." R.C. 2743.03(A)(1) (emphasis added); *see also Cirino v. Ohio Bureau of Workers' Comp.*, 153 Ohio St.3d 333, 2018-Ohio-2665, 106 N.E.3d 41, ¶ 19 ("The jurisdiction of the Court of Claims is defined by reference to the state's waiver of immunity in R.C. 2743.02."). Second, ***R.C. 2743.02 did not waive the State's discretionary function immunity*** for "essential acts of governmental decisionmaking," *Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, ¶ 34. From these two principles it inevitably follows that the Court of Claims does not have jurisdiction over suits involving discretionary function immunity.

The Court of Appeals' contrary holdings in this case and in *McDermott* have far-reaching implications. In terms of the subject matter of this suit alone, as noted above, numerous State public universities are already facing lawsuits arising out of their responses to the COVID-19 pandemic. Yet the 10th District Court of Appeals' Decision here strips these universities of a

threshold, jurisdictional defense of immunity respecting core governmental decision-making in favor of the need to plead and prove immunity as a waivable defense in every case.

This expansive holding by the Court of Appeals would also apply with equal force and effect to all other key decisions by State officials and instrumentalities who were forced to adjust quickly to COVID-19's crippling impact. Among other such key decisions were those made by the Governor and the Director of the Ohio Department of Health to close State facilities, including all K-12 School buildings in the State, and to require Ohio's citizens generally to stay at home while the pandemic was raging. In this case, this Court should reaffirm that discretionary function immunity—involving executive functions "characterized by the exercise of a high degree of official judgment or discretion," *Risner v. ODOT*, 145 Ohio St.3d 55, 2015-Ohio-4443, 46 N.E.3d 687, ¶¶ 11-12—is jurisdictional, and that trial and appellate courts must address the threshold issue of whether they have subject matter jurisdiction regardless of when or in what context the issue of discretionary function immunity is first raised.

A. Sovereign Immunity In Ohio Prior To The Court Of Claims Act.

Discretionary function immunity is rooted in the broader doctrine of sovereign immunity, which has evolved in Ohio in response to constitutional and statutory changes. Put simply, sovereign immunity means that "a state is not subject to suit in its own courts unless it expressly consents to be sued." *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 7. Like most states, Ohio has recognized this "fundamental principle of law" throughout its history. *See Raudabaugh v. State*, 96 Ohio St. 513, 514, 118 N.E. 102 (1917).

In 1912, the Ohio Constitution was amended to add the following language regarding claims against the State:

> All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or

> delay. ***Suits may be brought against the state, in such courts and in such manner, as may be provided by law***.

Ohio Constitution Article I Section 16 (emphasis added). In *Radabaugh*, the Court considered whether this additional language, by itself, waived sovereign immunity. After reviewing similar language in the constitutions of other states, the Court concluded that Article I Section 16 of the Ohio Constitution "is not self-executing, and that legislative authority by statute is required as a prerequisite to the bringing of an action against the state in its own courts." *Raudabaugh* at 518. Thus, Article I Section 16 did not directly impact the scope of sovereign immunity.

In response to the *Radabaugh* decision, The Ohio General Assembly created a Sundry Claims Board. *See* Ohio Court of Claims, *History of the Court*, at https://ohiocourtofclaims.gov/about-us/history-of-the-court-2/; *see also* John P. Walsh, *The Ohio Sundry Claims Board*, 9 Ohio St. L.J. 437 (1948). The Sundry Claims Board consisted of five members: the state auditor, the state attorney general, the chairman of the House finance committee, the chairman of the Senate finance committee, and the director of the state office of budget and management. The Board was empowered to hear and resolve all claims of whatever nature against the State. This included both contract and tort claims. *See* Walsh, 9 Ohio St. L.J. at 440, 443. The only requirements for submitting a claim to the Board were that the claim must be submitted on the designated form and that the claim must be specific enough for the Board to determine what the alleged wrong was and which state agency or agencies were implicated. The Board held hearings, and each party was given the opportunity to argue their case, call witnesses, and cross-examine the opposing party's witnesses. Claimants were not required to, and most often did not, have an attorney; but the State was always represented by the Attorney General.

The Board had the authority to approve or disapprove the payment of claims. Approved claims for $1,000 or less would be paid by the Auditor of State. Approved claims in excess of

$1,000 became part of the annual Sundry Claims appropriation bill. The bill included a brief summary of each claim and was presented to the legislature for approval. Hearings would then be held in both houses and claimants often had to testify in support of their claim. The legislative committees had the power to make changes in the amount of the awards, increasing some, decreasing or totally eliminating others.

The Sundry Claims Board was the exclusive mechanism for asserting claims against the State following its creation. Sovereign immunity was still an absolute bar to bringing claims against the State in the courts because there was no legislative authorization for the courts to hear such claims. *See, e.g., W. Park Shopping Ctr., Inc. v. Masheter*, 6 Ohio St.2d 142, 216 N.E.2d 761 (1966), at paragraph 1 of the syllabus (holding action to quiet title was barred. "By reason of the doctrine of sovereign immunity, the state of Ohio cannot be sued without its consent."); *Visintine & Co. v. New York, C. & St. L. R. Co.*, 169 Ohio St. 505, 508, 160 N.E.2d 311 (1959) ("The state of Ohio owed certain duties to plaintiff under the contract entered into between them…. Even though the state, because of governmental immunity, can not be sued for its failure to perform those duties, the duties nevertheless existed."); *Palumbo v. Indus. Comm'n*, 140 Ohio St. 54, 58, 42 N.E.2d 766 (1942) (holding that action to garnish wages of state employee was barred and that "the consent of the state to be sued must be an express, not an implied consent").

Thus, despite the inherent limitations of the Sundry Claims Board system, sovereign immunity remained an absolute bar to bringing claims against and its instrumentalities in the courts of Ohio. The Sundry Claims Board was the only avenue of redress for claimants authorized by the legislature for decades following its creation.

B. The Court Of Claims Act Limited The Court Of Claims' Subject Matter Jurisdiction To The Scope Of The State's Statutory Waiver Of Immunity.

In 1972, this Court revisited sovereign immunity and reaffirmed that Article I Section 16 of the Ohio Constitution "is not self-executing, and ***statutory consent*** is a prerequisite to such suit." *Krause v. State*, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), at paragraph one of the syllabus (emphasis added). As *Krause* made clear: "[w]ithout enabling legislation [sovereign immunity] is an absolute bar to suits against the state." *Id*. at 145; *see Schenkolewski v. Cleveland Metroparks Sys.*, 67 Ohio St.2d 31, 426 N.E.2d 784 (1981) (overruling *Krause* in part to clarify that sovereign immunity could be abrogated judicially as well as statutorily). This left the Sundry Claims Board system in place as a claimant's sole vehicle for prosecuting claims against the State.

In response to the holding in *Krause*, the General Assembly enacted the Court of Claims Act in 1974. R.C. 2743.01 *et seq*. The Act had two key components: (1) it waived sovereign immunity under circumstances specified by statute, and (2) it created a forum to hear claims authorized by the statutory waiver of immunity. The scope of the state's waiver of immunity was set forth in R.C. 2743.02:

> (A)(1) The state hereby waives its immunity from liability, except as provided for the office of the state fire marshal in division (G)(1) of section 9.60 and division (B) of section 3737.221 of the Revised Code and subject to division (H) of this section, and ***consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties***[.] [Emphasis added.]

In addition, the Court of Claims was created and granted "exclusive, original jurisdiction of all civil actions against the state ***permitted by the waiver of immunity*** contained in section 2743.02." R.C. 2743.03(A)(1) (emphasis added).

Thus, under the Act, the Court of Claims' subject matter jurisdiction in R.C. 2743.03 is tied to the scope of the state's waiver of immunity in R.C. 2743.02. *Cirino v. Ohio Bureau of*

Workers' Comp., 153 Ohio St.3d 333, 2018-Ohio-2665, 106 N.E.3d 41, ¶ 19 ("The jurisdiction of the Court of Claims is defined by reference to the state's waiver of immunity in R.C. 2743.02."). In other words, if R.C. 2743.02 did not waive the State's immunity with respect to a claim, the Court of Claims does not have subject matter jurisdiction over that claim. *See id.*; *Fuerst v. Ohio Dep't of Aging*, Ct. of Cl. No. 2006-05969-AD, 2007-Ohio-1926, ¶ 37 ("This Court lacks jurisdiction to hear plaintiff's claims since they are beyond the State's limited waiver of immunity established by the General Assembly.").

C. R.C. 2743.02 Did Not Waive Discretionary Function Immunity.

While the waiver of immunity in R.C. 2743.02 narrowed the longstanding doctrine of sovereign immunity, this Court has been consistently clear that part of sovereign immunity survived the enactment of the Court of Claims Act. Specifically, the Court has continued to recognize that core governmental functions are immune from suit under the doctrine of discretionary function immunity.

The Court first addressed discretionary function immunity following the passage of the Ohio Court of Claims Act in its 1984 decision in *Reynolds*. The Court explained that the enactment of the Court of Claims Act did ***not*** waive the state's immunity for core governmental decisions:

> The language in R.C. 2743.02 that "the state" shall "have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *" means that ***the state cannot be sued for*** its legislative or judicial functions or ***the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion***.

Reynolds v. State, 14 Ohio St.3d 68 (1984), at paragraph one of the syllabus (emphasis added).

Nearly 20 years later, the Court reaffirmed and elaborated upon this holding in *Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018. In *Wallace*, the Court distinguished between discretionary function immunity and the common law public duty rule. The

Court held that the statutory waiver of immunity in R.C. 2743.02(A)(1) ***had*** abrogated the common law ***public duty*** rule. *Id.* at ¶ 31 ("[W]e hold that the public-duty rule is incompatible with R.C. 2743.02(A)(1)'s express language requiring that the state's liability in the Court of Claims be determined 'in accordance with the same rules of law applicable to suits between private parties.'"). However, the Court expressly reaffirmed its holding in *Reynolds* that the state ***never waived*** its discretionary function immunity with respect to "essential acts of governmental decisionmaking":

> In *Reynolds v. State* (1984), 14 Ohio St.3d 68, 14 OBR 506, 471 N.E.2d 776, a case in which this court squarely addressed the meaning of R.C. 2743.02(A)(1), this court acknowledged that the state's potential liability under R.C. Chapter 2743 is not unbounded. Analogizing to its earlier holdings concerning the limitations on the abrogation of municipal immunity, ***this court rejected the notion that the General Assembly's abrogation of sovereign immunity in R.C. 2743.02 extended to essential acts of governmental decisionmaking***.

Id. at ¶ 34 (emphasis added).

Most recently, in *Risner v. ODOT*, 145 Ohio St.3d 55, 2015-Ohio-4443, 46 N.E.3d 687, this Court reaffirmed its holding in *Reynolds* and "adopt[ed] the phrase 'discretionary-function doctrine' … as shorthand to mean that ***the state cannot be sued*** for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision that is characterized by the exercise of a high degree of official judgment or discretion." *Id.* at ¶ 12 (emphasis added). In reaching this decision, the Court recognized that the applicability of discretionary function immunity turns on the character of the governmental decision at issue—if the claim seeks to impose "liability ***arising from*** the decisions made pursuant to [the state's] discretionary function" it is barred regardless of how it is characterized in pleadings. *Id.* at ¶ 24 (emphasis added); *see, e.g.*, *Davis v. Ohio Peace Officers Training Acad.*, Ct. of Cl. No. 2010-09604-AD, 2011-Ohio-3757, ¶ 14 (discretionary function immunity barred breach of

contract and promissory estoppel claims alleging contract was improperly cancelled); *Johns v. Dep't of Rehab. & Corr.*, Ct. of Cl. No. 2006-07724-AD, 2007-Ohio-3748, ¶ 7 (discretionary function immunity barred inmate's claim seeking to recover funds allegedly accrued during incarceration).

Through these decisions, this Court has made it clear that discretionary function immunity survived the enactment of the Court of Claims Act, which makes it fundamentally different from legislatively-created defenses like the public duty rule. Ohio courts have uniformly and continuously applied discretionary function immunity to decisions both far-reaching and mundane, so long as they involve a high degree of official judgment or discretion. *See, e.g.*, *Risner* at ¶ 16 (discretionary function immunity applies to decisions whether or not to improve a highway and what type of improvement to make); *Williams v. Ohio Dep't of Rehab. & Corr.*, Ct. of Cl. No. 2009-05170, 2009-Ohio-7019, ¶ 5 (discretionary function immunity applies to a correctional facility's decision to confiscate an inmate's keyboard); *Al-Jahmi v. Ohio Ath. Com.*, Ct. of Cl. No. 2017-00986JD, 2020-Ohio-3487, ¶¶ 27–37 (collecting cases and noting discretionary function immunity applies to decisions concerning nursing home inspections and licensing, disciplinary complaints, parole decisions, removal of seatbelts from transport vans, and qualifications for boxing referees and ringside physicians).

