

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JOSHUA R. CARTER,
individually and on behalf of others similarly situated,
Plaintiff - Appellant,

vs.

**CURATORS OF THE UNIVERSITY OF MISSOURI, GEORGE
HARRIS, M.D., CARY CHELLADURAI, and KRISTEN KLEFFNER,**
Defendants - Respondents.

**On Appeal from the Circuit Court of Jackson County
Honorable Adam Caine, Circuit Judge
Case No. 2316-CV15651**

BRIEF OF THE APPELLANT

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Table of Contents

Table of Authorities	6
Jurisdictional Statement.....	9
Statement of Facts.....	10
A. Overview	10
B. Background.....	11
1. The Program	11
2. Mr. Carter’s enrollment and first year	11
3. Alternative curriculum plan	12
4. Impact of the ACP on Mr. Carter’s education.....	15
5. Withdrawal and request for transcripts.....	17
C. Proceedings below	18
1. Original petition and the University’s loss of accreditation.....	18
2. Refiled petition and motion to dismiss	18
3. Hearings and judgments	21
Points Relied On	26
I. (Error in holding limitation period began to accrue in 2012)	26
II. (Continuing wrong doctrine obviated application of statute of limitations)	27
III. (Breach of accreditation promise was actionable breach of contract).....	28
IV. (Breach of promise to provide compliant transcripts was actionable breach of contract)	29
V. (Misrepresentation that academic probation was not available was actionable breach of contract).....	30
VI. (Breach of promise that repeated coursework would adjust GPA was actionable breach of contract).....	31
Argument.....	32

Standard of Review as to All Points	32
I. (Error in holding limitation period began to accrue in 2012)	33
Preservation Statement.....	33
Additional Standard of Review	33
A. Mr. Carter’s breach of contract claim falls within the five-year statute of limitations in § 516.120, R.S.Mo.	35
B. Mr. Carter’s injury was not capable of ascertainment where he reasonably relied on the expert advice of university professionals and did not double-check the validity of their recommendation as he was under no legal obligation to do so.	36
C. Instead, Mr. Carter’s damages were capable of ascertainment, and the statute of limitations began to run when he received written notice alerting him to the legal wrong in March 2013.	40
D. At most, when Mr. Carter’s cause of action accrued is a question of fact for the jury because reasonable minds could reach different conclusions as to when he was put on notice of a potential legal wrong.	44
II. (Continuing wrong doctrine obviated application of statute of limitations)	46
Preservation Statement.....	46
A. Where a plaintiff suffers a continuing wrong, it delays the start of the limitation period.	47
B. The University’s false representations that all six years of the Program were accredited created a continuing injury preventing the statute of limitations from running until Mr. Carter withdrew from the Program.....	49
C. The University’s failure and refusal to provide transcripts containing separate grade point averages for undergraduate and graduate work also created a continuing injury preventing the statute of limitations from running until Mr. Carter withdrew from the Program.....	51

III. (Breach of accreditation promise was actionable breach of contract).....	53
Preservation Statement.....	53
Additional Standard of Review	53
A. A student may bring an action for breach of contract against a university where the university failed to honor an identifiable contractual promise.	54
B. Mr. Carter made a sufficient breach of contract claim, as the University marketed its six-year program as fully accredited and collected a higher tuition from students enrolled in the Program versus undergraduate students.....	58
IV. (Breach of promise to provide compliant transcripts was actionable breach of contract)	60
Preservation Statement.....	60
A. To form a contractual obligation, a university policy must be concrete and mandatory and not aspirational in nature.....	61
B. Taking Mr. Carter’s allegations as true, the University had a mandatory obligation to provide him with a transcript containing separate grade point averages for his undergraduate and graduate level coursework.	63
V. (Misrepresentation that academic probation was not available was actionable breach of contract).....	66
Preservation Statement.....	66
VI. (Breach of promise that repeated coursework would adjust GPA was actionable breach of contract).....	69
Preservation Statement.....	69
Conclusion	73
Certificate of Compliance	73
Certificate of Service.....	74

Appendix.....	(filed separately)
Order and Judgment of Dismissal (D64) (Mar. 7, 2025)	A1
Judgment of Dismissal (D63) (May 3, 2024)	A3
Order in Case No. 1816-CV05589 (D53) (Nov. 15, 2019).....	A5
First Amended Class Action Petition for Damages (D30)	
(Dec. 11, 2023).....	A6
§ 516.100, R.S.Mo.....	A29
§ 516.110, R.S.Mo.....	A31
§ 516.120, R.S.Mo.....	A33
§ 516.230, R.S.Mo.....	A36

Table of Authorities

Cases

<i>Baier v. Darden Restaurants</i> , 420 S.W.3d 733 (Mo. App. 2014)	73
<i>Balk v. Cent. Mo. Elec. Coop.</i> , 966 S.W.2d 15 (Mo. App. 1997)	50
<i>Boland v. St. Luke’s Health Sys., Inc.</i> , 471 S.W.3d 703 (Mo. banc 2015)	37
<i>Brantle v. Curators of Univ. of Mo.</i> , 616 S.W.3d 494 (Mo. App. 2020)	33, 35
<i>Bus. Men’s Assur. Co. of Am. v. Graham</i> , 891 S.W.2d 438 (Mo. App. 1994)	37
<i>Capital One Bank v. Creed</i> , 220 S.W.3d 874 (Mo. App. 2007).....	36
<i>City of Lake St. Louis v. City of O’Fallon</i> , 324 S.W.3d 756 (Mo. banc 2010)	33, 72
<i>Cook v. DeSoto Fuels, Inc.</i> , 169 S.W.3d 94 (Mo. App. 2005)	50
<i>D.A.N. Joint Venture, III v. Clark</i> , 218 S.W.3d 455 (Mo. App. 2006)	33
<i>Dannenhauer v. Briscoe</i> , 698 S.W.3d 794 (Mo. App. 2024)	37
<i>Dannenhauer v. Dimmit</i> , 698 S.W.3d 797 (Mo. App. 2023).....	48
<i>Davis v. Laclede Gas Co.</i> , 603 S.W.2d 554 (Mo. banc 1980)	28, 48-49, 51-52
<i>Doe v. Univ. of Mo.</i> , No. 19-CV-04229-NKL, 2022 WL 4043458 (W.D.Mo. Aug. 30, 2022).....	30-32, 63-64, 66, 69, 72
<i>Doyle v. Crane</i> , 200 S.W.3d 581 (Mo. App. 2006)	35
<i>Dumler v. Nationstar Mortg., LLC</i> , 585 S.W.3d 343 (Mo. App. 2019)	28, 49-50, 52
<i>Eckel v. Eckel</i> , 540 S.W.3d 476 (Mo. App. 2018)	38
<i>Ferrellgas, Inc. v. Edward A. Smith, P.C.</i> , 190 S.W.3d 615 (Mo. App. 2006)	45

<i>Fueston v. Burns and McDonnell Eng'g Co.</i> , 877 S.W.2d 631 (Mo. App. 1994)	34
<i>Gerken v. Sherman</i> , 351 S.W.3d 1 (Mo. App. 2011)	38
<i>Grewell v. State Farm Mut. Auto. Ins. Co., Inc.</i> , 102 S.W.3d 33 (Mo. banc 2003)	55
<i>Heintz v. Swimmer</i> , 922 S.W.2d 772 (Mo. App. 1996)	45
<i>Huffman v. Credit Union of Tex.</i> , 758 F.3d 963 (8th Cir. 2014)	27, 42-44
<i>Lomax v. Sewell</i> , 1 S.W.3d 548 (Mo. App. 1999)	35, 46
<i>Lucero v. Curators of Univ. of Mo.</i> , 400 S.W.3d 1 (Mo. App. 2013)	29-32, 56, 62, 69
<i>Martin v. Crowley, Wade & Milstead, Inc.</i> , 702 S.W.2d 57 (Mo. banc 1985)	27, 37-39
<i>Martin v. Lindenwood Univ.</i> , No. 4:20-CV-1128RLW, 2021 WL 3077665 (E.D.Mo. July 21, 2021)	29, 57-59
<i>Mayes v. St. Luke's Hosp. of Kan. City</i> , 430 S.W.3d 260 (Mo. banc 2014)	34, 47, 61, 67, 70
<i>McDonald v. Chamber of Comm. of Indep.</i> , 581 S.W.3d 110 (Mo. App. 2019)	54
<i>Moore v. Armed Forces Bank, N.A.</i> , 534 S.W.3d 323 (Mo. App. 2017)	55-56
<i>Moynihan v. Gunn</i> , 204 S.W.3d 230 (Mo. App. 2006)	33
<i>Niedermeyer v. Curators of the Univ. of Mo.</i> , 61 Mo. App. 654 (1895)	29, 32, 56-57, 73
<i>Pentecost v. Webster</i> , 674 S.W.3d 195 (Mo. App. 2023)	27, 43-44

<i>Powell v. Chaminade Coll. Preparatory, Inc.</i> , 197 S.W.3d 576 (Mo. banc 2006)	46
<i>Ruhling v. Robert Dawes Const. Co.</i> , 610 S.W.2d 403 (Mo. App. 1980)	36
<i>Smock v. Assoc. Elec. Coop., Inc.</i> , 567 S.W.3d 211 (Mo. App. 2018)	28, 49
<i>Soueidan v. St. Louis Univ.</i> , 926 F.3d 1029 (8th Cir. 2019)	30-32, 62-63, 72
<i>Thomas v. Grant Thornton, LLP</i> , 478 S.W.3d 440 (Mo. App. 2015)	27, 41-42, 44
<i>Tuttle v. Dobbs Tire & Auto Ctrs., Inc.</i> , 590 S.W.3d 307 (Mo. banc 2019).	54-55
<i>Twin Chimneys Homeowners Ass’n v. J.E. Jones Constr. Co.</i> , 168 S.W.3d 488 (Mo. App. 2005)	28, 50
<i>Vogt v. Emmons</i> , 158 S.W.3d 243 (Mo. App. 2005)	33
Constitution of Missouri	
Art. V, § 3	10
Revised Statutes of Missouri	
§ 477.070	10
§ 516.100	38, 44, 48
§ 516.110	36
§ 516.120	27, 34, 36, 45, 47
§ 516.230	27, 34, 45
Missouri Supreme Court Rules	
Rule 55.03	75
Rule 55.08	35
Rule 84.04	61
Rule 84.06	74

Rules of the Missouri Court of Appeals, Western District

Rule 41.....	74
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Other authorities

BLACK’S LAW DICT. (6th ed. 1990).....	65
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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Jackson County dismissing the plaintiff's claims for breach of contract, promissory estoppel, and unjust enrichment.

This case does not involve the validity of a Missouri statute or constitutional provision or of a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Jackson County. Under § 477.070, R.S.Mo., venue lies in the Western District.

Statement of Facts

A. Overview

In 2011, Joshua Carter enrolled in the University of Missouri-Kansas City's six-year combined Bachelor of Arts/Doctor of Medicine degree program (D30 pp. 2, 4). The Program allowed students, including Mr. Carter, to complete undergraduate and medical coursework concurrently while also participating in clinical training (D30 p. 2). It required students to satisfy certain academic standards, including maintaining a minimum science GPA (D30 pp. 4-5).

In the summer of 2012, Mr. Carter failed a second-year course and university administrators informed him that he either repeat his first-year courses and complete additional elective coursework to improve his science GPA or withdraw from the Program (D30 pp. 7-8). Mr. Carter requested to be placed on academic probation instead, consistent with University policy, but his request was denied (D30 pp. 8-10). Although he completed the required alternate curriculum plan, University administrators failed to adjust his science GPA as they had represented (D30 pp. 11-12).

Mr. Carter ultimately withdrew from the Program and filed an action against the University and its administrators for breach of contract (D30 pp. 1, 3-4, 14). The defendants moved to dismiss, arguing that his claims were time barred and insufficiently pleaded (D34 pp. 12-23; D38; D48 pp. 3-10). The trial court granted the motions and dismissed all claims with prejudice (D63; D64). Mr. Carter appeals (D62).

B. Background

1. The Program¹

In 2011, the University of Missouri-Kansas City (“the University”) offered a six-year program through its School of Medicine that enabled students to earn both a Bachelor of Arts and a Doctor of Medicine degree in just six years (“the Program”) (D30 pp. 2, 4). The Program allowed students to complete undergraduate and medical coursework concurrently while gaining practical clinical experience through docent groups at local hospitals (D30 p. 2).

Eligibility for enrollment in the Program generally extended to students who had recently graduated from high school or completed their first year of undergraduate college (D30 p. 2). Participants were responsible for typical educational expenses including room, board, books, and school supplies (D30 p. 2), as well as an average annual tuition exceeding \$25,000 (D30 p. 2). Students in the Program were ineligible for undergraduate tuition rates and scholarship opportunities (D30 p. 16).

2. Mr. Carter’s enrollment and first year

In the fall of 2011, Joshua Carter enrolled in the Program (D30 p. 2). At that time, the Council on Evaluation’s Policy Manual & Guidelines (“COE Manual”) governed the Program’s academic and evaluation policies (D30 p. 4). According to the COE Manual and the University’s Medical Student

¹ Because the trial court granted the defendants’ motion to dismiss, the facts stated here are taken from Mr. Carter’s amended petition (D30). *See City of Lake St. Louis v. City of O’Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010).

Handbook (“the Handbook”), Mr. Carter was required to meet four criteria to progress from Year 1 to Year 2 of the Program:

- 1) Satisfactory completion of two semesters in Year 1, including the required courses listed below ...
- 2) Arts& Sciences: at least 19 acceptable credit hours
- 3) GPA: Cumulative of at least 2.80 or higher
- 4) Science GPA: Cumulative of at least 2.80 or higher

(D30 pp. 4-5).

The COE Manual defined “satisfactory completion” as earning a passing grade of “C-” or higher (D30 p. 5).

Mr. Carter met all progression requirements and finished his first academic year ranked in the top 5% of his class for decent performance (D30 pp. 5-6). He maintained both cumulative and science GPAs above the 2.80 threshold and passed all required courses (D30 p. 5). During the fall semester, he completed 22 credit hours with a 3.25 GPA and in the spring semester he earned a 3.40 GPA across 17 credit hours (D30 p. 5).

3. Alternative curriculum plan

The COE Manual states the Program includes a “Year 1 Alternate Program” for students who experience academic difficulties during their first year and “require additional time to successfully complete requirements for promotion” to Year 2 (D30 p. 6). A student is placed in the alternate program if he has not met the criteria for either dismissal or promotion by May 31st of the first year (D30 p. 6). A student fails to meet the promotion criteria if he (1) earns a failing grade of “D+/-,” “F,” “WF,” “No Credit,” or “Fail” in a

required course, or (2) holds an insufficient cumulative science GPA for promotion (D30 p. 6).

Based on his academic performance in his first two semesters, Mr. Carter believed he had satisfied all requirements for promotion to Year 2 (D30 p. 6). So, during the summer after his first year, he enrolled in several Year 2 courses (D30 p. 7). While he earned passing grades in elementary organic chemistry and his medical clinic course, he received a “D” in cell biology (D30 p. 7).

Shortly before the next fall semester began, Kristen Kleffner, the senior education team coordinator for Year 1 and 2 medical students, e-mailed Mr. Carter to discuss the impact of his failing grade on his program status (D30 pp. 4, 7-8). Ms. Kleffner informed him that he either could enter an Alternate Curriculum Plan (“ACP”), which would require repeating a substantial portion of his first-year coursework, or withdraw from the Program entirely (D30 pp. 7-8).

Under the COE Manual, a Year 2 student is considered to have academic difficulties if he earns a failing grade of “D,” “F,” “WF,” “No Credit,” or “Fail” in a required course (D30 p. 7). If so, the manual directs that the student be placed on academic probation but otherwise permits him to continue his Year 2 coursework (D30 p. 7).

Mr. Carter responded to Ms. Kleffner’s e-mail the same day, requesting permission to remain in his Year 2 courses (D30 p. 8). He wrote:

I have attached a PDF file showing how my schedule is currently planned out. Since Cell Biology is not a prerequisite for any other course that I would take this fall, and since Genetics and

Biochemistry are going to be needed as well, I was able to add Cell Bio to my schedule without time conflicts or prerequisite issues. In reviewing the UMKC handbook, the recent summer session is part of the SECOND year and not the first. It therefore looks like the rules allow me to institute the above plan and there are no conflicting prerequisite issues.

[...] I would ask to be given the chance to put the above plan into action before being required to enter an Alternate pathway.

Thank you for your help. Sincerely,

Josh Carter.

(D30 p. 8) (emphasis removed).

Mr. Carter also forwarded this e-mail to Cary Chelladurai, the advisor for Years 1 and 2 medical students and the manager of affairs (D30 pp. 4, 8). A few days later, Ms. Chelladurai denied his request to be placed on academic probation, calling it “unrealistic and not approved” (D30 p. 8). She stated that by failing cell biology, Mr. Carter automatically would be placed on a seven-year track (D30 p. 9).

Less than a week later, Ms. Chelladurai and Ms. Kleffner e-mailed Mr. Carter an ACP to sign (D30 p. 9). The plan required him to repeat cell biology, a second-year course, and functional anatomy, which he already had passed (D30 pp. 9-10, 12). It also required several additional upper-level biology courses including some with laboratory components, which it promised would also count toward his science GPA (D30 p. 10).

In their e-mail, Ms. Chelladurai and Ms. Kleffner stated that under the ACP, Mr. Carter would complete his bachelor’s degree requirements by his “Year 4 Campus Semester” and that the required courses – including the

elective biology classes – would help rehabilitate his science GPA (D30 pp. 9-10, 13).

The COE Manual also provides that “[i]f a science course is repeated, only the final grade is used in the science GPA calculation (the initial grade earned in a repeated course will be dropped only from the cumulative science calculation)” (D30 p. 10).

On receiving the ACP, Mr. Carter faxed a letter to Dr. George Harris, Assistant Dean of the Medical School, expressing his concern about being required to repeat his first-year coursework (D30 p. 9). Dr. Harris responded that he would “only sign the alternate curriculum plan as designed and sent by” Ms. Kleffner and Ms. Chelladurai (D30 p. 9).

Later that day, Dr. Harris spoke by phone with Mr. Carter’s father (D30 p. 9). During the conversation, he assured Mr. Carter’s father that repeating the Year 1 coursework was required under departmental guidelines and the repeated classes would strengthen Mr. Carter’s science GPA (D30 pp. 9, 13).

After this discussion, Mr. Carter chose to remain in the Program and entered into the ACP Ms. Kleffner and Ms. Chelladurai had designed (D30 pp. 9-10).

4. Impact of the ACP on Mr. Carter’s education

Between February and April 2013, Mr. Carter and Ms. Kleffner exchanged a series of e-mails concerning how his new grades would affect his GPA (D30 p. 11). In February 2013, Ms. Kleffner assured Mr. Carter that his GPA would be adjusted by each new grade replacing the corresponding prior

grade from his freshman year (D30 p. 11). She also apologized to him for making him “the guinea pig for [her] to learn this” (D30 p. 11).

On March 8, 2013, however, the University’s assistant registrar informed Ms. Kleffner that GPA adjustments were permitted only when a student had earned a “D+” or lower grade in the original course (D30 p. 11). Shortly thereafter, Ms. Kleffner then e-mailed Mr. Carter and explained that he did not qualify for a GPA adjustment in functional anatomy, a course the ACP had required him to retake, because his original grade in that course was a “C,” not a “D+” or below (D30 p. 11).

In April 2013, Ms. Kleffner further e-mailed Mr. Carter that the upper-level elective biology courses his ACP required no longer would be counted toward his undergraduate biology degree and also would be excluded from his science GPA (D30 pp. 11-13). Despite this, she instructed him that those courses remained required under the ACP and therefore he had to complete them (D30 p. 12).

Mr. Carter completed the ACP in May 2013 (D30 p. 10). Over three semesters, he earned an “A” in every course that were supposed to count toward his science GPA, including biology II, biology II lab, histology, histology lab, and parasitology (D30 p. 10). At the conclusion of the spring 2013 semester, Ms. Kleffner emailed Mr. Carter to congratulate him on earning a 4.0 GPA (D30 pp. 10-11).

In October 2013, Ms. Kleffner left Mr. Carter a voicemail informing him that his new grade in cell biology would no longer replace his original failing grade in GPA calculations “due to accreditation demands” (D30 p. 11).

Instead, the Program retroactively would calculate his science GPA using the average of his two cell biology grades (D30 p. 11). The other courses in which he scored “As” also would not count toward his science GPA and also would not count toward his undergraduate degree in biology, either (D30 p. 12). Following this change, Mr. Carter’s science GPA fell to just above the Program’s minimum 2.80 requirement (D30 p. 12).

As a result, despite earning passing grades during the fall 2013 and spring 2014 semesters, Ms. Kleffner informed Mr. Carter that he would be required either to repeat his second-year courses or withdraw from the Program due to his low science GPA (D30 p. 12).

5. Withdrawal and request for transcripts

Mr. Carter ultimately withdrew from the Program in December 2014 and graduated with a Bachelor of Liberal Arts degree (D30 p. 14).