These decisions are consistent with longstanding authority recognizing that the State's power to take broad and decisive action to protect the health and safety of the public is an inherent exercise of its sovereignty. *See, e.g.*, *Kroplin v. Truax*, 119 Ohio St. 610, 621, 165 N.E. 498 (1929) ("The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and therefore whatever reasonably tends to preserve the public health is a subject upon which the Legislature, within its policy power, may take action."); *Ex*

Parte Co., 106 Ohio St. 50, 57, 139 N.E. 204 (1922) (recognizing in the context of a quarantine that "[t]he protection of the health and lives of the public is paramount"); *see also Lawton v. Steel*, 152 U.S. 133, 136, 14 S.Ct. 499, 38 L.Ed. 385 (1894) (stating that the states' police power "is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance").

D. Because R.C. 2743.02 Did Not Waive Discretionary Function Immunity, The Court Of Claims Lacks Subject Matter Jurisdiction Over Claims Barred By Discretionary Function Immunity.

This Court's prior decisions are on point and unequivocal. Discretionary function immunity is a residual aspect of sovereign immunity that was not waived by R.C. 2743.02. Because the Court of Claims' jurisdiction is limited to claims for which the State has waived its immunity in R.C. 2743.02, it follows that the Court of Claims does not have jurisdiction over claims that are subject to discretionary function immunity. It also follows that discretionary function immunity—as an issue of subject matter jurisdiction—"is not a waivable defense and may be raised for the first time on appeal." *In re Claim of King*, 62 Ohio St.2d 87, 89, 403 N.E.2d 200 (1980).

Despite this Court's clear precedents, the two respective panels of the 10th District in this case and in *McDermott* have held that discretionary function immunity is ***not*** jurisdictional and refused to consider the issue on appeal. This error is rooted in the 10th District's failure—in these two cases and others—to distinguish between (a) discretionary function immunity, a ***judicially-created*** doctrine that was not waived by R.C. 2743.02 and which immunizes the State from ***being sued***, and (b) the public duty rule, a ***statutory*** defense to ***liability*** respecting claims for which the State has otherwise waived its immunity in R.C. 2743.02, and which must be established by the State in each case.

As noted above, this Court expressly distinguished between discretionary function immunity and the common-law public duty rule in *Wallace*. While both concepts existed at common law, the Court held in *Wallace* that "the [common-law] public-duty rule is incompatible with R.C. 2743.02(A)(1)'s express language" and judicially abolished the common law doctrine. *Wallace* at ¶ 31. Yet in doing so, the Court expressly ***reaffirmed*** the continued vitality of discretionary function immunity as a ***separate*** aspect of sovereign immunity that had ***not*** been waived by R.C. 2743.02. *Id*. at ¶ 34.

In response to *Wallace*, the General Assembly amended the Court of Claims Act to incorporate the public duty rule as a ***statutory*** defense to ***liability***. *See* R.C. 2743.02(A)(3). The General Assembly did not, however, enact a statute codifying discretionary function immunity because there was no need to do so—the State never waived its immunity as to those suits in the first instance. Indeed, years after the General Assembly created the statutory public duty defense in R.C. 2743.02, this Court continued to apply discretionary function immunity as an independent aspect of common law sovereign immunity that had never been waived. *See, e.g.*, *Risner* at ¶¶ 12, 26.[5]

The 10th District's Decisions below in both OSU cases failed to recognize the distinction between these two doctrines. *See* Appx. at 18 (addressing discretionary function immunity but

[5] As the Court explained in *Wallace*, discretionary function immunity implicating subject matter jurisdiction and the statutory public duty rule are based on similar public policies but are different in scope and function. Discretionary function immunity applies to "essential acts of governmental decisionmaking" and provides "protection from litigious second-guessing of discretionary governmental decisions that necessarily involve difficult choices about how to allocate the state's resources." *Wallace* at ¶ 36. "[O]nce the decision has been made to engage in a certain activity or function," discretionary function immunity does not bar claims based the negligence of State employees or agents in the *performance* of that activity or function, but such claims may still be barred by the public duty rule if the claims are based on the breach of a duty owed to the public generally. *See id*. at ¶¶ 35-36; R.C. 2743.01(E) (defining "public duty" for purposes of the statutory public duty defense in R.C. 2743.02(A)(3)).

citing decisions concerning the public duty rule). The 10th District's decision in *McDermott* went even further—although OSU briefed and argued discretionary function immunity under *Wallace*, the court's Decision discussed the public duty rule and conflated these two fundamentally different concepts. *See McDermott v. Ohio State Univ.*, 10th Dist. Franklin No. 22AP-76, 2022-Ohio-4780, ¶¶ 69-71 (concluding "the public duty rule is not a jurisdictional issue").

Other panels of the 10th District have likewise previously failed to recognize this distinction and discussed discretionary function immunity as though it were a statutory defense that can be waived if not timely raised. *See, e.g.*, *Allen v. Dep't of Admin. Servs. Office of Risk Mgmt.*, 10th Dist. Franklin No. 19AP-729, 2020-Ohio-1138, ¶ 21; *Pottenger v. Ohio Dep't of Transp.*, 10th Dist. Franklin No. 88AP-832, 1989 Ohio App. LEXIS 4549, *6–7 (Dec. 7, 1989). While neither of those decisions found the State had actually waived discretionary function immunity and ultimately found the claims at issue were barred by the doctrine, they reflect persistent confusion by the 10th District regarding the nature and existence of discretionary function immunity.

This confusion has significant consequences for all cases challenging the State's response to COVID-19, and indeed for all future litigation against the State over "essential acts of governmental decisionmaking" that finds its way to the 10th District from the Court of Claims. Discretionary function immunity is an essential if limited shield that provides the State "a fair degree of protection from litigious second-guessing of discretionary governmental decisions that necessarily involve difficult choices[.]" *Wallace* at ¶ 36. By equating discretionary function immunity with the statutory public duty defense, the 10th District's decisions deprive the State of a separate and independent basis to seek early dismissal of litigation challenging core governmental functions. Indeed, the *McDermott* panel specifically and inexplicably instructed the

trial court that discretionary function immunity "***may not be determined in the context of class certification***." *McDermott* at ¶ 71 (emphasis added). Since all appeals from the Court of Claims are heard by the 10th District Court of Appeals, the decisions below and in *McDermott*, if left standing, would effectively eliminate discretionary function immunity as a viable jurisdictional defense in Ohio.

As such, it is essential that this Court clarify and reconfirm this important aspect of the law of Ohio and re-establish the scope of the State's discretionary function immunity from suit. Its decision will impact not only this case and *McDermott*, but all of the pending cases against Ohio universities in which the lack of subject matter jurisdiction patently and fatally infects the proceedings.

E. In The Interests Of Economy And Judicial Efficiency, OSU Respectfully Requests That This Court Determine That OSU's May 9, 2020 Decision Is A Decision For Which OSU Is Entitled To Discretionary Function Immunity.

OSU respectfully submits that, in the interest of economy and judicial efficiency, the Court can and should now also consider whether OSU's March 9, 2020 decision to temporarily transition to online instruction and to temporarily restrict access to its Columbus campus, to protect the health of its faculty, staff, and students while continuing its educational mission by alternate means, is a decision for which OSU is entitled discretionary function immunity from suit.[6]

Although OSU previously tendered this issue as Proposition of Law Number 1 and the Court initially declined to accept it for review, the Court has the inherent power to address this issue and, respectfully, should do so now. *See, e.g.*, *State v. Moore*, 154 Ohio St.3d 94, 2018-Ohio-3237, 111 N.E.3d 1146, ¶ 20 (deciding equal protection issue that was neither raised or briefed in

[6] Although no claim was asserted here against ODH for its March 14, 2020 decision to close all K-12 school buildings in Ohio, which decision altered Plaintiff's student teaching experience at Glendening Elementary School, discretionary function immunity would apply equally to any claims arising from ODH's decision as well as claims arising from OSU's March 9 Decision.

the court of appeals "in the interest of judicial economy"); *Olympic Holding Co., L.L.C. v. Ace Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d 93, ¶ 47 (deciding statute of frauds issues that the court of appeals had found were moot in the interest of judicial economy); *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, ¶ 47 (deciding waiver and estoppel issues that the court of appeals found moot in the interest of judicial economy).

Resolving now whether OSU's March 9 decision is entitled to discretionary function immunity is warranted in that it will demonstrably further judicial economy and preserve the parties' resources. All of the facts and legal standards relevant to this determination are currently before the Court. The extensive analysis of discretionary function immunity presented above encompasses the relevant standards that will also govern whether OSU's March 9 decision is entitled to discretionary function immunity. In addition, sufficient, relevant discovery into the character of the March 9 decision was completed below and is already in the record before this Court. The extensive testimony of Dr. McPheron underscores this graphically.

Neither the facts nor the law relevant to determining whether OSU's March 9 decision is entitled to discretionary function immunity will change materially through further proceedings in the courts below. Indeed, this Court makes a de novo determination as to whether discretionary function immunity applies. *See, e.g.*, *Risner* at ¶ 18 (reversing and holding discretionary function immunity applied without deference to the court below). Thus, if the parties are required to address the issue of discretionary function immunity on remand to the Court of Claims and up through the appellate process a second time, the only thing that will have changed is that more of the parties' time and resources will be spent to arrive at precisely the same place: for this Court to make a final, de novo determination as to whether OSU's March 9 decision is entitled to discretionary function immunity.

Accordingly, OSU respectfully requests that this Court now consider and determine whether OSU's March 9 decision may properly be characterized as an act of core "governmental decisionmaking" involving the "making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion" for which OSU is immune from suit. *See Wallace* at ¶ 34; *Reynolds* at paragraph one of the syllabus.

CONCLUSION

OSU respectfully requests that this Court reverse the lower court's Decision with respect to the doctrine of discretionary function immunity and confirm that the Court of Claims does not have subject matter jurisdiction to hear claims barred by the doctrine of discretionary function immunity. In addition, pursuant to this Court's inherent authority, OSU respectfully requests that the Court determine that OSU's March 9, 2020 decision to temporarily transition to online instruction and limit access to its Columbus, Ohio campus for the last four weeks of classes in the Spring 2020 semester was as an "essential act[ ] of governmental decisionmaking" for which OSU is entitled to discretionary function immunity from suit.

Respectfully submitted,

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APPENDIX:

BRIEF OF APPELLANT THE OHIO STATE UNIVERSITY

OHIO SUPREME COURT NO. 2023-00009

IN THE SUPREME COURT OF OHIO

BROOKE SMITH, individually and on behalf of all others similarly situated,	:	**Supreme Court Case No.:**
Plaintiff-Appellee,	:	**On Appeal from the Franklin County Court of Appeals, Tenth Appellate District**
v.	:	**Court of Appeals Case No.: 22AP-125**
THE OHIO STATE UNIVERSITY,	:	
Defendant-Appellant.	:	

NOTICE OF APPEAL
OF APPELLANT THE OHIO STATE UNIVERSITY

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NOTICE OF APPEAL

The Ohio State University hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 22AP-125 on November 17, 2022, in the case styled *Brooke Smith v. The Ohio State University*.

This case raises questions of public or great general interest.

Respectfully submitted,

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brooke Smith,	:	
Plaintiff-Appellee,	:	No. 22AP-125 (Ct. of. Cl. No. 2020-00321JD)
v.	:	(REGULAR CALENDAR)
The Ohio State University,	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 17, 2022, and having overruled assignment of error H, sustained assignments of error A and G, and determined assignments of error B, C, D, E, and F to be moot, it is the judgment and order of this court that the judgment of the Court of Claims of Ohio is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said decision. Any outstanding appellate court costs are waived.

SADLER, BEATTY BLUNT, and MCGRATH, JJ.

/S/ JUDGE

Tenth District Court of Appeals

Date: 11-17-2022

Case Title: BROOKE SMITH -VS- THE OHIO STATE UNIVERSITY

Case Number: 22AP000125

Type: JEJ - JUDGMENT ENTRY

So Ordered

/s/ Judge Lisa L. Sadler

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brooke Smith,	:	
Plaintiff-Appellee,	:	No. 22AP-125 (Ct. of. Cl. No. 2020-00321JD)
v.	:	(REGULAR CALENDAR)
The Ohio State University,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 17, 2022

On brief: *Squire Patton Boggs (US) LLP*, and *John R. Gall, Traci L. Martinez*, *E. Joseph D'Andrea*, *Elizabeth P. Helpling*, and *Roger M. Gold*, for appellant. **Argued:** *John R. Gall.*

On brief: *Climaco Wilcox Peca & Corogoli Co., LPA*, and *Scott Simpkins*, and *Bursor & Fisher, P.A.*, and *John Arisohn*, *Scott Bursor*, and *Sarah Westcot*, for appellee. **Argued:** *John Arisohn*.

APPEAL from the Court of Claims of Ohio

SADLER, J.