Two years later, Mr. Carter sent the University a letter requesting a transcript reflecting separate GPAs for his undergraduate coursework and the classes he completed as part of the Program (D30 p. 14). According to the University’s registration and records webpage, a student transcript “**will** contain ‘separate grade point averages for undergraduate, graduate, medicine, dentistry, law, and pharmacy programs’” (D30 p. 14) (emphasis in the original).

Nearly five months later, the University issued Mr. Carter a transcript that did not comply with his request to separate his undergraduate and graduate-level coursework (D30 p. 14). Instead, the transcript categorized all of Mr. Carter’s courses, including those he completed through the Program,

as undergraduate (D30 p. 14). The registrar explained it was “impossible to change undergraduate [medical school] credits” to graduate-level credits without jeopardizing “the integrity of student records while enforcing academic policies” (D30 p. 14).

C. Proceedings below

1. Original petition and the University’s loss of accreditation

In March 2018, Mr. Carter filed an action against the University (through its curators), as well as Dr. Harris, Ms. Chelladurai, and Ms. Kleffner individually (D30 p. 1, 3-4). The defendants removed the case to U.S. District Court in June 2018, but it was remanded to the Circuit Court of Jackson County in March 2019 and was assigned to the Honorable Jalilah Otto (D30 p. 1).

After remand, Dr. Harris filed a motion to dismiss the petition, which the court denied (D53).

In August 2021, while Mr. Carter’s original petition was still pending, the University admitted that the Program was not fully accredited (D30 p. 15). According to the University’s accreditation documents, only students enrolled in Years 3 through 6 of the Program were included in the accreditor’s review (D30 p. 15). The documents made no reference to students enrolled in the first two years of the Program or coursework completed during those years (D30 p. 16).

Until the University’s admission in August 2021, Mr. Carter had believed the Program was fully accredited (D30 p. 15). The University knowingly misled students including Mr. Carter into believing the Program

was fully accredited (D30 pp. 15-17). The University had represented to students that they would “be taking medical school coursework from Day 1” and that by entering the Program, they would be completing “coursework that would count towards their medical degree” (D30 p. 16). The University further promised students that “[u]pon entering the B.A./M.D. program, students [were] classified as professional students,” they would “begin studying medicine on their first day,” and “clinical experience begin[s] immediately” (D30 p. 16).

2. Refiled petition and motion to dismiss

In July 2022, three years after the case was remanded from federal court, Mr. Carter voluntarily dismissed it without prejudice (D30 pp. 1-2). Less than a year later, in June 2023, he refiled the action against the University and its administrators as a class action and it was assigned to the Honorable Adam Caine (D29). He later filed an amended petition in December 2023 (D30).

In his amended petition, Mr. Carter stated three counts against all defendants: breach of contract, promissory estoppel, and unjust enrichment (D30 pp. 20-22). In each count, he alleged he entered into a contract with the University and its administrators when he enrolled in the Program and that they failed to perform their contractual obligations (D30 pp. 20-22). He further alleged that as a result, he suffered substantial financial, educational, and professional harm (D30 pp. 9-10, 15-18). He claimed this unnecessarily prolonged his medical education, requiring him to pay additional tuition to repeat coursework he already had completed (D30 pp. 9-

10, 16). He also alleged he paid premium tuition for a “substandard, unaccredited” program (D30 pp. 15-17) and was unjustly denied eligibility for undergraduate scholarships because he was classified as a professional student (D30 pp. 15-17). Mr. Carter asserted he sustained significant financial damages (D30 pp. 9-10, 15-16).

Mr. Carter also alleged continuing harm to his educational and professional prospects (D30 pp. 14-15). He stated that because the University-issued transcript did not distinguish between his undergraduate and medical school coursework, his “undergraduate grade point average [was] lower than it would be if the grades for the medical/graduate courses were computed separately” (D30 pp. 14-15). He further alleged that this inaccurate transcript caused him to be rejected from other academic programs, including law school, due to its artificially low GPA (D30 pp. 15, 17-18).

The University moved to dismiss Mr. Carter’s amended petition (D32). It first argued that all his claims were barred by the five-year statute of limitations in § 516.120, R.S.Mo. (D34 pp. 12-17). The University argued that Mr. Carter’s original petition filed in March 2018 was outside the five-year limitations period because the cause of action accrued in August 2012 when he entered the ACP instead of being placed on academic probation (D34 pp. 13-14). The University further argued that Mr. Carter failed to “substantively state a claim” for any of the three counts (D34 pp. 17-23). As to the breach of contract claim, the University argued that mere enrollment did not create a contract and the provisions in the COE Manual and the

Handbook did not constitute “a specific contractual promise that was breached” (D34 pp. 17-19) (emphasis removed).

Ms. Chelladurai and Ms. Kleffner joined the University’s motion (D36). They additionally argued the claims against them should be dismissed because Mr. Carter did not allege any contract with them in their individual capacities (D38 p. 3).

Mr. Carter opposed the motions to dismiss, responding that his claims were timely and sufficiently pleaded (D40 pp. 5-8). He asserted that the claims were timely for two reasons (D40 pp. 5-7). First, he argued that his cause of action did not accrue in August 2012 because the continuing wrong doctrine delayed the statute of limitations (D40 pp. 6-7). Second, he argued that whether he knew or should have known of a “potentially actionable injury” was a question of fact for the jury (D40 p. 7). Mr. Carter also argued that he sufficiently stated a breach of contract claim by identifying specific contractual obligations in the University’s policies and representations the University and its administrators made but not honor (D40 pp. 7-8).

3. Hearings and judgments

The trial court held a hearing on the joint motion to dismiss in March 2024 (Tr.1 at 1).²

At the hearing, the University argued that the amended petition showed on its face that Mr. Carter was capable of ascertaining his injuries in August 2012 when he was denied placement on academic probation (Tr.1 at

² This brief cites the two separately paginated transcript volumes of the two motion hearings in chronological order as “Tr.1” and “Tr.2”

7-9). It contended that not all damages must be ascertainable for the statute of limitations to begin running, only some, and so, the continuing wrong doctrine could not save Mr. Carter's claims (Tr.1 at 10-11). The University argued that because Mr. Carter's cause of action accrued in August 2012 the five-year limitation period expired before he filed his lawsuit, warranting dismissal (Tr.1 at 9).

As to Mr. Carter's breach of contract claim, the University argued he failed to identify any specific contractual promise that the University had made and failed to honor (Tr.1 at 13-14). It argued that the policies Mr. Carter identified lacked the mutuality necessary to create binding contractual obligations and so could not form the basis of a breach of contract claim (Tr.1 at 14-16). The University also argued that amending the petition would not cure these defects, as "an amendment cannot change the fact that [Mr. Carter's] claims are time-barred, and he can't state a claim" (Tr.1 at 18). It requested dismissal with prejudice (Tr.1 at 19).

In response, Mr. Carter's counsel emphasized the case's "rather long procedural history," including the earlier proceedings before Judge Otto (Tr.1 at 20). He noted that before he had voluntarily dismissed, Judge Otto already had considered and rejected the defendants' timeliness arguments (Tr.1 at 20; D53). He acknowledged Judge Otto's ruling was not "necessarily res judicata" but argued that her rejection of the same arguments demonstrated that reasonable minds could differ as to whether the statute of limitations had run, making dismissal inappropriate (Tr.1 at 20-21, 23). He

also argued the continuing wrong doctrine tolled the limitation period because he suffered ongoing harm from the alleged breach (Tr.1 at 22).

The trial court took the matter under advisement (Tr.1 at 29) and then in May 2024, entered a judgment dismissing all claims against the University, Ms. Chelladurai, and Ms. Kleffner with prejudice (D63). The order did not specify the grounds for dismissal (D63).

In January 2025, Dr. Harris also moved to dismiss the claims against him (D48 p. 1). He argued “there is nothing unique in the Amended Petition as to Dr. Harris that would change the outcome” of the prior judgment and so the claims against him should equally be dismissed (D50 pp. 1-2). Dr. Harris reiterated the University and the other administrators’ arguments for dismissal, arguing Mr. Carter’s claims were both insufficiently pleaded and time-barred (D50 pp. 3-10).

Mr. Carter again opposed dismissal, arguing that the exact moment he knew or should have known of a potentially actionable injury was a question of fact for a jury (D52 pp. 4-6). He argued the statute of limitations had not expired because under the continuing wrong doctrine, he continued to sustain harm from day to day (D52 pp. 6-7). Finally, he argued his amended petition stated viable claims including for breach of contract (D52 pp. 7-11). He argued his breach of contract claim identified a clear contractual promise that was made and not honored, specifically, that he entered into the ACP based on representations by the University and its administrators, including Dr. Harris, regarding his education and GPA outcomes (D52 pp. 8-9).

The trial court held a hearing on Dr. Harris's motion in February 2025 (Tr.2 at 1). Dr. Harris reiterated his written arguments (Tr.2 at 3-13). He argued the statute of limitations began running in August 2012, when he allegedly failed to follow University policies, making all of Mr. Carter's claims untimely (Tr.2 at 5-7). He also challenged the applicability of the continuing wrong doctrine, asserting that his conduct occurred solely in August 2012 and so was a single, discrete event (Tr.2 at 8-9).

Dr. Harris also argued Mr. Carter's amended petition failed to state a claim (Tr.2 at 9-13). He argued the ACP was merely a document and its execution did not create a contract (Tr.2 at 10-12). He argued the deficiencies in Mr. Carter's pleading could not be cured by amendment, requiring dismissal with prejudice (Tr.2 at 13).

Mr. Carter responded a statute of limitations does not begin to run when the wrongful act occurs, but rather when the resulting damage becomes capable of ascertainment (Tr.2 at 15). He argued the damage from entering into the ACP was not discoverable until his GPA was affected, which did not occur until between March 2013 and summer 2013 (Tr.2 at 15-17, 19). So, he filed his March 2018 petition within the five-year limitation period (Tr.2 at 19).

Mr. Carter also argued that if "two potential conclusions" could reasonably be drawn from the evidence, the petition was "sufficient to survive a motion to dismiss" (Tr.2 at 20). He again noted Judge Otto previously had denied a similar motion to dismiss and analogized the differing rulings to

contradictory jury verdicts (Tr.2 at 21), making dismissal improper (Tr.2 at 21).

Mr. Carter also argued that his amended petition stated a valid breach of contract claim because the ACP, which he, Dr. Harris, and others had signed, constituted a distinct contract separate from the University's general policies (Tr.2 at 21). He argued the ACP contained specific promises regarding the academic consequences of completing it, he relied on those promises in signing, and Dr. Harris failed to honor them, which were facts sufficient to overcome a motion to dismiss (Tr.2 at 21-24).

The trial court again took the matter under advisement (Tr.2 at 29-31) and then entered judgment dismissing all claims against Dr. Harris with prejudice (D64). The order also stated "With the Court's prior order and judgment issued May 3, 2024 ... all pending claims have been finally disposed of and this is a final judgment in this case" (D64).

Mr. Carter timely moved to set aside or vacate the judgments dismissing his claims with prejudice (D58). He reiterated his arguments that the action was timely (D58 pp. 5-7) and his amended petition sufficiently stated a claim for breach of contract (D58 pp. 7-10). The University and its administrators jointly opposed the motion (D60).

Twelve days later, Mr. Carter timely appealed to this Court (D62). Following the filing of the notice of appeal, the trial court deemed the motion to set aside or vacate the judgments no longer at issue (D28 p. 17).

Points Relied On

- I. The trial court erred in dismissing Mr. Carter's breach of contract claim *because* the defendants' argument that the breach of contract claim was barred by the five-year statute of limitations in § 516.120, R.S.Mo., misapplied the law to the facts alleged in Mr. Carter's amended petition, taken as true and given their broadest reading, as the limitation period did not begin to run until the damages resulting from the University's conduct were capable of ascertainment *in that* Mr. Carter was not put on notice of a potentially actionable injury until after March 8, 2013, when he was notified of deficiencies in the ACP, he filed his original petition containing his breach of contract claim within five years of that discovery, and he refiled the action below within one year of dismissing the original petition, as the savings provision of § 516.230, R.S.Mo., allow.

Martin v. Crowley, Wade & Milstead, Inc., 702 S.W.2d 57

(Mo. banc 1985)

Thomas v. Grant Thornton, LLP, 478 S.W.3d 440 (Mo. App. 2015)

Huffman v. Credit Union of Tex., 758 F.3d 963 (8th Cir. 2014)

Pentecost v. Webster, 674 S.W.3d 195 (Mo. App. 2023)

II. The trial court erred in dismissing Mr. Carter's breach of contract claim *because* the defendants' argument that the breach of contract claim was barred by the five-year statute of limitations in § 516.120, R.S.Mo., misapplied the law to the facts alleged in Mr. Carter's amended petition, taken as true and given their broadest reading, even if Mr. Carter was put on notice of a potentially actionable injury in August 2012 when he was wrongfully enrolled in an the ACP *in that* the University's lack of accreditation for the first two years of the Program and the University's failure to provide transcripts containing separate grade point averages for undergraduate and graduate work were separate and continuing wrongs that delayed the limitation period from running.

Davis v. Laclede Gas Co., 603 S.W.2d 554 (Mo. banc 1980)

Dumler v. Nationstar Mortg., LLC, 585 S.W.3d 343 (Mo. App. 2019)

Smock v. Assoc. Elec. Coop., Inc., 567 S.W.3d 211 (Mo. App. 2018)

Twin Chimneys Homeowners Ass'n v. J.E. Jones Constr. Co.,
168 S.W.3d 488 (Mo. App. 2005)

III. The trial court erred in dismissing Mr. Carter's breach of contract claim *because* the defendants' argument that Mr. Carter failed to state a claim on which relief could be granted misapplied the law to the facts alleged in Mr. Carter's amended petition, taken as true and given their broadest reading, as the University made an identifiable contractual promise that it did not honor *in that* the University promised to Mr. Carter and other prospective students that its six-year medical school program was fully accredited and charged a premium tuition rate for all six years despite the first two years being excluded from accreditation documents.

Niedermeyer v. Curators of the Univ. of Mo., 61 Mo. App. 654 (1895)

Lucero v. Curators of Univ. of Mo., 400 S.W.3d 1 (Mo. App. 2013)

Martin v. Lindenwood Univ., No. 4:20-CV-1128RLW, 2021 WL 3077665
(E.D.Mo. July 21, 2021)

- IV. The trial court erred in dismissing Mr. Carter’s breach of contract claim *because* the defendants’ argument that Mr. Carter failed to state a claim on which relief could be granted misapplied the law to the facts alleged in Mr. Carter’s amended petition, taken as true and given their broadest reading, as the University and its administrators made an identifiable contractual promise that they did not honor *in that* the University promised to provide transcripts containing separate grade point averages for undergraduate and graduate work and then refused to provide Mr. Carter transcripts in compliance with the University’s promise.

Lucero v. Curators of Univ. of Mo., 400 S.W.3d 1 (Mo. App. 2013)

Soueidan v. St. Louis Univ., 926 F.3d 1029 (8th Cir. 2019)

Doe v. Univ. of Mo., No. 19-CV-04229-NKL, 2022 WL 4043458

(W.D.Mo. Aug. 30, 2022)

- V. The trial court erred in dismissing Mr. Carter’s breach of contract claim *because* the defendants’ argument that Mr. Carter failed to state a claim on which relief could be granted misapplied the law to the facts alleged in Mr. Carter’s amended petition, taken as true and given their broadest reading, as the University and its administrators made an identifiable contractual promise they did not honor *in that* the University’s policy mandated Mr. Carter be placed on academic probation after receiving a failing grade in a Year 2 course but administrators violated the policy and misrepresented to Mr. Carter that the only way for him to remain in the Program was to enter into an ACP and repeat his Year 1 coursework.

Lucero v. Curators of Univ. of Mo., 400 S.W.3d 1 (Mo. App. 2013)

Soueidan v. St. Louis Univ., 926 F.3d 1029 (8th Cir. 2019)

Doe v. Univ. of Mo., No. 19-CV-04229-NKL, 2022 WL 4043458

(W.D.Mo. Aug. 30, 2022)

VI. The trial court erred in dismissing Mr. Carter’s breach of contract claim *because* the defendants’ argument that Mr. Carter failed to state a claim on which relief could be granted misapplied the law to the facts alleged in Mr. Carter’s amended petition, taken as true and given their broadest reading, as the University and its administrators made an identifiable contractual promise they did not honor *in that* the University and administrators for the Program promised Mr. Carter that any repeated coursework would qualify to have his grade point average adjusted so that his newest grades would replace the previous one earned, but then after he completed the coursework they informed Mr. Carter that he no longer qualified for the adjustment.

Niedermeyer v. Curators of the Univ. of Mo., 61 Mo. App. 654 (1895)

Lucero v. Curators of Univ. of Mo., 400 S.W.3d 1 (Mo. App. 2013)

Soueidan v. St. Louis Univ., 926 F.3d 1029 (8th Cir. 2019)

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(W.D.Mo. Aug. 30, 2022)

Argument

Standard of Review for all points

This Court reviews a “trial court’s grant of a motion to dismiss *de novo*.” *Brantle v. Curators of Univ. of Mo.*, 616 S.W.3d 494, 497 (Mo. App. 2020).

“In reviewing the dismissal, this [C]ourt must give the petition its broadest intendment, and allegations therein must be construed favorably to the plaintiff.” *D.A.N. Joint Venture, III v. Clark*, 218 S.W.3d 455, 458 (Mo. App. 2006). The Court “takes a plaintiff’s averments as true and liberally grants plaintiff all reasonable inferences” *City of Lake St. Louis v. City of O’Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010).

“When the trial court fails to state a basis for its dismissal” this Court may “presume the dismissal was based on at least one of the grounds stated in the motion to dismiss.” *Moynihn v. Gunn*, 204 S.W.3d 230, 233 (Mo. App. 2006) (citation omitted). Further, this Court can affirm the trial court’s dismissal on any grounds that were before the trial court in the motion to dismiss, even if that specific ground was not relied upon by the trial court in its dismissal. *Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo. App. 2005).

For this reason, this brief addresses each of the defendants’ arguments for dismissing Mr. Carter’s breach of contract claim.

I. The trial court erred in dismissing Mr. Carter's breach of contract claim *because* the defendants' argument that the breach of contract claim was barred by the five-year statute of limitations in § 516.120, R.S.Mo., misapplied the law to the facts alleged in Mr. Carter's amended petition, taken as true and given their broadest reading, as the limitation period did not begin to run until the damages resulting from the University's conduct were capable of ascertainment *in that* Mr. Carter was not put on notice of a potentially actionable injury until after March 8, 2013, when he was notified of deficiencies in the ACP, he filed his original petition containing his breach of contract claim within five years of that discovery, and he refiled the action below within one year of dismissing the original petition, as the savings provision of § 516.230, R.S.Mo., allow.

Preservation Statement

Mr. Carter made the argument in this point in his suggestions in opposition to the University's motion to dismiss (D40 pp. 5-7) and in his motion to set aside or vacate the judgment (D58 pp. 5-7). Therefore, it is preserved for appellate review. *Mayes v. St. Luke's Hosp. of Kan. City*, 430 S.W.3d 260, 267 (Mo. banc 2014).

Additional Standard of Review

"A statute of limitations allows the cause of action to accrue and then cuts off the claim if suit is not filed within a certain period of time." *Fueston v. Burns and McDonnell Eng'g Co.*, 877 S.W.2d 631, 633 n. 3 (Mo. App. 1994). "The running of the applicable statute of limitations is an affirmative defense

and must be pleaded as such pursuant to Rule 55.08.” *Lomax v. Sewell*, 1 S.W.3d 548, 552 (Mo. App. 1999) (citation omitted).

“Whether a statute of limitations bars an action is a question of law, which is subject to *de novo* review.” *Brantle*, 616 S.W.3d at 497. “However, a petition will not be dismissed on the affirmative defense of the statute of limitations unless it is *absolutely clear* from the face of the petition that it is time barred.” *Doyle v. Crane*, 200 S.W.3d 581, 585 (Mo. App. 2006) (emphasis added). “Normally, the running of the statute is a question of law for the court to decide.” *Lomax*, 1 S.W.3d at 552 (citation omitted). “However, when a contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it is a question of fact for the jury to decide.” *Id.* at 552-53 (citations omitted).

* * *

The law of Missouri is that the five-year limitation period begins to run on a breach of contract claim after an injury is capable of ascertainment. Where the facts are uncontested, the trial court can decide whether the statute of limitations has run. But the issue becomes a factual question for the jury to decide where contradictory conclusions can be drawn from the evidence as to whether the period had run. Here, there was conflicting evidence as to whether Mr. Carter was put on notice of a potentially actionable injury in August 2012 or later. Taking his allegations as true and granting him all inferences, a reasonable juror could find he had not been. Nonetheless, the defendants argued Mr. Carter’s breach of contract claim was time barred as basis for dismissal. This misapplied the law.

A. Mr. Carter’s breach of contract claim falls within the five-year statute of limitations in § 516.120, R.S.Mo.

“The purpose of the statute of limitations is to prevent the assertion of stale claims.” *Ruhling v. Robert Dawes Const. Co.*, 610 S.W.2d 403, 406 (Mo. App. 1980) (citation omitted). The general rule in Missouri is “that actions on contracts must be brought within five years.” *Capital One Bank v. Creed*, 220 S.W.3d 874, 877-78 (Mo. App. 2007). Under § 516.120, R.S.Mo., a five-year limitation period applies to “[a]ll actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited”

The actions exempt from the five-year statute of limitations are:

- 1) An action upon any writing, whether sealed or unsealed, for the payment of money or property;
- 2) Actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of action shall accrue;
- 3) Actions for relief, not herein otherwise provided for.