{¶ 1} Defendant-appellant, The Ohio State University ("OSU"), appeals a decision and judgment of the Court of Claims of Ohio granting the motion for class certification filed by plaintiff-appellee, Brooke Smith. For the following reasons, we reverse the trial court judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} In 2016, Smith was admitted to OSU as an undergraduate student at the Columbus campus. By the spring semester of 2020, Smith was a fourth-year student in OSU's College of Education enrolled in a supervised student teaching internship and an in-

person seminar corresponding with the internship—the last two classes she needed to graduate.

{¶ 3} According to OSU's policies, Smith, as well as every other enrolled student, were "financially responsible to The Ohio State University for payment of all tuition, room and board fees, and related costs added to the student account" including "fees." (Appellant's Memo. in Opp. to Class Certification, Ex. A, A Buckeye's Guide to Academic Policies, hereinafter "Academic Policy," at 37.) The Academic Policy described the fees that could be accessed, in part pertinent to this case, as follows:

> **Instructional Fee**
> The Instructional Fee is used to fund instructional costs at the university. Students who are taking classes at more than one Ohio State campus during the same term are assessed fees based on the campus where they are taking the most instructional credit hours.
>
> **General Fee**
> The General Fee is mandated by the State of Ohio for the funding of non-instructional student services. At Ohio State, general fees provide student services that contribute to students' emotional and physical well-being as well as their cultural and social development outside formal instruction. These student services include Counseling and Consultation Services, Student Health Services, Disability Services and the Multicultural Center.
>
> **Learning Technology Fee**
> Some majors charge a Learning Technology Fee to pay for certain technology-related expenses within the primary program. [And providing a link to a fee table for particular majors.]
>
> **Program Fee**
> Some majors charge a Program Fee to pay for certain program-related expenses. [And providing a link to a fee table for particular majors.]
>
> **Course Fee**
> Course Fee(s) fund additional costs for specific courses. Any courses that require added materials and/or equipment will have this fee. [And providing a link to a fee table for particular courses.]
>
> * * *

> **Distance Education fee**
> Instruction in distance education courses occurs via technology; they have no scheduled in-classroom or on-site activities. Students enrolled exclusively in distance education courses are assessed a distance education administration surcharge of $100 per student per term. For these students, site-based fees (COTA Fee, Recreation Fee and Ohio Union Fee) are waived. * * *
>
> If a student has any regular or "hybrid" courses (regular courses that also have a significant distance education component but are not exclusively distance education) in addition to distance education classes, all regular fees are assessed. [And providing a link to a fee table for programs specifically designed as distance learning.]
>
> * * *
>
> **Student Activity Fee**
> All students at the Columbus campus are assessed a Student Activity Fee each term. This fee is used to fund major campus events planned by the Ohio Union Activities Board, student organizations, student governments, the Discount Ticket program, Buck-I-SERV (the alternative breaks program), local community service initiatives, and some of Ohio State's largest and most traditional campus programs.
>
> * * *
>
> **COTA Fee**
> The COTA Fee provides students at the Columbus campus unlimited use of Central Ohio Transit Authority (COTA) services each term.

(*Id.* at 37-40.) Out-of-state residents, such as Smith, also incurred a surcharge as compared to Ohio residents.

{¶ 4} The Academic Policy required students to "agree to [a] Financial Responsibility Statement before they can register for classes each term." (*Id.* at 41-42.) The Financial Responsibility Statement reiterates the student's agreement to be "financially responsible to The Ohio State University for payment of all tuition, room and board fees and related costs added to [the student's] account" and sets forth the student's "promise to pay any fees, fines or penalties" related to attendance at the university. (Appellant's Memo. in Opp. to Class Certification, Ex. J, Financial Responsibly Statement at 1.)

{¶ 5} According to Smith, for the spring 2020 semester, she paid OSU a total of $15,548.77 in fees comprised of: $4,584.00 instructional fee (i.e., tuition), a $10,488.50

non-resident surcharge on her tuition, a $186.00 general fee, a $37.50 student activity fee, a $90.00 learning technology fee, a $74.87 recreational fee, a $74.40 student union facility fee, and a $13.50 COTA bus fee. (Appellee's Brief at 28.) On or about January 6, 2020, Smith began both her internship, which involved a 12-week field placement in a local public school district classroom, and her reflective seminar, which was held in-person on OSU's Columbus campus.

{¶ 6} The semester proceeded without incident until February 2020, when the COVID-19 pandemic struck the United States. In response to the pandemic emergency, the State of Ohio mandated, among other restrictions and with limited exceptions, stay-at-home orders and the closure of schools. As a result, on March 16, 2020, following spring break, OSU transitioned all in-person classes to remote instruction and closed its campus facilities. The public school district where Smith was placed for her internship likewise ceased in-person instruction. Consequently, Smith's in-person internship halted, and her seminar transitioned to remote instruction. Smith participated in asynchronous student teaching in the form of "read aloud[s]" and completed alternative assignments for her seminar. (Smith Depo. at 80.) OSU considered the combination of in-person instruction, the read alouds, and alternative activities sufficient for Smith to complete her course requirements, and Smith graduated on-time in May 2020 with a degree in Early Childhood Education. OSU provided Smith a partial, pro-rated refund for room and board and a refund for the recreational fee but did not refund her tuition or the other fees it had charged.

{¶ 7} On May 21, 2020, Smith filed a class action complaint against OSU claiming breach of contract, unjust enrichment, and conversion.[1] In her complaint, Smith states the class action lawsuit is brought "on behalf of all people who paid tuition and fees for the Spring 2020 academic semester * * * and who, because of [OSU's] response to [the COVID-19] pandemic, lost the benefit of the education for which they paid, and/or the services for which their fees paid, without having their tuition and fees refunded to them." (Compl. at 1.) Smith alleged that she paid for a full semester of in-person classes with access to the OSU campus, but, for approximately half the semester, OSU instead provided her with online classes, which Smith asserted are "subpar" and "no way the equivalent" of in-person education. (Compl. at 2, 7.) Smith contended OSU's tuition and fees for in-person

[1] Smith voluntarily dismissed the conversion claim.

instruction were higher than for on-line instruction because in-person instruction encompasses a different, more robust experience beyond academic instruction. Smith's theory of the case centered on her entering a binding contract with OSU through the admission agreement and payment of tuition and fees, and that she and members of the class "suffered damage as a direct and proximate result of [OSU's] breach, including but not limited to being deprived of the education, experience, and services to which they were promised and for which they have already paid." (Compl. at 11.)

{¶ 8} On June 30, 2020, OSU filed a motion to dismiss pursuant to Civ.R. 12(B)(6). The trial court denied the motion to dismiss on September 9, 2020.

{¶ 9} Smith moved for class certification on June 25, 2021. Smith contended the central question to be answered by the class action is: "Should [OSU] be allowed to keep the tuition and fees that students paid for in-person instruction during the Spring 2020 semester, or should it instead be required to refund a portion of that money because it did not provide the services that students paid for?" (Mot. for Class Certification at 1.) According to Smith, the "handbooks, catalogs, policies, and brochures will provide the basis for any contractual terms across the board on a classwide basis." (Mot. for Class Certification at 12.) Smith asserted OSU breached its contract with her and class members when it terminated in-person classes on March 9, 2020. (Mot. for Class Certification at 12.) As to injury caused by the breach, Smith asserted: "none of the undergraduate students at OSU received the full semester of in-person classes that they paid for" but instead received online classes that "she intends to show (through expert testimony) that she should have been charged less for the substitute remote instruction that OSU provided." (Mot. for Class Certification at 3, 12.) She contended the trial court need not "adjudicate whether remote instruction was an adequate substitute for in-person instruction, but rather whether such a question raises a classwide issue" of "economics (i.e., what are the market differences in pricing for in-person instruction vs. emergency remote instruction)." (Mot. for Class Certification at 3.)

{¶ 10} These experts, according to Smith, "have also set out the methods that they will use to measure damages on a classwide basis." (Mot. for Class Certification at 13.) Her survey expert, Steven P. Gaskin, "has designed 'a market research survey and analysis' that will enable him 'to assess the extent of any reduction in market value resulting from the

closure of the OSU campus (measured in dollars and/or percentage terms), meaning the difference in market value between in-person classes and full access to OSU's campus and facilities, compared to the market value of virtual classes and no access to OSU's campus and facilities' " using a survey methodology called "conjoint analysis." (Mot. for Class Certification at 13.)

{¶ 11} According to Gaskin's declaration provided in support of the motion for class certification, this methodology is appropriate where the objective is "to determine the relative market values of a product or service with and without a particular product or service feature or claim on the label or given the disclosure or non-disclosure of a product or service feature at the time and point of acceptance" and "provide valid and reliable measures of consumer choices." (Gaskin Declaration at 3, 4.) Gaskin used similar methodologies in class actions involving consumer products such as motor vehicles, software, internet modems, LED televisions, chainsaws, cereal, iPhones, and pain medicine. In his deposition, Gaskin stated that he had not previously conducted a conjoint survey regarding university tuition prices and could not recall any other conjoint surveys used in this way.

{¶ 12} The nuanced survey design developed by Gaskin elicits responses based on certain defined "features" or "attributes" of an educational experience but is "independent from the pandemic"; it "assum[es] there are two safe * * * educational experiences available." (Gaskin Depo. at 97, 107-08, 111, 147.) Although he agreed that some students' preferences changed during the pandemic for health and safety reasons, he did not account for those preferences in his survey design. (Gaskin Depo. at 107-09.) In other words, the survey design is based on student preferences in a hypothetical safe world without "the added glitch that it might kill them to do one or the other" when evaluating preferences. (Gaskin Depo. at 109, 164.) Along these same lines, according to Gaskin, the design of the survey did not account for students who valued graduating more than the mode of the instruction. (Gaskin Depo. at 164.)

{¶ 13} Gaskin had not conducted the survey since he had not been asked to do so; he proposed the conjoint analysis survey "will be" pretested at some point and then conducted via a web-based software system that "will be" programmed. (Gaskin Declaration at 12.) According to Gaskin, "[t]he results obtained from conducting the

conjoint analysis survey will allow [him] to calculate the reduction in market value (measured in dollars and/or percentage terms) attributable to the closure of OSU campus in Spring 2020." (Footnote omitted.) (Gaskin Declaration at 25.) During his August 24, 2021 deposition, Gaskin agreed that he could not opine with a reasonable degree of scientific certainty that there is a reduction in market value between in-person classes with full access to the campus and virtual classes with no access to the campus at OSU since he had not yet conducted any surveys or analysis. (Gaskin Depo. at 27-32; Gaskin Declaration at 12.)

{¶ 14} According to Smith, once Gaskin issues findings expressed as a percentage of an overpayment factor, Smith's damages expert, Colin B. Weir, would then calculate tuition overpayment by multiplying the percentage overpayment factor by the total tuition that the class paid, prorated for the time period of remote instruction at issue. In his deposition, Weir stated that, although his client (Smith and her team of lawyers) expected a "likely" outcome after the survey is performed, he declined to say he had an expectation of the outcome. (Weir Depo. at 44.) The survey, according to Weir, "tests [a] hypothesis" that could be disproven by the results of the survey—a scenario that Weir recalled occurring in previous, unrelated surveys. (Weir Depo. at 44-45.)

{¶ 15} On September 1, 2021, OSU moved to strike the declarations and exclude the testimony of Smith's experts, but the motion was denied by the trial court. OSU additionally opposed the motion for class certification on its merits, arguing that Smith failed to carry her burden to show class certification is warranted under the rigorous analysis required under Civ.R. 23. In OSU's view, Smith failed to establish common issues of fact exist, let alone predominate, since there is no common, class-wide proof of either breach of contract or injury and because the fact and extent of injury requires individual inquiries, which Smith's experts failed to take into account. OSU further argued the conjoint analysis methodology proposed by Smith's expert's is unreliable and untested in assessing university tuition, and, regardless, is "speculation"—no part of it had yet been performed to stand as evidence of class-wide injury sufficient to meet Civ.R. 23 requirements. (Memo. in Opp. at 20.)

{¶ 16} To contrast Smith's experts' potential finding of economic injury, OSU provided a supporting affidavit and official documents of the University Registrar showing

OSU offered four different modes of instruction in Spring 2020—in-person, hybrid, distance enhanced, and distanced learning—each "identical" in cost. (Bricker Aff., Ex. A at 3.) Further, each mode of instruction had, built-in, the potential for remote instruction regardless of a state of emergency: an in-person course was generally defined to include up to 24 percent of remote instruction; a hybrid course involved a combination go in-person and online instruction with 25-74 percent of student activities completed online; a distance enhanced course offered 75-99 percent of student activities online; and a distance learning course would be conducted completely online. (Memo. in Opp. at 3; Bricker Aff., Ex. A at 2-3; July 6, 2021 Letter, Ex. C at 1.) OSU provided an expert report opining the proposed class was not economically damaged by OSU's transition to online instruction for a few weeks during the Spring 2020 semester, and that Smith's experts' proposed methodology was flawed in several key respects. OSU emphasized that, "before registering for classes, students agree to be financially responsible to OSU for the payment of all tuition, room and board fees and related costs that are added to the student's account." (Bricker Aff., Ex. A at 5.) OSU additionally asserted that even if breach and injury could be shown, the amount of damages is not capable of measurement on a class-wide basis, Smith is inadequate as a representative of the class, and the stated class is overbroad, ambiguous, and indefinite.

{¶ 17} Smith filed a reply to the memorandum in opposition to class certification on September 29, 2021. Smith argued that the post-COVID-19 "version of OSU should have cost less." (Reply to Memo. in Opp. at 1.) Smith cited to Weir's deposition that explained that, at the point of sale, "[i]f the value of that tuition would be less on a marketwide basis, everybody is injured by an overpayment." (Reply to Memo. in Opp. at 1, citing Weir Depo. at 136.) Therefore, in Smith's view, calculation of overpayment does not depend on individual questions. Smith added, "[b]ecause there is no data on the market price for online-only classes at OSU without campus access, a survey is required to calculate it." (Reply to Memo. in Opp. at 5.) Smith included Gaskin's reply to the report of the OSU's expert, a reply declaration from Weir, and part of a deposition in which Weir addressed injury and explains, "[i]t remains to be seen what the outcome of the Gaskin survey will be. * * * So if the value of that tuition would be less on a marketwide basis, everybody is injured by an overpayment." (Weir Depo. at 135-36.)

{¶ 18} The trial court held an oral hearing on class certification on December 13, 2021. During the hearing, the trial court expressed that it did not "want the issue of the identification of the class being something that bogs this case down" and that it would like to certify a class in order to reach the merits issues. (Dec. 13, 2021 Hearing Tr. at 23.) The attorneys for both parties likewise acknowledged the trial court's reluctance to consider issues related to the merits of the case at the class certification stage. Smith's attorney stated, "[s]o I know the Court doesn't want to get into the merits at this stage, and I won't do that," while OSU's attorney similarly stated, "[a]nd I understand Your Honor's position here which is you want to get by the class phase and onto the merits." (Dec. 13, 2021 Hearing Tr. at 7, 28.)

{¶ 19} OSU declined the court's suggestion to agree to a class definition and persisted in arguing Smith had not met her burden in adducing common evidence that class members suffered an injury to warrant class certification. OSU argued that, in fact, no evidence of common injury exists in this case: Smith's expert was unable to opine whether there is a diminished value since the proposed survey had not yet been done. OSU emphasized that under prevailing case law, "for the class phase, [presenting] the methodology alone is not sufficient." (Dec. 13, 2021 Hearing Tr. at 29.) OSU additionally argued against Smith as a representative of the proposed class. Smith countered that, at the class certification stage, only a methodology for calculating damages is needed; she did not separately address OSU's argument regarding the lack of any common evidence of injury.

{¶ 20} In the trial court's view, "[t]he reason that the expert hasn't done [the survey and analysis] is because the plaintiffs don't want to pay him [a large sum of money] to go and do that" and, as a reason to certify the class, that the court believed "getting to the merits of this case is something that is important to do." (Dec. 13, 2021 Hearing Tr. at 18-19.) The trial court acknowledged the damages issue is "perplexing," but wanted "to give the plaintiffs an opportunity to give their best shot, let me look at it. Let me see what it is." (Dec. 13, 2021 Hearing Tr. at 20.) As to the issue of calculating damages, the trial court signaled that the methodology presented, while "maybe improbabl[e] or difficult[]," was nevertheless sufficient for class certification as long as "it is not in the realm of impossibility." (Dec. 13, 2021 Hearing Tr. at 48.) The trial court added, "[b]ut that's not

what I'm here to determine today * * * I'm here to determine whether a class should be certified." (Dec. 13, 2021 Hearing Tr. at 48.)

{¶ 21} On January 21, 2022, the trial court issued its written decision and judgment entry certifying a class consisting of: "All undergraduate students enrolled in classes at the Columbus campus of The Ohio State University during the Spring 2020 semester who paid tuition, the general fee, student union activity fee, learning technology fee, course fees, program fees, and/or the COTA bus fee." (Jan 21, 2022 Decision at 4 and Judgment Entry at 1.) In doing so, the trial court: accepted Smith's implied contract theory; determined the proposed class is identifiable, unambiguous and not overbroad; found that the injury suffered by the class is "losing the benefit for which they contracted: in-person classes and access to the campus"; found the "proposed * * * model of determining that damages is consistent with its liability case;" and agreed Smith was a proper representative of the class. (Jan 21, 2022 Decision at 2-3, 15.)

{¶ 22} Appellant filed a timely notice of appeal.[2]

II. ASSIGNMENTS OF ERROR

{¶ 23} Appellant sets forth eight assignments of error for review:

> A. In its Decision of January 21, 2022, the trial court erred and abused its discretion in certifying the class because it failed to conduct the "rigorous analysis" required by Civ.R. 23 in determining whether Plaintiff had satisfied the prerequisites for class certification.
>
> B. In its Decision of January 21, 2022, the trial court erred and abused its discretion when it found that Plaintiff's claims satisfied the commonality requirement of Civ.R. 23.
>
> C. In its Decision of January 21, 2022, the trial court erred and abused its discretion by certifying the class when individual issues of fact predominated as to the existence of an implied contract, of a breach of that contract, of injury and of damages, and a class action was not superior for resolving the controversy.
>
> D. In its Decision of January 21, 2022, the trial court erred and abused its discretion when it certified the class, which was overbroad and ambiguous as stated.

[2] A motion for summary judgment filed on November 5, 2021 by OSU on the basis of liability remains pending before the trial court.

> E. In its Decision of January 21, 2022, the trial court erred and abused its discretion when it held that Plaintiff's claims were typical of the class and that Plaintiff herself was a member of the class she sought to represent.
>
> F. In its Decision of January 21, 2022, the trial court erred and abused its discretion when it held that that Plaintiff was an adequate representative, where her alleged injuries differed from other members of the class and where her interests were inherently at odds with a substantial number of the class members.
>
> G. In its Decision of January 21, 2022, the trial court erred and abused its discretion when it failed to conduct the "rigorous analysis" required under Civ.R. 23 regarding Plaintiff's experts' proposed methodology to determine liability and damages, and when it failed entirely to consider OSU's expert's report and testimony.
>
> H. In its Decision of January 21, 2022, the trial court erred and abused its discretion when it certified the class in a suit over which the court lacked jurisdiction because OSU is an agency or instrumentality of the State, and its decision to temporarily close or restrict access to its facilities in the face of the COVID-19 pandemic was a basic policy decision characterized by a high degree of official judgment and discretion.

III. STANDARD OF REVIEW

{¶ 24} A trial court has broad discretion in deciding whether a class action may be maintained, and that conclusion will not be disturbed absent a showing of an abuse of discretion. *Egbert v. Shamrock Towing, Inc.*, 10th Dist. No. 20AP-266, 2022-Ohio-474, ¶ 14, citing *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200 (1987), syllabus. However, "a trial court's discretion in deciding whether to certify a class action is not without limits and must be exercised within the framework of Civ.R. 23." *Egbert* at ¶ 15, citing *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70 (1998). Moreover, as a trial court "does not have discretion to apply the law incorrectly[,] * * * courts apply a de novo standard when reviewing issues of law." *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, ¶ 38.

IV. ANALYSIS

{¶ 25} Because OSU's last assignment of error, labeled "H," asserts the trial court lacked jurisdiction to issue the instant decision on class certification, which, if correct, would render the remaining assignments of error moot, we will address it first. Following

analysis of the jurisdictional issue, we will proceed to address appellant's assignments of error concerning the merits of the trial court decision on class certification.

A. Discretionary Immunity and Jurisdiction of the Court of Claims

{¶ 26} OSU argues that discretionary immunity applies in this case because it is an agency or instrumentality of the state, and its decision to temporarily close or restrict access to its facilities in the face of the COVID-19 pandemic was a basic policy decision characterized by a high degree of official judgment and discretion. In OSU's view, because OSU enjoys discretionary immunity, the trial court lacked jurisdiction over Smith's lawsuit since Smith's claims do not fall within the waiver of sovereign immunity in R.C. 2743.02 as required by R.C. 2743.03(A)(1). OSU believes that although it did not raise discretionary immunity to the trial court, it can be raised at any time because it involves a jurisdictional issue. Therefore, OSU contends this court should determine that the trial court erred and abused its discretion when it certified the class in a suit over which the court lacked jurisdiction.

{¶ 27} Smith counters that because discretionary immunity is an affirmative defense, and OSU did not raise this issue to the trial court, it has been waived. Smith also argues the discretionary immunity argument fails on the merits since not issuing a partial refund to account for the campus closures is merely implementation of the larger policy decision, and, regardless, courts have not applied discretionary immunity to defeat a breach of contract claim (as opposed to a tort claim) against the state.

{¶ 28} The discretionary immunity doctrine provides that the "state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Al-Jahmi v. Ohio Ath. Comm.*, 10th Dist. No. 20AP-321, 2022-Ohio-2296, ¶ 80, quoting *Reynolds v. State Div. of Parole & Community Servs.*, 14 Ohio St.3d 68, 70 (1984). "Under Ohio law, immunity is an affirmative defense." *Allen v. Dept. of Adm. Servs. Office of Risk Mgt.*, 10th Dist. No. 19AP-729, 2020-Ohio-1138, ¶ 21 (considering discretionary immunity issue arising in the court of claims), citing *Turner v. Cent. Local Sch. Dist.*, 85 Ohio St.3d 95, 97 (1999). *See Pottenger v. Ohio Dept. of Transp.*, 10th Dist. No. 88AP-832, 1989 Ohio App. LEXIS 4549, at *6 (Dec. 7, 1989) (stating the defense of discretionary immunity is an affirmative defense

within the contemplation of Civ.R. 8(C)). Considering precedent explaining the issue of discretionary immunity is an affirmative defense, OSU has not demonstrated that discretionary immunity is jurisdictional in nature.

{¶ 29} Since OSU has not shown that discretionary immunity is a jurisdictional bar, it is an issue that OSU should have raised to the trial court to address in the first instance. "A fundamental rule of appellate review is that an appellate court will not consider any error that could have been, but was not, brought to the trial court's attention." *Greenberg v. Heyman-Silbiger*, 10th Dist. No. 16AP-283, 2017-Ohio-515, ¶ 50, quoting *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.*, 91 Ohio App.3d 76, 80 (9th Dist.1993). For example, this court declined to address an immunity issue where the state defendant raised public duty immunity as an affirmative defense in an answer but did not argue it in the motion to the trial court, and the trial court did not independently address public duty immunity. *See, e.g., Al-Jahmi* at ¶ 46, fn. 10, 15 (declining to address public duty immunity for the first time where the state defendant raised public duty immunity as an affirmative defense in an answer but did not argue it in the motion to the trial court, and the trial court did not address public duty immunity in its decision.). *See also Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, ¶ 22 (declining to decide issues of immunity before the lower courts had the opportunity to address them in the first instance).

{¶ 30} Overall, we find the assigned error lacks merit as to its assertion of a jurisdictional bar, and additionally find it inappropriate to decide, in the first instance, whether OSU is entitled to the defense of discretionary immunity. *See Al-Jahmi* at ¶ 46. For these two reasons, OSU's assignment of error based on discretionary immunity and jurisdiction fails.

{¶ 31} According, we overrule assignment of error H.

B. Merits of the Decision to Certify the Instant Class

{¶ 32} OSU in its remaining seven assignments of error makes a broad challenge to the trial court's certification of the class in this case. For the following reasons, we find OSU has demonstrated the trial court abused its discretion in failing to conduct a rigorous analysis as required for class certification.

1. Legal standard and analysis required to support class certification

{¶ 33} Ohio courts find seven prerequisites for certification of a class action pursuant to Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous, (2) the named plaintiff representatives must be members of the class, (3) the class must be so numerous that joinder of all the members is impracticable ("numerosity"), (4) there must be questions of law or fact common to the class ("commonality"), (5) the claims or defenses of the representatives must be typical of the claims or defenses of the class ("typicality"), (6) the representative parties must fairly and adequately protect the interests of the class, and (7) one of the three requirements for certification set forth in Civ.R. 23(B) must be met. *Egbert at* ¶ 16, citing *Hamilton* at 70, 71 (1998), citing *Warner v. Waste Mgt.*, 36 Ohio St.3d 91, 96 (1988); Civ.R. 23.

{¶ 34} In this case, Smith moved for certification under Civ.R. 23(B)(3), which sets forth the "predominance" and "superiority" requirement. Specifically, Civ.R. 23(B)(3) states that "[a] class action may be maintained if * * *:

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (a) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (b) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (d) the likely difficulties in managing a class action.

Civ.R. 23(B)(3).

{¶ 35} "[C]lass-action suits are the exception to the usual rule that litigation is conducted by and on behalf of only the individually named parties." *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, ¶ 25. "To fall within that exception, the party bringing the class action must affirmatively demonstrate compliance with the procedural rules governing class actions." *Id.* Specifically, "[t]he party seeking class action certification pursuant to Civ.R. 23 must prove, by a preponderance of the evidence, that the proposed class meets each of the requirements set forth in the rule." *See Egbert* at ¶ 17.