§ 516.110, R.S.Mo. Instead, these actions fall within a separate ten-year limitation period. *Id.*

Mr. Carter’s contract with the University and its administrators does not fall into any of these exceptions. Therefore, the five-year statute of limitations applies.

B. Mr. Carter’s injury was not capable of ascertainment where he reasonably relied on the expert advice of university professionals and did not double-check the validity of their recommendation as he was under no legal obligation to do so.

Here, the defendants argued Mr. Carter’s breach of contract claim was barred by the five-year limitation period because he brought the action in March 2018 but the limitations period began to run in August 2012 when he entered into the ACP (D34 pp. 13-14; D50 pp. 3-10). The trial court dismissed Mr. Carter’s breach of contract claim against all defendants (D63; D64). This was error because Mr. Carter was not obligated to double-check the validity of the administrators’ professional recommendations and taking his allegations as true and granting him all inferences, a reasonable juror could find Mr. Carter did not ascertain his injuries until at least March 2013.

“To determine whether a statute of limitations bars recovery, it is necessary to establish when the cause of action accrued.” *Boland v. St. Luke’s Health Sys., Inc.*, 471 S.W.3d 703, 710 (Mo. banc 2015) (citation omitted). The “discovery of the damage is not the event that triggers the statute of limitations.” *Bus. Men’s Assur. Co. of Am. v. Graham*, 891 S.W.2d 438, 445 (Mo. App. 1994). Rather, the limitations period begins to run “when the cause of action accrues.” *Dannenhauer v. Briscoe*, 698 S.W.3d 794, 799 (Mo. App. 2024).

But “the mere occurrence of an injury does not necessarily coincide with the accrual of a cause of action.” *Martin v. Crowley, Wade & Milstead, Inc.*, 702 S.W.2d 57, 58 (Mo. banc 1985). A cause of action is *not* “deemed to accrue when the wrong is done or the technical breach of contract or duty

occurs” § 516.100, R.S.Mo. Instead, the period begins “when the damage resulting therefrom is sustained and is capable of ascertainment” *Id.*

“In other words, ‘a cause of action accrues when a plaintiff has some notice or awareness that he has suffered an injury or that another individual has committed a legal wrong which may result in harm to the plaintiff.’” *Eckel v. Eckel*, 540 S.W.3d 476, 486 (Mo. App. 2018) (citation omitted).

To determine whether the plaintiff had the requisite notice, Missouri uses the reasonable person standard. *Gerken v. Sherman*, 351 S.W.3d 1, 7 (Mo. App. 2011). This means an injury is capable of ascertainment when “a reasonable person would have been put on notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages.” *Id.*

But the law is well established that a plaintiff does not have an affirmative duty to investigate and uncover an injury resulting from the services of a professional. *Martin*, 702 S.W.2d at 58.

In *Martin*, property owners hired a professional engineering, architectural, and land-surveying corporation to survey their lot and determine a location to build their home. *Id.* at 57. The owners instructed them to set the house back fifty feet from the front property line and twelve feet east from the west property line. *Id.* A month later, the surveyors prepared a plot plan, staked the lot lines, and marked the intended house location. *Id.* The house then was constructed based on the stakes and the plot plan. *Id.*

Seven years later, the property owners discovered their house “was located only six feet from the true west property line rather than twelve.” *Id.* at 57-58. As a result of the misplacement, the home’s fair market value substantially decreased. *Id.* at 58. The owners then filed an action against the surveyor seeking damages, but the surveyor moved to dismiss, arguing that the claim was barred by the five-year statute of limitations. *Id.* It argued the improper placement of the home was an easily visible defect ascertainable by an inspection of the land or asking a neighbor. *Id.* at 58. The trial court agreed and sustained the surveyor’s motion and dismissed the case. *Id.* at 57.

The Supreme Court reversed the dismissal, holding that the owner’s damages were not capable of ascertainment at the time of the staking and plotting. *Id.* at 58. This was because holding otherwise “would impose upon plaintiffs an automatic, affirmative duty to double check the services provided by a professional expert.” *Id.* The property owners reasonably relied on the surveyor’s expertise and so “had not duty to double check” their work. *Id.* Therefore, the damages were not capable of ascertainment at the time the home was constructed, and the claim was timely. *Id.*

Here, the University and its administrators argued that Mr. Carter’s damages were capable of ascertainment in August 2012 when he signed the ACP, which would make his March 2018 action barred by the five-year statute of limitations (D34 pp. 13-14). But this is in error, because like the property owners in *Martin*, that would impose an affirmative duty on Mr.

Carter to double-check the services of the University's professional administrators.

Mr. Carter received an e-mail from an administrator on August 1, 2012, stating he would need to be enrolled in an ACP for the upcoming semester (D30 p. 8). He immediately responded, requesting to be placed on academic probation instead, which was permitted under the school's policies (D30 p. 8). But this request was rejected by three separate administrators (D30 pp. 8-9). Ms. Chelladurai called it "unrealistic and not approved" (D30 p. 8). She told Mr. Carter that failing a class had automatically placed him on a track to become a seven-year student (D30 p. 9). And Dr. Harris, the Assistant Dean of the Medical School, informed Mr. Carter there were no acceptable alternatives to the ACP Ms. Kleffner and Ms. Chellandurai had designed (D30 p. 9). He even reiterated this sentiment on a phone call later that day with Mr. Carter's father (D30 p. 9).

At no point in these interactions did the University or its administrators acknowledge that in reality the ACP was an incorrect means of addressing the "D" Mr. Carter earned in cell biology or that it potentially could harm his overall education (D30 pp. 8-9). Nor did they acknowledge that the courses in which he received "As" that it promised would count toward his science GPA in fact would not (D30 pp. 10, 12). Rather, they repeatedly told Mr. Carter that entering into the ACP was the *only* solution that would allow him to continue in the Program (D30 pp. 8-9). Of course, this wound up not being true (D30 pp. 8-12).

Just like in *Martin*, this was a layperson/expert relationship in which the layperson did not have a duty to double check an expert's word. 702 S.W.2d at 58. Mr. Carter was a student layman who reasonably relied on the expert opinions of *three* university administrators including a dean (D30 pp. 8-9). All these opinions rejected the validity of academic probation and purported that the ACP was the only way Mr. Carter could rehabilitate his GPA and remain in the Program (D30 pp. 8-9).

Under these circumstances, Mr. Carter had no duty to double-check the professional recommendation he was given. Instead, it was perfectly reasonable for him to rely on the expertise of three separate administrators when they told him the ACP was the only path forward. Therefore, taking Mr. Carter's allegations as true and giving them their broadest meaning, his damages were not capable of ascertainment in August 2012 as the defendants argued.

C. Instead, Mr. Carter's damages were capable of ascertainment, and the statute of limitations began to run when he received written notice alerting him to the legal wrong in March 2013.

Rather, the earliest Mr. Carter could have been capable of ascertaining his injuries was after March 8, 2013, when he received direct notice from an administrator that the ACP was deficient and had harmed him.

It is well established that an injury is capable of ascertainment when a party receives written notice alerting him to a legal wrong.

In *Thomas v. Grant Thornton, LLP*, clients of an accounting firm received deficiency notices from the IRS in 2006 that rejected the firm's tax strategies for the 2002-2004 tax years and notified the clients that back taxes

and penalties would be assessed. 478 S.W.3d 440, 442-43 (Mo. App. 2015). Five years later, the clients sued the accounting firm alleging fraudulent and negligent misrepresentation, breach of fiduciary duty, and professional negligence. *Id.* But the trial court dismissed the case, holding the claims accrued in 2006 and were barred by the statute of limitations. *Id.* at 444.

This Court affirmed, holding that the claims against the accounting firm accrued when the clients received the deficiency notices from the IRS. *Id.* at 446. The purpose of the notice was to alert the clients “to the facts giving rise to their” claims. *Id.* And “[u]pon receipt of the detailed notices of deficiency, the [clients] actually discovered that the tax schemes were not legitimate tax avoidance strategies as allegedly represented” by the accounting firm. *Id.* So, the notice would make a reasonable person aware that the accounting firm had committed a legal wrong, which resulted in harm. *Id.*

In *Huffman v. Credit Union of Tex.*, borrowers whose vehicles were repossessed and then sold brought a class action alleging a credit union violated the Missouri Uniform Commercial Code and the Missouri Merchandising Practices Act. 758 F.3d 963, 965 (8th Cir. 2014). The case was removed to federal court where a district judge dismissed the case, holding the borrowers’ claims were time-barred. *Id.*

The Eighth Circuit affirmed, holding there was no doubt the district court’s alternative rule was correct – that the “fact of damage” from the alleged wrongful non-disclosure was made known to the plaintiffs when their vehicles were repossessed, the repossessed cars were sold, and plaintiffs

received deficiency notices in March 2005 advising that, even though they had made substantial down payments and installment payments, they still owed more than the value of the vehicles when they were purchased.

Id. at 967. On receiving those notices, the borrower's legal injury was complete, so the five-year limitation period began to run. *Id.* at 967-68.

In *Pentecost v. Webster*, a father was awarded possession of the family farm in a divorce judgment. 674 S.W.3d 195, 201 (Mo. App. 2023). But, in 1992, before the judgment was entered, he signed a quitclaim deed purporting to transfer the farm to his son. *Id.* Despite this, the father retained possession of the farm and never disclosed the deed, not even to his girlfriend of over 20 years. *Id.*

After the father's death, the girlfriend sought to admit a handwritten will to probate that left her all of his property including the farm. *Id.* at 202. In 2019, nine years after the probate court approved a final settlement of the father's estate, the son sent the girlfriend a letter asserting ownership of the farm. *Id.* at 203. In response, she filed a quiet title action. *Id.* The son argued that her claim was barred by the statute of limitations, asserting it had accrued either when the father executed the quitclaim deed or at the latest on his death. *Id.* at 206.

This Court held the cause of action did not accrue when the quitclaim deed was purportedly signed or at the time of the father's death because the father's girlfriend had no notice of a legal wrong at either of those moments. *Id.* Instead, the cause of action accrued when the son "asserted, contrary to the recorded title, 'ownership' over [the farm] in or around 2019 when he sent

[the girlfriend] a letter.” *Id.* (internal punctuation modified). On receiving that written notice, the girlfriend promptly filed her action, which was well within the limitation period. *Id.*

The decisions in *Thomas*, *Huffman*, and *Pentecost* show that an injury is complete and unquestionably capable of ascertainment where a party receives written notice of a deficiency that could cause injury. There is no reason this case should be any different.