See State ex rel. Doner v. Zody, 130 Ohio St.3d 446, 2011-Ohio-6117, ¶ 54 ("A preponderance of the evidence is defined as that measure of proof that convinces the judge or jury that the existence of the fact sought to be proved is more likely than its nonexistence."). Correspondingly, "[t]he trial court must carefully apply the requirements of Civ.R. 23 and conduct a rigorous analysis into whether those requirements have been satisfied." *Egbert* at ¶ 15, citing *Hamilton* at 70, *Felix* at ¶ 26, and *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, at ¶ 17.

2. The trial court failed to conduct a rigorous analysis as to the common evidence of class-wide injury (Assignments of Error A and G)

{¶ 36} In OSU's first assignment of error, labeled "A," OSU contends the trial court abused its discretion in certifying the class despite failing to conduct the "rigorous analysis" required by Civ.R. 23 in determining whether Smith had satisfied the prerequisites for class certification. (Appellant's Brief at 1, 25.) In assignment of error G, OSU reiterates its position asserting the trial court failed to conduct the required rigorous analysis particularly with regard to Smith's proposed methodology to determine liability and damages.

{¶ 37} Smith counters that OSU waived this argument, and, regardless, OSU is incorrect that she failed to demonstrate classwide injury. Smith asserts, "[a]ll class members were injured because they all paid for something that they did not receive: in-person classes with access to the OSU campus. [Smith] is not required [to] provide more at the class certification stage." (Appellee's Brief at 38.) Smith argues that under *Felix* at ¶ 33, which relied on *Comcast Corp. v. Behrand*, 559 U.S. 27 (2013), and the "similar standard" stated in *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497, 505 (6th Cir.2015), which was decided a week prior to *Felix*, "class certification requires a methodology for demonstrating classwide injury and damages, not an actual quantification." (Appellee's Brief at 39.)

{¶ 38} Following precedent of this court and the Supreme Court of Ohio concerning the level of analysis required at the class certification stage, we agree with OSU. In explaining a court's duty to conduct a rigorous analysis prior to certifying a class for litigation, the Supreme Court has emphasized that Civ.R. 23 is not "a mere pleading standard." *Felix* at ¶ 26, quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Contrary to Smith's suggestion, it is not sufficient for class certification purposes that the plaintiff's allegations merely raise " 'a colorable claim.' " *Madyda v. Ohio Dept. of Pub. Safety*, 10th Dist. No. 20AP-217, 2021-Ohio-956, ¶ 15, quoting *Cullen* at ¶ 34. Rather, the court must determine whether the party seeking class certification "affirmatively demonstrat[ed] compliance with the rules for certification and [is] prepared to prove 'that there are in fact sufficiently numerous parties, common questions of law and fact, etc.' " *Felix* at ¶ 26, quoting *Dukes* at 350.

{¶ 39} To this point, "a trial court's rigorous analysis of the evidence often requires looking into enmeshed legal and factual issues that are part of the merits of the plaintiff's underlying claims," but review of the merits may "only [be conducted] for the purpose of determining that the plaintiff has satisfied Civ.R. 23." *Felix* at ¶ 26, citing *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶ 40. This "analysis requires the court to resolve factual disputes relative to each requirement and to find, based upon those determinations, other relevant facts, and the applicable legal standard, that the requirement is met." *Cullen* at ¶ 16.

{¶ 40} *Cullen* serves as an illustration of a rigorous analysis of the underlying merits of a plaintiff's claim, and review of the evidence presented, for purposes of determining whether class certification is appropriate. At the outset, the *Cullen* court emphasized that a court should not avoid evaluating evidence presented on contested issues of merit and reiterated that sufficient evidence must support the trial court's findings on class certification. Among other issues, the *Cullen* court examined the testimony and reports provided by the plaintiff's experts and found that, contrary to the plaintiff's argument, the experts fell short of establishing common proof of an element of the plaintiff's contract claim. In doing so, the court remarked on the questionable reliability of the scientific theory employed, the lack of sufficient evidentiary foundation for the experts' opinions, and the failure of the experts' opinions to resolve individual questions raised by the facts of the case that would overwhelm any classwide issue. Therefore, the *Cullen* court determined the trial court abused its discretion in granting class certification since a rigorous analysis of the evidence presented by the parties demonstrated that, under Civ.R. 23(B)(3), individual questions predominated over issues common to the class.

{¶ 41} This court had occasion to apply the *Cullen* and *Felix* standard recently in a similar case. In *Cross v. Univ. of Toledo*, 10th Dist. No. 21AP-279, 2022-Ohio-3825, we reversed the judgment of the trial court certifying a class of undergraduate students who paid tuition and fees at the University of Toledo during the spring 2020 pandemic. In doing so, while we were mindful of the high bar for reversal in an appeal of a class certification ruling, we nevertheless found the trial court's "perfunctory, conclusory" decision and "fail[ure] to grapple with the relevant law and the parties' arguments" to constitute an abuse of discretion considering the novel and complex issues of the case and, particularly, the plaintiff's theory of common injury as viewed under the Civ.R. 23(B)(3) predominance requirement. *Id.* at ¶ 39. Therefore, we found the trial court failed to conduct a rigorous analysis necessary for class certification and remanded the matter for further proceedings.

{¶ 42} Here, contrary to Smith's assertion of waiver, the parties hotly contested whether Smith provided sufficient proof of injury amenable to resolution on a classwide basis, and OSU contends the trial court's analysis on this issue lacked the necessary scrutiny of the arguments and evidence. " 'Perhaps the most basic requirement to bringing a lawsuit is that the plaintiff suffer some injury.' " *Felix* at ¶ 36, quoting Schwartz & Silverman, *Common Sense Construction of Consumer Protection Acts*, 54 U.Kan.L.Rev. 1, 50 (2005). "Although plaintiffs at the class-certification stage need not demonstrate through common evidence the precise amount of damages incurred by each class member, * * * they must adduce common evidence that shows all class members suffered *some* injury." *Felix* at ¶ 33. "If the class plaintiff fails to establish that all of the class members were damaged (notwithstanding questions regarding the individual damages calculations for each class members), there is no showing of predominance under Civ.R. 23(b)(3)." *Felix* at ¶ 35. *See also Cullen* at ¶ 15 (stating that, as a part of a proper rigorous analysis, the trial court must determine whether the party satisfied "*through evidentiary proof* at least one of the provisions of Rule 23(b) "). (Emphasis added.)

{¶ 43} The trial court in this case concluded that each student in the class had been injured by "losing the benefit for which they contracted: in-person classes and access to the campus," and this conclusion served as the basis for nearly every class certification requirement. (Trial Court Decision at 7 (identifiable class), 9 (class representative and membership, numerosity), 11 (commonality, typicality), 12-13 (fair and adequate

representation), and 15 (predominance, superiority). The trial court treated the fact of closure of the campus and the cessation of in-person classes as dispositive to establishing an injury on behalf of Smith and the class. The trial court explained, "[t]he determination of whether in-person classes ceased and whether the campus was closed is well suited for classwide determination." *Id.* at 15. The trial court then repeatedly treated Smith experts' model as the means to, eventually, pin down the amount of damages owed to the class and did not consider OSU's challenge to it: "the precise application of [Smith]'s [market value] model to the students' various circumstances, and the resultant amount of damages for each student, is not addressed at this time." *Id.* at 15.

{¶ 44} Several problems undermine this analysis. First, instead of considering whether Smith presented sufficient evidence of the economic injury she claimed to have occurred, the trial court here assumed a "benefit" was lost based only on the fact OSU closed its campus and switched to remote classes and services in response to the pandemic. In other words, the trial court either accepted Smith's allegations as true, as would occur under a pleading standard, or believed the asserted breach in this case—closure of campus and temporary termination of in-person classes and services—itself served as evidence of economic injury. Either scenario constituted an abuse of discretion. *See Felix* at ¶ 26 (stating Civ.R. 23 is not "a mere pleading standard"); *Leiby v. Univ. of Akron*, 10th Dist. No. 05AP-1281, 2006-Ohio-2831, ¶ 24, citing *Metro. Life Ins. Co. v. Triskett Illinois, Inc.*, 97 Ohio App.3d 228, 235 (1st Dist.1994) (finding that, to recover on a breach-of-contract claim, the claimant must prove not only that the contract was breached, but that the claimant was injured due to the breach); *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 10th Dist. No. 12AP-647, 2013-Ohio-3890, ¶ 23 ("Generally, to recover for breach of contract, a plaintiff must prove the existence of economic damage as the result of the breach. * * * Recovery does not require proof of the amount of the economic damage."). *Claris, Ltd. v. Hotel Dev. Servs., LLC*, 10th Dist. No. 16AP-685, 2018-Ohio-2602, ¶ 28, quoting *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 144, (9th Dist.1996) ("[d]amages are not awarded for a mere breach of contract; the amount of damages awarded must correspond to injuries resulting from the breach").

{¶ 45} Second, the trial court did not review the evidence and arguments raised by OSU contesting proof of injury. OSU argued that, having not conducted any portion of the

market survey or analysis, Gaskin admitted he could not opine to a reasonable degree of scientific certainty that OSU students were injured in this case.[3] Moreover, according to Gaskin's report and testimony, the methodology presented to potentially answer the question of whether the class suffered any common injury due to the campus closure and switch to remote classes excludes any survey questions or consideration of market preferences during an emergency such as the pandemic that forced the closure here. OSU submitted an expert report that made this point, as well as evidence that students paid the same for in-person and online learning and that the in-person teaching modality carried the possibility of substantial remote instruction even in a normal semester.

{¶ 46} The trial court, in assuming an injury from the fact of closure and termination of in-person classes, did not assess these complicated and difficult considerations, particularly as they relate to whether Smith presented *any* common evidence—or even a method to possibly determine—that class members suffered an economic injury considering the effect of the pandemic.[4] As demonstrated by statements during the oral hearing, the trial court did not believe that issues of merit should be considered at the class certification stage and sought to expediate defining a class in order to examine those merits issues at the next stage of litigation. Thus, having accepted the closure of campus and temporary termination of in-person classes and services as an injury per se, and having failed to consider how the pandemic affects class certification in this case at all, the trial court did not undertake a rigorous analysis with respect to the number and nature of individualized inquires that might be necessary to establish liability with respect to both tuition and fees.

{¶ 47} Finally, the trial court folded Smith's unjust enrichment claim and arguments as to certain fees into the same generalized injury analysis without providing any individualized consideration of those issues. *See, e.g., Cross* at ¶ 36 (finding the trial court failed to conduct a rigorous analysis as to certain fees where the trial court acknowledged

[3] In other words, without an expert opinion as to this issue, the plaintiff's case here is arguably weaker than that presented in *Cullen*, which included experts' opinions as common proof of a breach of contract claim under the predominance requirement, but, according to the Supreme Court, those opinions lacked a sufficient evidentiary foundation.

[4] We note that even Smith agrees speculation is insufficient to "tip the scales in a class certification ruling." (Reply to Memo. in Opp. at 3, citing *Bridging Communities Inc. v. Top. Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir.2016).)

the parties' competing factual positions on the fees but "went no further in addressing how issues of commonality or predominance applied to [them]").

{¶ 48} Considering all the above, we find the trial court's conclusion that OSU's (alleged) breach of implied contract to hold in-person classes on an open campus constituted—in and of itself—proof of a common injury suffered by the class was an error of law, and the trial court's failure to rigorously analyze the requirements for class certification due to this error constitutes an abuse of discretion. Therefore, we conclude OSU's assignments of error challenging the trial court's rigorous analysis, labeled A and G, have merit. We further find that, because the error permeated the trial court's reasoning throughout its decision, our decision in this regard renders the remaining assignments of error, labeled B, C, D, E, and F, moot at this juncture. App.R. 12(A)(c).

{¶ 49} Accordingly, assignments of error A and G are sustained.

V. CONCLUSION

{¶ 50} Having overruled assignment of error H, sustained assignments of error A and G, and determined assignments of error B, C, D, E, and F to be moot, we reverse the judgment of the Court of Claims of Ohio. The cause is remanded for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

BEATTY BLUNT and McGRATH, JJ., concur.

IN THE COURT OF CLAIMS OF OHIO

BROOKE SMITH, Indv. Plaintiff v. THE OHIO STATE UNIVERSITY Defendant	Case No. 2020-00321JD Judge Dale A. Crawford DECISION

This matter is before the Court on Plaintiff's motion for class certification. Plaintiff Brooke Smith was a senior at Defendant The Ohio State University (Defendant or OSU), at the Columbus campus, during the Spring 2020 semester. She seeks to represent a class of all undergraduate students enrolled in classes at the Columbus campus of OSU during the Spring 2020 semester who paid tuition and/or fees. Plaintiff asserts that she and her fellow students contracted with OSU for in-person classes, and when OSU closed its Columbus campus and switched to online classes in March 2020 in response to the Novel Coronavirus Disease 2019 (COVID-19), it breached her contract. Plaintiff claims that the class is entitled to a partial refund of the tuition and fees that they paid. On December 13, 2021, the Court conducted a hearing on Plaintiff's Civ.R. 23 motion.

The Ohio Supreme Court, in its seminal class action case, *Cullen v. State Farm Mut. Auto. Ins. Co.*, held:

> A trial court must conduct a rigorous analysis when determining whether to certify a class pursuant to Civ.R. 23 and may grant certification only after finding that all of the requirements of the rule are satisfied; the analysis requires the court to resolve factual disputes relative to each requirement and to find, based upon those determinations, other relevant facts, and the applicable legal standard, that the requirement is met.

137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, paragraph one of the syllabus. The party seeking class certification must demonstrate by a preponderance of the evidence that the proposed class meets each of the requirements of Civ.R. 23. *Cullen*, at paragraph three of the syllabus. Upon review of the evidence and applicable law, the Court finds that class certification is appropriate.

Factual Background

On March 16, 2020, OSU closed its Columbus campus in response to the COVID-19 pandemic.[1] OSU refunded a prorated portion of some fees when it closed the campus, such as the room and board and the recreational fee, but it did not refund any tuition or any of the following fees: general fee, student activity fee, student union facility fee, learning technology fee, course fees, program fees, and the COTA bus fee.[2]

Plaintiff argues that OSU should have refunded a prorated amount of tuition because the students lost part of the benefit of the bargain for which they paid tuition when the school transitioned from in-person classes to online classes. (Motion, p. 1.) Plaintiff also asserts that OSU should have refunded a prorated amount of the fees listed above when OSU closed the campus because the students could no longer use any of the facilities that the fees were paid to secure. (Motion, p. 3.)

Proposed Class

Plaintiff moves the Court to certify a class of "all undergraduate students enrolled in classes at the Columbus campus of The Ohio State University during the Spring 2020

[1] Plaintiff asserts that OSU closed its campus on March 9, 2020. However, March 9, 2020 was the beginning of spring break. If not for the COVID-19 pandemic, in-person classes would have resumed on March 16, 2020. (Bricker Aff., ¶ 21.)

[2] The motion for class certification does not include a list of the fees for which Plaintiff seeks a prorated reimbursement. Counsel for Plaintiff provided the list of fees to the Court during the December 13, 2021 hearing. Counsel also listed the instructional fee and the non-resident surcharge, which for purposes of this decision shall be referred to as "tuition."

semester who paid tuition and/or fees." During the hearing, counsel for Plaintiff provided the following list of fees: general fee, student activity fee, student union facility fee, learning technology fee, course fees, program fees, and the COTA bus fee.

During the hearing, the undersigned requested that the parties confer and refine the proposed class definition. On December 22, 2021, the parties filed a notice informing the Court that they were unable to reach an agreement on a revised class definition. Nevertheless, the Court itself has the authority to modify the class definition when the Court concludes that it is warranted. *See* Civ.R. 23(C)(1)(b); *see also* Civ.R. 23(D)(1) (providing that in conducting an action under Civ.R. 23, the court "may issue orders that: * * * (c) impose conditions on the representative parties or on intervenors; * * * or (e) deal with similar procedural matters"); *Ritt v. Billy Blanks Enters*, 171 Ohio App.3d 204, 2007-Ohio-1695, 870 N.E.2d 212, ¶ 104-105 (8th Dist.) (modifying the class definition); *In re NHL Players' Concussion Injury Litigation*, D.Minn. No. 14-2551 (SRN/BRT), 2017 U.S. Dist. LEXIS 115159, at *5 (July 24, 2017) (courts possess administrative and procedural authority over the course of class action proceedings under Fed.R.Civ.P. 23(d)(1)(A) and 23(d)(1)(E) and inherent authority to manage their own affairs so as to achieve the orderly and expeditious disposition of cases).

In another case before this Court against this same Defendant, *McDermott v. The Ohio State University*, Ct. of Cl. No. 2020-00286JD, the Court certified a class of undergraduate and graduate students enrolled at the Columbus campus of OSU for the Spring 2020 semester who paid the student union fee. If Plaintiff's proposed class definition were certified in this case, it would overlap with the class in *McDermott* in regard to the student union fee. Because the class in *McDermott* was certified first, the Court concludes that the *McDermott* class effectively has staked its claim on the student

union fee.[3] *See EEOC v. Univ. of Pennsylvania*, 850 F.2d 969 (3rd Cir.1988) (providing an overview of the first-filed rule, which is analogous to the instant situation). Therefore, the Court modifies the class definition in the instant case to exclude the student union fee.

The Court hereby defines the class as "all undergraduate students enrolled in classes at the Columbus campus of The Ohio State University during the Spring 2020 semester who paid tuition, the general fee, student activity fee, learning technology fee, course fees, program fees, and/or the COTA bus fee."

Requirements for Class Certification

Rule 23 of the Ohio Rules of Civil Procedure governs class actions in Ohio. *See* Civ.R. 23.[4] A trial judge "has broad discretion in determining whether a class action may be maintained." *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), syllabus. The Ohio Supreme Court has cautioned, however, that the trial court's discretion in deciding whether to certify a class action "is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23." *Hamilton v. Ohio Savs. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998). The Ohio Supreme Court has further cautioned: "The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied." *Hamilton* at 70.

The United States Supreme Court too has emphasized that courts should engage in rigorous analysis in determining whether a proposed class should be certified

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[3] Every student who would have been a member of the class in this case due to paying the student union fee is also included in the *McDermott* class.

[4] The Ohio Supreme Court has determined that federal authority may aid Ohio courts in interpreting Civ.R. 23. *See Cullen* at ¶ 14, quoting *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 31 Ohio B. 398, 509 N.E.2d 1249 (1987) ("[b]ecause Civ.R. 23 is virtually identical to Fed.R.Civ.P. 23, we have recognized that 'federal authority is an appropriate aid to interpretation of the Ohio rule'").

in class action case. In *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013), the Court stated:

> Repeatedly, we have emphasized that it "'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Id. at 350-351* (quoting *General Telephone Co. of Southwest* v. *Falcon*, 457 U.S. 147, 160-161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)). Such an analysis will frequently entail "overlap with the merits of the plaintiff's underlying claim." 564 U.S., at 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374. That is so because the "'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Ibid.* (quoting *Falcon*, *supra*, at 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740).

A party seeking class certification must meet the following requirements before the action may be maintained as a class pursuant to Civ.R. 23:

> (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.

Cullen, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 11 (citations omitted).

Identifiable Class

"An identifiable class must exist before certification is permissible. The definition of the class must be unambiguous." *Warner v. Waste Mgt.,* 36 Ohio St.3d 91, 521 N.E.2d 1091 (1988), paragraph two of the syllabus. "[T]he requirement that there be 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 v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 71-72, 69 N.E.2d 442 (1998) (citations omitted). The class definition "must be precise enough 'to permit identification within a reasonable effort.'" *Id.* at 72, quoting *Warner* at 96.

Plaintiff argues that the proposed class is identifiable and unambiguous because "[e]ach member of this class can be easily identified from Defendant's records." (Motion, p. 6.)

Defendant does not argue that it is unable to identify class members from its records. Instead, Defendant argues that the proposed class is defined too broadly such that it includes members who have not been harmed. For instance, the class is overly broad because there were 826 students who were exclusively enrolled in distance learning classes and thus could not be part of Plaintiff's class. And other students "took a mixture of both in-person classes and classes through another mode of instruction." (Memorandum in Opposition, p. 7.) Defendant cites an Ohio Supreme Court case for the proposition that if "a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification." *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 53, citing *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir.2012). In *Stammco*, some of the putative class members may not have been harmed because they may have authorized the allegedly improper charges on their accounts. *Stammco* was thus unsuitable for class certification because the court would

have to determine, on an individual basis, whether each putative class member authorized the charges.

However, *Stammco* does not apply here because Defendant is able to clearly identify from its records which students paid tuition and the various fees. Furthermore, because the class has been defined as students enrolled in classes at the Columbus campus, the 826 students who were exclusively enrolled in distance learning are clearly not part of the class.[5] The students who were enrolled in a mixture of in-person classes on the Columbus campus and other modes of instruction clearly fall within the class. The Court need not consider at this time how the amount of damages will be affected for those students. *See Behrend*, 569 U.S. at 35 ("calculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case); *see also Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 33 (plaintiffs in class-action suits "must demonstrate that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions. * * * Although plaintiffs at the class-certification stage need not demonstrate through common evidence the precise amount of damages incurred by each class member, * * * they must adduce common evidence that shows all class members suffered *some* injury").

Defendant also argues that "some students who exclusively took in-person classes suffered no injury as a result of the transition to virtual instruction." (Memorandum in Opposition, p. 7.) However, as the Court previously stated, the Court will not recast Plaintiff's claim. (Entry Denying Defendant's Motion to Dismiss, Sept. 9, 2020.) The injury suffered by the class, according to Plaintiff's theory of the case, is losing the benefit for which they contracted: in-person classes and access to the campus. The terms of an implied contract can be inferred from the parties' external

[5] Plaintiff's original proposed class definition also limited the class to students "enrolled in classes at the Columbus campus of The Ohio State University."

conduct. *See Hercules Inc. v. United States*, 516 U.S. 417, 424, 116 S.Ct. 981 (1996) ("An agreement implied in fact is founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding."); *see also Columbus H. v. & T. R. Co. v. Gaffney*, 65 Ohio St. 104, 115, 61 N.E. 152 (1901) ("whereas in the other case the contract is established by the conduct of the parties, viewed in the light of surrounding circumstances, and is called a contract implied in fact"). In this case, OSU advertised in-person classes as an option and advertised its campus on which the students would take said classes. OSU charged tuition and fees. And the students paid the tuition and fees and could not attend classes or use campus facilities.

Therefore, the Court finds that the proposed class is not overbroad, but rather is identifiable and unambiguous.

Class Representative and Membership

In order to establish class membership, it is necessary to demonstrate that "the representative[s] have proper standing. In order to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent." *Hamilton*, 82 Ohio St.3d at 74, 694 N.E.2d 442.

Plaintiff was an undergraduate student at the Columbus campus of OSU during the 2020 Spring semester. She asserts that she possesses the same interest and suffered the same injury as the other class members because none of them received the benefit of their bargain.

Defendant argues, however, that Plaintiff's experiences and alleged injuries differed from other undergraduate students because she was a student teacher in the Spring 2020 semester. According to Plaintiff's deposition, she took two classes during the Spring 2020 semester: a student teaching field placement and a seminar at OSU

that reflected on the student teaching experience. (Smith Depo., p. 55.) Prior to March 16, 2020, Plaintiff's seminar was taught in-person at the Columbus campus. (Zurmehly Aff., Ex. D.) Starting March 16, 2020, the seminar was taught online. (Smith Depo., p. 281-282.) Therefore, even though her student teaching assignment was conducted off-campus, Plaintiff still took one class at the Columbus campus that was converted to online learning due to the pandemic. It is not necessary that the class representative be the most injured member of the class. Furthermore, the fact that she only took one class on campus and how that might affect the damages she is due is not relevant at this time. *See Felix, supra*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, at ¶ 33. Therefore, the Court finds that Plaintiff possesses the same interests and suffered the same injury shared by all members of the class.

Numerosity

"Numerosity is presumed for classes larger than forty members * * * However, the numerosity inquiry is not strictly mathematical but must take into account the context of the particular case, in particular whether a class is superior to joinder based on other relevant factors including: (i) judicial economy, (ii) geographic dispersion, (iii) the financial resources of class members, (iv) their ability to sue separately, and (v) requests for injunctive relief that would involve future class members." *Pennsylvania Pub. School Emp. Retirement Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir.2014); *see also Warner v. Waste Mgmt.*, 36 Ohio St.3d 91, 521 N.E.2d 1091 (1988) (approving the maxim that if a class has more than forty people in it, numerosity is satisfied).

Defendant argues in a footnote that the proposed class does not meet the numerosity requirement because the proposed class includes uninjured class members. The Court already addressed this argument in analyzing whether there is an identifiable class. For the same reasons given above, the Court rejects that argument here. The Court finds that joinder of all members of the proposed class is impractical due to,

among other things, the number of students who have been affected by OSU's response to the COVID-19 pandemic, judicial economy, and potential requests for relief that would involve future class members. Therefore, the numerosity requirement has been met.

Commonality

Pursuant to Civ.R. 23(A)(2), there must be the presence of "questions of law or fact common to the class." Courts have generally given a permissive application to this requirement. *Warner*, 36 Ohio St.3d at paragraph three of the syllabus, 521 N.E.2d 1091. It requires a "common nucleus of operative facts." *Id.* However, "it is not necessary that all the questions of law or fact raised in the dispute be common to all the parties." *Hamilton* at 77.