Construing Mr. Carter’s amended petition liberally and viewing all allegations in his favor, *Martin*, 702 S.W.2d at 57, he did not receive actual notice of the ACP’s deficiencies or their potential effects until March 2013 (D30 pp. 11). On March 8, 2013, Ms. Kleffner was notified that Mr. Carter had to earn a “D+” or lower in the original class to qualify for a grade adjustment (D30 p. 11). Shortly thereafter, she e-mailed Mr. Carter to inform him that despite being compelled to repeat functional anatomy under the ACP, his original grade was too high to qualify for a grade adjustment (D30 pp. 11). Therefore, he would no longer receive any tangible benefit from the additional coursework and only then was on notice of a potential injury (D30 pp. 10-12).

So, under § 516.100, the earliest the five-year limitations period on could begin to run on Mr. Carter’s cause of action for breach of contract was shortly after March 8, 2013, because that is when “the damage resulting” from the University and its administrator’s conduct could be “capable of ascertainment” (D30 p. 11). Mr. Carter filed his original petition reciting all

of these facts and claims on March 2, 2018, within five years of that date, meeting § 516.120(1) (D30 p. 1).

Section 516.230 provides in relevant part that “[i]f any action shall have been commenced within” the applicable limitations period “and the plaintiff therein suffer a nonsuit, ... such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered” A “nonsuit” includes a voluntary dismissal. *Heintz v. Swimmer*, 922 S.W.2d 772, 776 (Mo. App. 1996). Therefore, § 516.230 allows a plaintiff to commence a “new action” within “one year after” he voluntarily dismissed “any action commenced within” the applicable statute of limitations. *Id.*

Here, Mr. Carter voluntarily dismissed his original petition without prejudice on July 5, 2022 (D30 pp. 1-2). He then refiled it on June 12, 2023 (D29 p. 1), and amended it as the petition below on December 11, 2023 (D30 p. 1). Under § 516.230, his refiling therefore was timely, too.

D. At most, when Mr. Carter’s cause of action accrued is a question of fact for the jury because reasonable minds could reach different conclusions as to when he was put on notice of a potential legal wrong.

As Mr. Carter already explained above at pp. 36-37, the only way for an injury to be capable of ascertainment is for a reasonable person to be put on notice of a potential injury or legal wrongdoing.

It is true that “[w]hether damages are capable of ascertainment is an objective test, ordinarily decided as a matter of law.” *Ferrellgas, Inc. v. Edward A. Smith, P.C.*, 190 S.W.3d 615, 620 (Mo. App. 2006). “However, when contradictory or different conclusions may be drawn from the evidence

as to whether the statute of limitations has run, it is a question of fact for the jury to decide.” *Powell v. Chaminade Coll. Preparatory, Inc.*, 197 S.W.3d 576, 585 (Mo. banc 2006) (quoting *Lomax*, 1 S.W.3d at 552-53).

Here, at most, reasonable minds might disagree about when Mr. Carter’s injuries were capable of ascertainment. While the defendants contended Mr. Carter could have ascertained his injuries as early as August 2012, reasonable people plainly could draw other conclusions from these facts.

For example, in Mr. Carter’s original March 2018 action, one of the University’s administrators brought a similar motion to dismiss arguing the claim was barred by the five-year statute of limitations (Tr.1 at 20). But the trial court denied that motion (D53). The door was only reopened for the defendants to revisit this argument after Mr. Carter had refiled his petition (D29; D30 pp. 1-2). Unlike the first trial court, the new trial court granted their motions and dismissed the case with prejudice (D63; D64)

That two different trial courts reviewed the same facts and came to contradictory conclusions and only goes to show this is not a proper issue for dismissal. At most, the question of when the statute of limitations began to run would be a question for the jury to decide. *Lomax*, 1 S.W.3d at 552-53. Dismissing Mr. Carter’s claim was error.

This Court should reverse the trial court’s judgment and remand the case for further proceedings.

II. The trial court erred in dismissing Mr. Carter's breach of contract claim *because* the defendants' argument that the breach of contract claim was barred by the five-year statute of limitations in § 516.120, R.S.Mo., misapplied the law to the facts alleged in Mr. Carter's amended petition, taken as true and given their broadest reading, even if Mr. Carter was put on notice of a potentially actionable injury in August 2012 when he was wrongfully enrolled in an the ACP *in that* the University's lack of accreditation for the first two years of the Program and the University's failure to provide transcripts containing separate grade point averages for undergraduate and graduate work were separate and continuing wrongs that delayed the limitation period from running.³

Preservation Statement

Mr. Carter made the argument in this point in his suggestions in opposition to the University's motion to dismiss (D40 pp. 6-7). Therefore, it is preserved for appellate review. *Mayes*, 430 S.W.3d at 267.

* * *

The law of Missouri is that when there is more than one item of damage alleged, the statute of limitations does not begin to run until the most recent incident so the plaintiff may recover all resulting damage. Here, Mr. Carter alleged multiple items of damage in his breach of contract claim including the false representation that all six years of the Program were fully

³ This point is in alternative to Point II, above.

accredited and continued until Mr. Carter's withdraw in December 2014. Nonetheless, the defendants argued the limitation period on Mr. Carter's breach of contract claim began running in August 2012. This misapplied the law.

A. Where a plaintiff suffers a continuing wrong, it delays the start of the limitation period.

If the Court disagrees with Mr. Carter's first point and holds a reasonable person would have had notice in August 2012 of a potentially actionable injury, Mr. Carter's breach of contract claim would still be timely. This is because a continuing injury delays the beginning of the limitation period.

Again, generally, a limitation period begins to run "when the cause of action accrues." *Dannenhauer v. Dimmit*, 698 S.W.3d 797, 799 (Mo. App. 2023). But when there is "more than one item of damage," the limitations period does not begin until "the last item, so that all resulting damage may be recovered, and full and complete relief obtained." § 516.100.

The Supreme Court of Missouri has interpreted the "capable of ascertainment" language in § 516.100, to mean that if "all of the damages, past and future, are capable of ascertainment in a single action," then the statute begins to run when the damage first occurs. *Davis v. Laclede Gas Co.*, 603 S.W.2d 554, 556 (Mo. banc 1980). But if the wrong continues day-to-day, creating a new injury each day, and is capable of being terminated, then a plaintiff may recover for the damages incurred within the statutory period immediately preceding the filing of suit. *Id.*

This is the “continuing-wrong” exception to traditional accrual. *Dumler v. Nationstar Mortg., LLC*, 585 S.W.3d 343, 349 (Mo. App. 2019) (citation omitted). Under this doctrine, “each continuation or repetition of wrongful conduct may be regarded as a separate cause of action.” *Smock v. Assoc. Elec. Coop., Inc.*, 567 S.W.3d 211, 218 (Mo. App. 2018).

In *Davis*, the owners of a dry cleaning and pressing plant sued a gas company for breach of contract and negligence after it failed to move a gas meter from inside the building to the outside. 603 S.W.2d at 555. While the company acknowledged the interior meter created a dangerous condition, it only installed a vent pipe from the meter to the building’s exterior. *Id.* But the vent pipe interfered with the gas supply, rendering the presses inoperable until the company eventually moved the meter outside in 1970. *Id.*

The owner filed its action three years later. *Id.* The trial court dismissed the claims, holding the statute of limitations began to run in 1965 when the plant became inoperable. *Id.* The Supreme Court reversed, holding the owner was entitled to allege and prove a cause of action for the duration of the gas company’s wrongful conduct, which persisted until July 1970 when the meter was moved outside. *Id.* at 556. But the owner was not permitted to recover for damages from July 1970 to January 1973, when he filed his action, because the gas company’s wrongful conduct ceased when the meter was moved to the exterior of the plant. *Id.*

While the Supreme Court in *Davis* characterized the exception as “peculiar” and stated it only applied in “particular circumstances,” *id.*, in the

years since, Missouri courts have affirmed the exception numerous times.

See i.e.:

- *Balk v. Cent. Mo. Elec. Coop.*, 966 S.W.2d 15, 20 (Mo. App. 1997) (affirming denial of motion for JNOV where defective transformer's failure to properly supply electricity to a group of dairy farmers represented a continuing wrong);
- *Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 105-06 (Mo. App. 2005) (reversing summary judgment to gas station owner in contamination action where property owners showed continuing injury to their land and groundwater from gasoline leaking from underground tanks);
- *Twin Chimneys Homeowners Ass'n v. J.E. Jones Constr. Co.*, 168 S.W.3d 488, 501-02 (Mo. App. 2005) (affirming determination that subdivision developers' failure to maintain the subdivision's common areas constituted a continuing wrong for limitation purposes);
- *Dumler*, 585 S.W.3d at 350 (affirming determination the statute of limitations did not bar a homeowner's slander of title action where the deed of trust was void, so the loan servicer did not have a valid lien interest in the property but refused to release the lien).

B. The University's false representations that all six years of the Program were accredited created a continuing injury preventing the statute of limitations from running until Mr. Carter withdrew from the Program.

Here, the University, through its School of Medicine, offered a joint six-year program that allowed enrolled students to earn both an undergraduate degree and a medical degree upon completion (D30 p. 2). Mr. Carter alleged

the University represented to both enrolled and prospective students that *all* six years of the program were accredited (D30 pp. 16-17). But, on August 9, 2021, the University admitted that the first two years of the Program in fact were not accredited (D30 p. 15). According to the Program's own accreditation documents, only students enrolled in Years 3 through 6 were considered in the accreditors' review, with no mention of accreditation for coursework completed in Years 1 or 2 (D30 pp. 15-16).

Mr. Carter entered the Program in the fall of 2011 but withdrew in December 2014 to graduate with a Bachelor of Liberal Arts degree instead (D30 pp. 4, 14). During his time in the Program, he completed only coursework from the non-accredited first and second years, as he was not permitted to advance to Year 3 (D30 pp. 4-12, 14). Despite this, per the University's promise when he enrolled, he believed these classes were accredited and did not learn otherwise until 2021 (D30 p. 15).

The University had the ability to be transparent about its accreditation status (D30 p. 15). But it was not. Instead, it marketed the Program as being fully accredited while providing students, including Mr. Carter, with a substandard, unaccredited education (D30 pp. 16-17). And it did so while charging those enrolled in the first and second years of the Program a premium tuition rate because it deemed all students enrolled in the Program "professional students" and ineligible for standard undergraduate tuition or scholarships (D30 pp. 2, 16).

This is exactly "the peculiar and particular circumstances" where the continuing wrong exception applies. *Davis*, 603 S.W.2d at 556. The

University held itself out as if its six-year medical program was fully accredited, despite the first two years being entirely excluded from its accreditation documents (D30 pp. 16-17). The University made a deliberate decision that caused “a continuing wrong that created ‘a fresh injury from day to day’” until the conduct ceased. *Dumler*, 585 S.W.3d at 355. Not only did the wrong persist day in and day out, but it was also “capable of being terminated” *Davis*, 603 S.W.2d at 556. The University had the ability to cease the wrong by being transparent in its marketing about which years of the Program were accredited and providing enrolled students with fair tuition rates based on whether they were completing coursework in an accredited year. Instead, the University opted to prolong the injury.

Therefore, “a right of action exists for the damages” Mr. Carter “suffered within the statutory period immediately preceding suit.” *Id.* Mr. Carter filed his action on March 2, 2018 (D30 p. 2). Therefore, he is entitled to collect damages under the continuing wrong exception as far back as March 8, 2013.

C. The University’s failure and refusal to provide transcripts containing separate grade point averages for undergraduate and graduate work also created a continuing injury preventing the statute of limitations from running until Mr. Carter withdrew from the Program.

Mr. Carter also alleged that the University’s webpage promised that a “student transcript will contain ‘separate grade point averages for undergraduate, graduate, medicine, dentistry, law and pharmacy programs’” (D30 p. 14) (emphasis in the original) (internal punctuation modified).

Mr. Carter then alleged that despite this clear and mandatory promise, after he had withdrawn from the Program and graduated from the University with his bachelor's degree, the registrar denied his request to provide him with a transcript containing separate grade point averages for his undergraduate coursework and the courses he completed while enrolled in the six-year medical program (D30 p. 14). While the University promised that students enrolled in the Program were classified as professional students from day one, the registrar claimed, "it was 'impossible to change undergraduate [medical school] credits' to graduate-level credits without 'jeopardizing the integrity of student records while enforcing academic policies.'" (D30 p. 14, 16) (internal punctuation modified). This breached its promise.

Further, the transcript the University later released to Mr. Carter did not compute separate undergraduate and graduate school grade point averages (D30 p. 14). As a result, Mr. Carter claimed that "other academic programs have refused to admit [him] because the transcripts" the University released did "not accurately reflect his grade point average and the academic level of the courses" he completed (D30 p. 15).

This, too, fits the continuing wrong doctrine.

This Court should reverse the trial court's judgment dismissing Mr. Carter's breach of contract claim and remand this case for further proceedings.

III. The trial court erred in dismissing Mr. Carter’s breach of contract claim *because* the defendants’ argument that Mr. Carter failed to state a claim on which relief could be granted misapplied the law to the facts alleged in Mr. Carter’s amended petition, taken as true and given their broadest reading, as the University made an identifiable contractual promise that it did not honor *in that* the University promised to Mr. Carter and other prospective students that its six-year medical school program was fully accredited and charged a premium tuition rate for all six years despite the first two years being excluded from accreditation documents.

Preservation Statement

Mr. Carter made the argument in this point in his opposition to the University’s motion to dismiss (D40 pp. 7-8) and his motion to set aside or vacate the judgment (D58 pp. 7-10). Therefore, it is preserved for appellate review. *Mayes*, 430 S.W.3d at 267.

Additional Standard of Review

“A motion to dismiss for failure to state a claim on which relief can be granted is solely a test of the adequacy of the petition.” *Tuttle v. Dobbs Tire & Auto Ctrs., Inc.*, 590 S.W.3d 307, 310 (Mo. banc 2019) (citation omitted). This Court reviews the petition “to determine if the plaintiff has alleged facts that meet the elements of a recognized cause of action or of a cause that might be adopted in that case.” *McDonald v. Chamber of Comm. of Indep.*, 581 S.W.3d 110, 114 (Mo. App. 2019) (citation omitted). When determining if dismissal was appropriate, this Court “must accept all properly pleaded facts

as true, giving the pleadings their broadest intendment, and construe all allegations favorably to the pleader.” *Tuttle*, 590 S.W.3d at 310.

“A petition is sufficient to withstand the motion if it invokes substantive principles of law entitling plaintiff to relief and alleges ultimate facts informing defendant of that which plaintiff will attempt to establish at trial.” *Grewell v. State Farm Mut. Auto. Ins. Co., Inc.*, 102 S.W.3d 33, 36 (Mo. banc 2003) (citation and quotation marks omitted).

* * *

The law of Missouri is that a student may bring a breach of contract claim against a university when the university made the student an identifiable contractual promise and the university failed to honor it. Here, the University advertised a fully accredited six-year medical program to prospective students, including Mr. Carter. It charged premium tuition rates for all six years of the program, rendering enrolled students ineligible for undergraduate tuition rates or scholarship opportunities. Despite these representations, the first two years of the Program were not accredited. Nonetheless, the defendant’s argued Mr. Carter failed to state a claim for breach of contract. This misapplied the law.

A. A student may bring an action for breach of contract against a university where the university failed to honor an identifiable contractual promise.

In Missouri, “the essential elements of a breach of contract claim include: ‘(1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff.” *Moore v. Armed*

Forces Bank, N.A., 534 S.W.3d 323, 327 (Mo. App. 2017) (citation omitted) (internal punctuation modified).

“In order to make a submissible case of breach of contract, the complaining party must establish the existence of a valid contract, *the rights of plaintiff and obligations of defendant under the contract*, a breach by defendant, and damages resulting from the breach.” *Lucero v. Curators of Univ. of Mo.*, 400 S.W.3d 1, 5 (Mo. App. 2013) (emphasis in the original) (citation omitted). Therefore, “to establish a claim for breach of contract,” a party must “identify which rights or obligations” the other party breached under the contract. *Id.*

It is true that “[n]ot every dispute between a student and a university is amendable to a breach of contract claim.” *Id.* (citation omitted). But that does not mean it is impossible. Instead, this Court has held a student simply must “point to an identifiable contractual promise that the [university] defendant failed to honor.” *Id.* (citation omitted). The contractual promises that “may form the basis of a legally cognizable contractual relationship between an institution and its students” would include those made in the “educational institution’s brochures, policy manuals and other advertisements” *Id.* (citation omitted).

In *Niedermeyer v. Curators of the Univ. of Mo.*, a student was permitted to bring an action against a university for excessive tuition payments. 61 Mo. App. 654, 662 (1895). The University of Missouri advertised in its 1891-1892 catalogue that “[a]pplicants for admission to any of the classes of the law department, or as special students of elective courses, are required to pay the

sum of fifty dollars for the first year's attendance and forty dollars for each successive year.” *Id.* at 656. Relying on this advertisement, the student enrolled and paid the university treasurer fifty dollars in tuition. *Id.*

When the student attempted to pay forty dollars for his second year, the university refused the payment and required another ten dollars for a full fifty-dollar tuition payment. *Id.* at 656-57. The student paid the additional ten dollars under protest and then sued for excessive tuition. *Id.* The trial court entered a judgment in favor of the university. *Id.* at 657.

This Court reversed, holding a contract was formed between the university and the student and the plaintiff's rights became fixed “[a]fter the proposition contained in the catalogue of 1892 and 1893 had been accepted by plaintiff” *Id.* at 662. Therefore, “it was not within the power of the [university] to alter or abridge those rights by withdrawing the proposition” contained in the catalogue. *Id.*

In *Martin v. Lindenwood Univ.*, a student filed a class action in federal district court against a university on behalf of all students who paid tuition and fees for the Spring 2020 semester but were denied in-person instruction due to the COVID-19 Pandemic. No. 4:20-CV-1128RLW, 2021 WL 3077665, at *1 (E.D.Mo. July 21, 2021). The university moved to dismiss the student's breach of contract claim, arguing he had “failed to identify a specific promise for in-person instruction.” *Id.* at *5.

The district denied the university's motion to dismiss, holding the student sufficiently alleged a claim for breach of contract based on the promise for “an in-person education.” *Id.* at *6. The student had alleged the

the university website marketed the “on-campus experience” as a benefit of enrollment and the admissions viewbook advertised the campus as a beautiful place with “everything you need to succeed right outside your door.”

Id. He also alleged the university imposed higher tuition and fees for in-person courses than online courses because the “costs cover[ed] not just the academic instruction, but encompass[ed] an entirely different experience,” including:

- In person interaction with professors, mentors and peers;
- Access to facilities such as libraries, laboratories, computer labs, and study room;
- Student governance and student unions;
- Extra-curricular activities, groups, intramural sports, etc.;
- Student art, cultures, and other activities;
- Social development and independence;
- Hands-on learning and experimentation; and
- Networking and mentorship opportunities.

Id. (internal punctuation and citations omitted).

The district court specifically noted the student alleged he “signed up and paid for a full-semester tuition, not the on-line pricing option.” *Id.* The university’s publications and marketing established a “course of conduct” which created an expectation of an in-person experience. *Id.* The student relied on this promise, but the university did not honor it. *Id.* Therefore, taking those allegations as true, the student made a sufficient breach of contract claim.

B. Mr. Carter made a sufficient breach of contract claim, as the University marketed its six-year program as fully accredited and collected a higher tuition from students enrolled in the Program versus undergraduate students.

Here, Mr. Carter made sufficient allegations to overcome a motion to dismiss his breach of contract claim. First, the University breached its promise to provide a fully accredited six-year medical school program.

The same as in *Martin* is true here. Like the student in *Martin*, Mr. Carter also alleged the University's marketing established a "course of conduct" which created an expectation of a specific experience that was not provided. 2021 WL 3077665, at *6. He alleged the University recruited students to the six-year program "directly out of high school/freshman year of college" with the promise that they "would be taking medical school coursework from Day 1" and would begin clinical experiences immediately (D30 pp. 16-17). Because all students enrolled in the Program were "classified as professional students," they were also considered ineligible for undergraduate tuition rates and scholarship opportunities (D30 p. 16). As a result, Mr. Carter alleged that all students, including himself, paid a premium tuition rate for the first two years of the Program to take graduate courses while also completing an undergraduate degree (D30 p. 16).

Mr. Carter enrolled in the Program in the fall of 2011 and remained in it until he withdrew in December 2014 (D30 pp. 4, 14). Throughout his enrollment, he believed the Program was fully accredited as the University had promised and did not learn otherwise until August 2021 (D30 pp. 15-16). He alleged the University admitted it was "not accredited as a medical school

for the coursework included in the first two years of the six-year medical program” (D30 p. 15). He alleged the University’s accreditation documents corroborated this admission, showing “only those students enrolled in years 3-6 of the Program were considered” in the accreditors review (D30 p. 15). Despite this, Mr. Carter alleged the University was still representing the Program was fully accredited as recently as the 2022-2023 academic year (D30 p. 16).