Plaintiff asserts that there are common questions as to (1) "whether OSU was contractually bound to provide her with in-person classes[,]" (2) "whether [that contract] was breached[,]" and (3) "whether it was unjustified for OSU to retain the entirety of her tuition and fee payments even though it failed to provide in-person classes for the entirety of the Spring 2020 semester." (Motion, p. 8.)

Defendant argues that Plaintiff has not met the commonality requirement because there is no common, classwide proof of breach of contract because "an in-person class may be conducted between 0-24% by virtual means" and "when a course had reached more than 24% of online instruction in the spring 2020 semester will vary with each course and with each professor." (Memorandum in Opposition, p. 9.) However, Defendant also states that "the semester was nearly two-thirds complete when OSU transitioned to virtual instruction." (Memorandum in Opposition, p. 9.) Doing the math, while the alleged contract may not have been breached on the same day for each class member, it was certainly breached for all of them by the end of the semester.

Defendant also argues that there is no common, classwide proof of injury because "not all putative class members were injured by OSU's transition to virtual

instruction in March 2020." (Memorandum in Opposition, p. 10.) However, as stated above in the analysis regarding whether the class was identifiable, the injury suffered by the class is losing the benefit for which they contracted: in-person classes and access to the campus. Proof of injury is therefore susceptible to classwide determination. Therefore, the commonality requirement has been met.

Typicality

"Under Civ.R. 23(A)(3), the claims or defenses of the representative parties must be typical of the claims or defenses of the class. The typicality requirement has been found to be satisfied where there is no express conflict between the representatives and the class." *Warner*, 36 Ohio St.3d at 97-98, 512 N.E.2d 442.

> [A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.

Baughman v. State Farm Mut. Auto. Ins. Co., 88 Ohio St.3d 480, 485, 727 N.E.2d 1265 (2000).

Defendant argues that Plaintiff is atypical of her class because her alleged injuries are unique to her. In thus arguing, Defendant focuses on Plaintiff's injury of not being able to finish her student teaching assignment in-person, allegedly due to her assigned local school's—not OSU's—decisions. However, Plaintiff's injury is typical of the class because of her other course—the seminar that was originally scheduled to be taught in-person on OSU's Columbus campus. While Plaintiff also took a rather unique course, that does not put her interests in conflict with the class, and "the typicality

requirement is usually met irrespective of varying fact patterns which underlie individual claims." *Baughman*, at 485. Therefore, the typicality requirement has been satisfied.

Fair and Adequate Representation

Adequate representation requires the Court to examine: (1) the adequacy of the representative class members themselves; and (2) the adequacy of counsel for the representative class members. *Warner* at 98. "A representative is deemed adequate so long as his interest is not antagonistic to that of other class members." *Marks v. C.P. Chemical Co., Inc.*, 31 Ohio St.3d 200, 203, 509 N.E.2d 1249 (1987), quoting 3B Moore's Federal Practice (1987) 23-188, paragraph 23.07[1]. Regarding the adequacy of counsel requirement,

> [t]he issue of whether counsel is competent to handle the action can be the most difficult in the Rule 23 analysis. The fact that an attorney has been admitted to practice does not end the judicial inquiry. An attorney should be experienced in handling litigation of the type involved in the case before class certification is allowed. Close scrutiny should be given to the attorney's qualifications to handle the matter with which he is entrusted.

Warner, 36 Ohio St.3d at 98, 521 N.E.2d 1091.

Defendant first contests the adequacy of Plaintiff to serve as class representative with the same arguments, and indeed in the same section of its brief, that it set forth regarding typicality—that she did not suffer the same injury as the class members. And for the same reasons, the Court finds this argument to be unpersuasive.

Defendant next argues that "Plaintiff and her counsel are inadequate representatives of the 33,334 class members who paid in-state tuition or the 3,669 international students who paid an International Undergraduate Student Fee in the spring 2020 semester." (Memorandum in Opposition, p. 18.) Defendant argues that Plaintiff, an out-of-state student, cannot adequately represent in-state students because

it is in her interest to increase the recovery for out-of-state students at the expense of in-state students. However, the case law cited by Defendant is not applicable, and the Court finds Defendant's argument to be unpersuasive. Plaintiff possesses the same interest and suffered the same injury as the other members of the class. Furthermore, even if she wanted to, it is not apparent to the Court—nor does Defendant explain—how Plaintiff herself could inappropriately influence the survey proposed by her experts. Therefore, the Court finds that Plaintiff is an adequate class representative.

While Defendant briefly asserts that Plaintiff's counsel are not adequate class counsel, it does provide a reason. Upon review of Plaintiff's exhibits A and B, the Court finds that Bursor & Fisher, P.A. and Climaco Wilcox Peca & Garfoli Co, LPA are both law firms with extensive experience with class actions and that the individual attorneys have experience with class actions. Furthermore, two of Plaintiff's attorneys, Scott Simpkins and Joshua Arisohn, have already been appointed class counsel in another case before this Court. *See Weiman v. Miami Univ.*, Ct. of Cl. Nos. 2020-00614JD and 2020-00644JD (Dec. 13, 2021). Therefore, the Court finds that Scott Simpkins, Joshua Arisohn, and Sarah Westcot are adequate class counsel.

Predominance and Superiority

In order for a class to be certified, it must meet one of the Civ.R. 23(B) requirements. Plaintiff seeks class certification under Civ.R. 23(B)(3). Civ.R. 23(B)(3) requires the trial court to make the following findings:

> [F]irst, "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and, second, "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This inquiry requires a court to balance questions common among class members with any dissimilarities between them, and if the court is satisfied that common questions predominate, it then should "consider whether any alternative

> methods exist for resolving the controversy and whether the class action method is in fact superior."

Cullen, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 29, quoting *Ealy v. Pinkerton Govt. Servs., Inc.*, 514 Fed. Appx. 299 (4th Cir. 2013). "The purpose of Civ.R. 23(B)(3) was to bring within the fold of maintainable class actions cases in which the efficiency and economy of common adjudication outweigh the interests of individual autonomy." *Hamilton*, 82 Ohio St.3d at 80, 69 N.E.2d 442.

Plaintiff argues that each of the elements for the breach of contract claim presents a common question for the class and that they each have a common answer. Plaintiff asserts that the contents of the contract between each student and OSU will be determined by the same handbooks, catalogs, policies, and brochures. "Accordingly, whether OSU and class members were parties to a contract, and whether that contract contained a requirement that OSU would provide in-person classes, are questions that can be answered for all class members in one fell swoop." (Motion, p. 12.) Plaintiff further asserts that the elements for a claim of unjust enrichment are equally well suited to classwide treatment. Lastly, Plaintiff asserts that a class action would be superior to thousands of individual actions.

Regarding damages, Plaintiff avers that her experts have set out a method for measuring damages on a classwide basis regarding tuition. Plaintiff's experts propose to conduct a market research survey and analysis, using a conjoint analysis, to compare the market value for in-person classes and full access to OSU's campus and facilities to the market value of virtual classes and no access to OSU's campus and facilities. (Motion, p. 13-14.) The experts will then use those numbers to determine the percent by which in-state students and out-of-state students overpaid for tuition.

Defendant argues that predominance is lacking because "the transition to virtual instruction is not itself an injury." (Memorandum in Opposition, p. 11.) Accordingly, the Court would have to examine whether each class member suffered an injury.

Therefore, class certification is not appropriate. Defendant illustrates its argument by comparing the students within Plaintiff's academic program and by comparing students across several different programs and types of classes. However, as stated above in the analysis regarding whether the class was identifiable, the injury suffered by the class is losing the benefit of in-person classes and access to the campus. The determination of whether in-person classes ceased and whether the campus was closed is well suited for classwide determination.

Defendant next argues that predominance is lacking because students were assessed different rates of fees and received different amounts of financial aid. However, Plaintiff has proposed a model of determining damages that is consistent with its liability case. The precise application of Plaintiff's model to the students' various circumstances, and the resultant amount of damages for each student, is not addressed at this time. *See Behrend*, *supra*, 569 U.S. at 35; *see also Felix*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, at ¶ 33.

The Court agrees with Plaintiff that the elements of each claim are well suited for classwide determination. Accordingly, the Court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. *See McDermott v. Ohio State University*, Ct. of Cl. No. 2020-00286JD (Dec. 27, 2021); *see also Cross v. Univ. of Toledo*, Ct. of Cl. No. 2020-00274JD, 2021 Ohio Misc. LEXIS 43 (April 26, 2021); *Weiman v. Miami Univ.*, Ct. of Cl. Nos. 2020-00614JD and 2020-00644JD (Dec. 13, 2021).

The Court further finds that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy presented by Plaintiff, especially given a requirement and desirability that litigation of the presented claims should be litigated in this forum. *See* Civ.R. 23(B)(3); *see also* R.C. 2743.03(A)(1) (providing that the Ohio Court of Claims "has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in [R.C. 2743.02] and exclusive

jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims").

Conclusion

For the reasons discussed above, the Court concludes that Plaintiff's motion for class certification will be granted.

DALE A. CRAWFORD
Judge

IN THE COURT OF CLAIMS OF OHIO

BROOKE SMITH, Indv.	Case No. 2020-00321JD
Plaintiff	Judge Dale A. Crawford
v.	JUDGMENT ENTRY
THE OHIO STATE UNIVERSITY	
Defendant	

For the reasons set forth in the decision filed concurrently herewith, the Court GRANTS Plaintiff's motion for class certification. The Court hereby certifies the following class: all undergraduate students enrolled in classes at the Columbus campus of The Ohio State University during the Spring 2020 semester who paid tuition, the general fee, student activity fee, learning technology fee, course fees, program fees, and/or the COTA bus fee.

Pursuant to Civ.R. 23(C)(1)(c), this Court may alter or amend the class certifications before final judgment.

The Court appoints the following attorneys as class counsel: Scott Simpkins (0066775), Joshua Arisohn (admitted pro hac vice), and Sarah Westcot (admitted pro hac vice).

DALE A. CRAWFORD
Judge

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IN THE COURT OF CLAIMS OF OHIO

BROOKE SMITH, Indv. Plaintiff v. THE OHIO STATE UNIVERSITY Defendant	Case No. 2020-00321JD Judge Patrick M. McGrath Magistrate Holly True Shaver ENTRY DENYING DEFENDANT'S MOTION TO DISMISS

On June 30, 2020, defendant The Ohio State University (OSU) filed a motion to dismiss plaintiff's amended complaint pursuant to Civ.R. 12(B)(6).[1] On July 30, 2020, plaintiff filed a response. On August 6, 2020, defendant filed a reply. For the reasons discussed below, defendant's motion shall be denied.

Standard of Review

A motion to dismiss filed pursuant to Civ.R. 12(B)(6) tests the sufficiency of the claims asserted in a complaint. *Gordon v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 17AP-792, 2018-Ohio-2272, ¶ 13. In construing a complaint upon a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim, the court "must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). In order for a court to dismiss a complaint, it must appear beyond a doubt that the plaintiff can prove no set of facts entitling her to recovery. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991). "In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the

[1]Plaintiff also named the Ohio Department of Higher Education (ODHE) in her amended complaint. However, on July 15, 2020, this court dismissed ODHE as a party in this action at the request of plaintiff. Since ODHE is no longer a party in this action the June 30, 2020 motion to dismiss filed on behalf of ODHE is DENIED as moot.

statements and facts contained in the pleadings, and may not consider or rely on evidence outside the complaint." *Powell v. Vorys*, 131 Ohio App.3d 681, 684, 723 N.E.2d 596 (10th Dist.1998).

Factual Background

Plaintiff is an undergraduate student at OSU and brings a complaint on behalf of herself and a proposed class. The proposed class consists of "all ODHE students who paid Defendants (sic) Spring Semester 2020 tuition and/or fees for in-person educational services that Defendants failed to provide, and whose tuition and fees have not been refunded." (Complaint at ¶ 29.) Plaintiff alleges that on March 9, 2020, OSU's president moved all classes online due to the Covid-19 pandemic. *Id.* at ¶ 20. Thereafter, OSU's president announced that all in-person classes would be conducted virtually for the remainder of the spring semester. *Id.* Plaintiff alleges that the online instruction provided by OSU is deficient compared to the in-person classes for which she and the proposed class members contracted. *Id.* The claims brought on behalf of plaintiff and the proposed class seek to recover "a refund of all tuition and fees for services, facilities, access and/or opportunities that Defendants have not provided." *Id.* at ¶ 22. Plaintiff brings claims for breach of contract, unjust enrichment, and conversion on behalf of herself and the putative class members.

In its motion, defendant argues that plaintiff's claims are for educational malpractice, which is not a viable claim in Ohio. Defendant alternatively argues that the unjust enrichment and conversion claims should be dismissed because unjust enrichment and conversion cannot be pleaded alternatively to breach of contract in this circumstance.

Plaintiff's breach of contract claim is not an educational malpractice claim

According to defendant, plaintiff's amended complaint asserts that online learning is substandard to in-person classes, and that plaintiff points to no specific contractual

provision stating that classes would be conducted in person. Therefore, defendant argues that plaintiff's breach of contract claim is an educational malpractice claim in disguise, which is not a recognized claim in Ohio. Consequently, defendant argues, plaintiff's breach of contract claim concerning a refund of tuition and fees should be dismissed.

However, when a trial court determines whether an action sets forth a claim upon which relief can be granted, a trial court should look to the body of the complaint. *Guillory v. Ohio Dept. of Rehab. & Correction*, 10th Dist. Franklin Nos. 07AP-861, 07AP-928, 2008-Ohio-2299, ¶ 11. A trial court's role generally does not include recasting a party's pleadings. *See Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008) (stating that in "our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present").

Plaintiff alleges that when she paid tuition to defendant a contract was created and that by holding classes virtually and not refunding a portion of the previously paid tuition and fees, defendant breached said contract. The essence of plaintiff's breach of contract claim is that she contracted for in-person classes and received online classes instead. The mere mention of possible consequences to plaintiff's educational or professional future does not render plaintiff's complaint a claim for educational malpractice. Accordingly, making all reasonable inferences in plaintiff's favor, the court finds that plaintiff may state a claim for breach of contract. Therefore, defendant's motion to dismiss plaintiff's breach of contract claim is DENIED.

Plaintiff can plead unjust enrichment and conversion in the alternative

Defendant alternatively argues that plaintiff's unjust enrichment and conversion claims should be dismissed because unjust enrichment and conversion cannot be pleaded in the alternative to a breach of contract claim absent an allegation of fraud or

bad faith, or if the parties do not dispute the existence of the contract governing their relationship. Plaintiff does not allege fraud or bad faith. And defendant argues that the parties agree that a contract exists between them. It is well settled that the relationship between a university and a student enrolled therein is contractual in nature. *Savoy v. Univ. of Akron*, 10th Dist. Franklin No. 13AP-696, 2014-Ohio-3043, ¶ 24.

Defendant refers to case law, including *Savoy*, to argue that the university catalog, handbook, and other guidelines supplied to the student constitute the terms of a contract between the university and the student. However, in the same motion, defendant asserts that plaintiff has failed to point to any contractual provision that covers the basis of plaintiff's breach of contract claim. As plaintiff correctly argues, it is not known at this point which express contract, if any, governs plaintiff's claims. Furthermore, plaintiff asserts that defendant is in possession of the documents covering her claim which is only available to her through discovery. Therefore, not only do the parties disagree as to which contract governs this case, but they also disagree as to the existence of one or more of the alleged contracts. In construing the complaint under the Civ.R. 12(B)(6) standard, the court "must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell*, 40 Ohio St.3d at 192, 532 N.E.2d 753. Because the existence of the underlying contract is disputed, it would be premature for the court to dismiss plaintiff's unjust enrichment and conversion claims. Furthermore, it would also be premature for the court to dismiss unjust enrichment and conversion claims pleaded in the alternative at this stage of the litigation. *See Cristino v. Admr., Ohio Bur. of Worker's Comp.*, 10th Dist. Franklin No. 12AP-60, 2012-Ohio-4420, ¶ 26. ("The mere presence of both [breach of contract and unjust enrichment] claims in a complaint does not warrant the dismissal of the unjust-enrichment claim on a Civ.R. 12(B)(6) motion."). Accordingly, defendant's motion to dismiss plaintiff's unjust enrichment and conversion claims is denied.

Conclusion

Based upon the foregoing, defendant's motion to dismiss is DENIED. Defendant shall file its answer to plaintiff's amended complaint in the normal course.

PATRICK M. MCGRATH
Judge

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Section 2743.01 | State liability definitions.

Effective: *September 30, 2021* ***Latest Legislation:*** *House Bill 110 - 134th General Assembly*

As used in this chapter:

(A) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state. "State" does not include political subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

(C) "Claim for an award of reparations" or "claim" means a claim for an award of reparations made under sections 2743.51 to 2743.72 of the Revised Code.

(D) "Award of reparations" or "award" means an award made under sections 2743.51 to 2743.72 of the Revised Code.

(E)(1) "Public duty" includes, but is not limited to, any statutory, regulatory, or assumed duty concerning any action or omission of the state involving any of the following:

(a) Permitting, certifying, licensing, inspecting, investigating, supervising, regulating, auditing, monitoring, law enforcement, emergency response activity, or compromising claims;

(b) Supervising, rehabilitating, or liquidating corporations or other business entities.

(2) "Public duty" does not include any action of the state under circumstances in which a special relationship can be established between the state and an injured party as provided in division (A)(3) of section 2743.02 of the Revised Code.

Last updated August 9, 2021 at 11:24 AM

Available Versions of this Section

March 31, 2005 – House Bill 316 - 125th General Assembly

September 30, 2021 – Amended by House Bill 110 - 134th General Assembly

Section 2743.02 | State waives immunity from liability.

Ohio Revised Code / Title 27 Courts-General Provisions-Special Remedies / Chapter 2743 Court Of Claims

Effective: *September 30, 2021* ***Latest Legislation:*** *House Bill 110 - 134th General Assembly*

(A)(1) The state hereby waives its immunity from liability, except as provided for the office of the state fire marshal in division (G)(1) of section 9.60 and division (B) of section 3737.221 of the Revised Code and subject to division (H) of this section, and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) or (3) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, that the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for the officer's or employee's acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

(3)(a) Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state.

(b) The state immunity provided in division (A)(3)(a) of this section does not apply to any action of the state under circumstances in which a special relationship can be established between the state and an injured party. A special relationship under this division is demonstrated if all of the following elements exist:

(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

(ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

(iii) Some form of direct contact between the state's agents and the injured party;

(iv) The injured party's justifiable reliance on the state's affirmative undertaking.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions that have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined in section 2305.113 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees, and, whether or not

such insurance is purchased, may, to the extent that its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorney's fees, damage, loss, or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of the indemnified person's duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify those persons, or to agree to so indemnify, shall reserve any funds that are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or, if the hospital requests the superintendent to do so, the superintendent shall recommend, a specific amount for any period that, in the superintendent's opinion, represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery that the claimant receives or is entitled to. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action, except a civil action for ten thousand dollars or less, that is filed in the court of claims.

(F) A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims that has exclusive, original jurisdiction

to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. The officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

(G) If a claim lies against an officer or employee who is a member of the Ohio national guard, and the officer or employee was, at the time of the act or omission complained of, subject to the "Federal Tort Claims Act," 60 Stat. 842 (1946), 28 U.S.C. 2671, et seq., the Federal Tort Claims Act is the exclusive remedy of the claimant and the state has no liability under this section.

(H) If an inmate of a state correctional institution has a claim against the state for the loss of or damage to property and the amount claimed does not exceed three hundred dollars, before commencing an action against the state in the court of claims, the inmate shall file a claim for the loss or damage under the rules adopted by the director of rehabilitation and correction pursuant to this division. The inmate shall file the claim within the time allowed for commencement of a civil action under section 2743.16 of the Revised Code. If the state admits or compromises the claim, the director shall make payment from a fund designated by the director for that purpose. If the state denies the claim or does not compromise the claim at least sixty days prior to expiration of the time allowed for commencement of a civil action based upon the loss or damage under section 2743.16 of the Revised Code, the inmate may commence an action in the court of claims under this chapter to recover damages for the loss or damage.

The director of rehabilitation and correction shall adopt rules pursuant to Chapter 119. of the Revised Code to implement this division.

Last updated August 9, 2021 at 11:25 AM

Available Versions of this Section

September 10, 2012 – House Bill 487 - 129th General Assembly

September 30, 2021 – Amended by House Bill 110 - 134th General Assembly

Section 2743.03 | Court of claims.

Effective: *June 23, 2021* ***Latest Legislation:*** *Senate Bill 22 - 134th General Assembly*

(A)(1) There is hereby created a court of claims. Except as provided under section 107.43 of the Revised Code, the court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code and exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims. The court shall have full equity powers in all actions within its jurisdiction and may entertain and determine all counterclaims, cross-claims, and third-party claims.

(2) If the claimant in a civil action as described in division (A)(1) of this section also files a claim for a declaratory judgment, injunctive relief, or other equitable relief against the state that arises out of the same circumstances that gave rise to the civil action described in division (A)(1) of this section, the court of claims has exclusive, original jurisdiction to hear and determine that claim in that civil action. This division does not affect, and shall not be construed as affecting, the original jurisdiction of another court of this state to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief.

(3) In addition to its exclusive, original jurisdiction as conferred by divisions (A)(1) and (2) of this section, the court of claims has exclusive, original jurisdiction as follows:

(a) As described in division (F) of section 2743.02, division (B) of section 3335.03, and division (C) of section 5903.02 of the Revised Code;

(b) Under section 2743.75 of the Revised Code to hear complaints alleging a denial of access to public records in violation of division (B) of section 149.43 of the Revised Code, regardless of whether the public office or person responsible for public records is an office or employee of the state or of a political subdivision.

(B) The court of claims shall sit in Franklin county, its hearings shall be public, and it shall consist of incumbent justices or judges of the supreme court, courts of appeals, or courts of common pleas, or retired justices or judges eligible for active duty pursuant to division (C) of Section 6 of Article IV, Ohio Constitution, sitting by temporary assignment of the chief justice of the supreme court. The chief justice may direct the court to sit in any county for cases on removal upon a showing of substantial hardship and whenever justice dictates.

(C)(1) A civil action against the state shall be heard and determined by a single judge. Upon application by the claimant or the state, the chief justice of the supreme court may assign a panel of three judges to hear and determine a civil action presenting novel or complex issues of law or fact. Concurrence of two members of the panel is necessary for any judgment or order.

(2) Whenever the chief justice of the supreme court believes an equitable resolution of a case will be expedited, the chief justice may appoint magistrates in accordance with Civil Rule 53 to hear the case.

(3) When any dispute under division (B) of section 153.12 of the Revised Code is brought to the court of claims, upon request of either party to the dispute, the chief justice of the supreme court shall appoint a single referee or a panel of three referees. The referees need not be attorneys, but shall be persons knowledgeable about construction contract law, a member of the construction industry panel of the American arbitration association, or an individual or individuals deemed qualified by the chief justice to serve. No person shall serve as a referee if that person has been employed by an affected state agency or a contractor or subcontractor involved in the dispute at any time in the preceding five years.

Proceedings governing referees shall be in accordance with Civil Rule 53, except as modified by this division. The referee or panel of referees shall submit its report, which shall include a recommendation and finding of fact, to the judge assigned to the case by the chief justice, within thirty days of the conclusion of the hearings. Referees appointed pursuant to this division shall be compensated on a per diem basis at the same rate as is paid to judges of the court and also shall be paid their expenses. If a single referee is appointed or a panel of three referees is appointed, then, with respect to one referee of the panel, the compensation and expenses of the referee shall not be taxed as part of the costs in the case but shall be included in the budget of the court. If a panel of three referees is appointed, the compensation and expenses of the two remaining referees shall be taxed as costs of the case.

All costs of a case shall be apportioned among the parties. The court may not require that any party deposit with the court cash, bonds, or other security in excess of two hundred dollars to guarantee payment of costs without the prior approval in each case of the chief justice.

(4) An appeal from a decision of the attorney general pursuant to sections 2743.51 to 2743.72 of the Revised Code shall be heard and determined by the court of claims.

(D) The Rules of Civil Procedure shall govern practice and procedure in all actions in the court of claims, except insofar as inconsistent with this chapter. The supreme court may promulgate rules governing practice and procedure in actions in the court as provided in Section 5 of Article IV, Ohio Constitution.

(E)(1) A party who files a counterclaim against the state or makes the state a third-party defendant in an action commenced in any court, other than the court of claims, shall file a petition for removal in the court of claims. The petition shall state the basis for removal, be accompanied by a copy of all process, pleadings, and other papers served upon the petitioner, and shall be signed in accordance with Civil Rule 11. A petition for removal based

on a counterclaim shall be filed within twenty-eight days after service of the counterclaim of the petitioner. A petition for removal based on third-party practice shall be filed within twenty-eight days after the filing of the third-party complaint of the petitioner.

(2) Within seven days after filing a petition for removal, the petitioner shall give written notice to the parties, and shall file a copy of the petition with the clerk of the court in which the action was brought originally. The filing effects the removal of the action to the court of claims, and the clerk of the court where the action was brought shall forward all papers in the case to the court of claims. The court of claims shall adjudicate all civil actions removed. The court may remand a civil action to the court in which it originated upon a finding that the removal petition does not justify removal, or upon a finding that the state is no longer a party.

(3) Bonds, undertakings, or security and injunctions, attachments, sequestrations, or other orders issued prior to removal remain in effect until dissolved or modified by the court of claims.

Available Versions of this Section

July 10, 2014 – House Bill 261 - 130th General Assembly

September 28, 2016 – Amended by Senate Bill 321 - 131st General Assembly

June 23, 2021 – Amended by Senate Bill 22 - 134th General Assembly