The University’s marketing strategy and tuition practices are in the same vein as those the district court determined constituted a sufficient enough claim for breach of contract to overcome a motion to dismiss in *Martin*. The same result commands here too. The University created an expectation that students enrolled in the six-year program would receive a fully accredited medical education from day one in exchange for a higher rate of tuition. But the University did not meet this expectation. Granting the University’s and its administrators’ motions to dismiss was error.

This Court should reverse the trial court’s judgment and remand the case for further proceedings.

IV. The trial court erred in dismissing Mr. Carter's breach of contract claim *because* the defendants' argument that Mr. Carter failed to state a claim on which relief could be granted misapplied the law to the facts alleged in Mr. Carter's amended petition, taken as true and given their broadest reading, as the University and its administrators made an identifiable contractual promise that they did not honor *in that* the University promised to provide transcripts containing separate grade point averages for undergraduate and graduate work and then refused to provide Mr. Carter transcripts in compliance with the University's promise.⁴

Preservation Statement

Mr. Carter made the argument in this point in his opposition to the University's motion to dismiss (D40 pp. 7-8) and his motion to set aside or vacate the judgment (D58 pp. 7-10). Therefore, it is preserved for appellate review. *Mayes*, 430 S.W.3d at 267.

* * *

The University's webpage also promised to provide students with transcripts that separated grade point averages for undergraduate and graduate coursework. Despite this, the University refused to provide Mr. Carter with a transcript separating his undergraduate classes from

⁴ This point, as well as Points V and VI, accompany Point III, above, applying the law to argue an additional aspect of Mr. Carter's breach of contract claim. Because Rule 84.04(d) prohibits consolidating multiple claims into a single point, the points have been separated.

coursework he completed while in the Program. This also was an actionable breach of contract that Mr. Carter properly stated.

A. To form a contractual obligation, a university policy must be concrete and mandatory and not aspirational in nature.

Mr. Carter incorporates his explanation from Point III, above, at pp. 54-57, that the law of Missouri permits a student to bring a breach of contract action against a university where the student identifies a contractual promise the university made and failed to honor.

Although a student may establish a breach of contract claim against a university by relying on promises made in “brochures, policy manuals, and other advertisements” *Lucero*, 400 S.W.3d at 5, the promises provided in these sources may not just be “aspirational in nature.” *Soueidan v. St. Louis Univ.*, 926 F.3d 1029, 1035 (8th Cir. 2019) (discussing the application of *Lucero*, 400 S.W.3d at 5-6). Aspirational policies do “not create an obligation on the part of” the university to take action. *Id.* Rather, these policies use terms like “should” rather than authoritative language like “must” or “shall” *Id.*

In *Soueidan*, a doctoral student brought an action for breach of contract and fraudulent misrepresentation against a university when it failed to award him his doctorate in philosophy. *Id.* at 1031. The student relied on a number of provisions in the university’s catalog and student handbook to support his claim. *Id.* at 1035. These policies stated that students “should have an advisor assigned within the first few weeks of classes starting” and that “students are to meet with their advisor in January to complete their

Annual Student Review” *Id.* The U.S. Court of Appeals for the Eighth Circuit held that neither of these policies placed an obligation on the university to act because the language the student alleged indicated they were more like recommendations or goals, which are aspirational in nature. *Id.*

In *Doe v. Univ. of Mo.*, two former students brought a breach of contract action against their university after being sexually harassed or assaulted by another student and then denied participation in the Title IX process. No. 19-CV-04229-NKL, 2022 WL 4043458, at *1 (W.D.Mo. Aug. 30, 2022). The university moved for summary judgment, arguing that the plaintiffs failed to state a valid breach of contract claim. *Id.* at *28.

The students argued the university violated its “Collective Rules and Regulations” (“CRRs”) by “unilaterally decid[ing]” to make “itself the Complainant in Plaintiffs’ stead.” *Id.* at *2. Under CRR 600.030, students are to “remain the ‘Complainant’ unless they explicitly express that they do not wish to be the Complainant.” *Id.* at *29 (internal punctuation modified). The policy also “set forth specific rights, opportunities, and protections” that a student forfeits if she chooses not to remain the Complainant, including the rights to have an advisor present, call witnesses, present evidence and argument, and appeal the decision. *Id.* at *29-30. CRR 600.030 further provided that the accused “will not be permitted to question the Complainant unless she agrees.” *Id.* at *30.

The district court noted the record showed that neither student indicated a desire to relinquish her rights as Complainant. *Id.* Nevertheless,

the university unilaterally assumed that role, which deprived the students of the ability to have an advisor during the hearing, present witnesses or documents, or appeal the panel's decision. *Id.* Both students also were informed that the accused would be permitted to question them directly. *Id.*

The district court held that the CRRs “imposed multiple obligations and duties on the University,” creating a contractual obligation. *Id.* at *29-30. These provisions were not “aspirational or vague,” but rather “concrete, mandatory, and unmistakable.” *Id.* at *30. Accordingly, the court concluded that CRR 600.030 could “constitute a basis for a claim for breach of contract.” *Id.*

B. Taking Mr. Carter's allegations as true, the University had a mandatory obligation to provide him with a transcript containing separate grade point averages for his undergraduate and graduate level coursework.

Here, Mr. Carter also made sufficient allegations to support his breach of contract claim and overcome the University's motion to dismiss because it promised to provide students with a transcript containing separate grade point averages from undergraduate and graduate level coursework and then breached that promise.

In his amended petition, Mr. Carter alleged that the University's webpage promised that a “student transcript **will** contain ‘separate grade point averages for undergraduate, graduate, medicine, dentistry, law and pharmacy programs’” (D30 p. 14) (emphasis in the original) (internal punctuation modified).

When used as an auxiliary verb, the word “will” carries the same mandatory sense of “shall” or “must”. BLACK’S LAW DICT. 1598 (6th ed. 1990). “It is a word of certainty, while the word ‘may’ is one of speculation and uncertainty.” *Id.*

Mr. Carter’s amended petition alleged that the University’s webpage stated a student’s transcript *will* contain the separate grade point averages (D30 p. 14). Therefore, the policy is not permissive and does not indicate it only serves as a recommendation or goal for the registrar to complete. Rather, the language carries the same authoritative weight as if the policy said the University “shall” provide the transcript with the separate grade point averages and imparted an obligation on the University to comply.

Despite this clear and mandatory promise, after Mr. Carter had withdrawn from the Program and graduated from the University with his bachelor’s degree, the registrar denied his request to provide him with a transcript containing separate grade point averages for his undergraduate coursework and the courses he completed while enrolled in the six-year medical program (D30 p. 14). Although the University promised that students enrolled in the Program were classified as professional students from day one, the registrar claimed, “it was ‘impossible to change undergraduate [medical school] credits’ to graduate-level credits without ‘jeopardizing the integrity of student records while enforcing academic policies.’” (D30 p. 14, 16) (internal punctuation modified). This breached its promise.

The transcript the University later released to Mr. Carter did not compute separate undergraduate and graduate school grade point averages (D30 p. 14). As a result, Mr. Carter claimed that “other academic programs have refused to admit [him] because the transcripts” the University released did “not accurately reflect his grade point average and the academic level of the courses” he completed (D30 p. 15).

Like the CRRs in *Doe*, the University’s policy was not “aspirational or vague,” but rather was “concrete, mandatory, and unmistakable.” 2022 WL 4043458, at *30. The registrar was therefore obligated to comply and provide Mr. Carter with a transcript delineating his undergraduate and graduate level grade point averages. But the University refused to do so, breaching its promise. Dismissing Mr. Carter’s breach of contract claim was error.

This Court should reverse the trial court’s judgment and remand the case for further proceedings.

- V. The trial court erred in dismissing Mr. Carter's breach of contract claim *because* the defendants' argument that Mr. Carter failed to state a claim on which relief could be granted misapplied the law to the facts alleged in Mr. Carter's amended petition, taken as true and given their broadest reading, as the University and its administrators made an identifiable contractual promise they did not honor *in that* the University's policy mandated Mr. Carter be placed on academic probation after receiving a failing grade in a Year 2 course but administrators violated the policy and misrepresented to Mr. Carter that the only way for him to remain in the Program was to enter into an ACP and repeat his Year 1 coursework.

Preservation Statement

Mr. Carter made the argument in this point in his opposition to the University's motion to dismiss (D40 pp. 7-8), his opposition to Dr. Harris's motion to dismiss (D52 pp. 7-9), and his motion to set aside or vacate the judgment (D58 pp. 7-10). Therefore, it is preserved for appellate review. *Mayes*, 430 S.W.3d at 267.

* * *

The University's manual mandated a student receiving a failing grade in Year 2 of the Program be placed on academic probation. Despite this, administrators refused to place Mr. Carter on academic probation and entered him into alternative curriculum that forced him to repeat coursework from his first year. This also was an actionable breach of contract.

Mr. Carter incorporates his explanation from Point III, above at pp. 54-57, that the law of Missouri permits students to bring breach of contract actions against a university where the student identifies a contractual promise the university made and failed to honor. He also incorporates his explanation from Point IV, above at pp. 61-63, that university policies using mandatory language and imposing an obligation on the University to act a certain way are not aspirational and can be the basis of a breach of contract claim.

The University's COE Manual also states that a student will be placed on an ACP where the "student does not meet" the "criteria for dismissal or promotion to [Year] 2 by May 31st of the first year of enrollment" (D30 p. 6) (emphasis removed). But an ACP is no longer appropriate under the Program policies once a student has been promoted to Year 2 (D30 p. 7). Instead, the manual states "a student **will** be placed on" academic probation if (1) the student does not meet the criteria for dismissal or promotion to Year 3 by the end of spring semester in their second year; (2) the student experiences "academic difficulties" or earns a failing grade of a "D", "F", "WF", "No Credit", or "Fail" in a required course; or (3) the student does not meet the minimum cumulative science GPA for enrollment in the Human Structure Function series (D30 p. 7) (emphasis added).

Mr. Carter satisfied the University's criteria for promotion to Year 2 of the Program at the conclusion of the spring semester in his first year (D30 p. 6). He then enrolled in summer classes for Year 2 students, including cell

biology where he received a “D” at the conclusion of the summer semester (D30 p. 7).

According to the University’s policy, because Mr. Carter was a student in his second year, it was mandated to place him on academic probation (D30 p. 7). But the Program’s administrators did not comply with the policy, instead placing Mr. Carter on an ACP that required him unnecessarily to retake Year 1 coursework that he already had completed and passed (D30 pp. 6-7).

The University’s policy manual formed “the basis of a legally cognizable contractual relationship between an institution and its students” *Lucero*, 400 S.W.3d at 5. Mr. Carter alleged the policy stated students receiving a failing grade in their second year “will” be placed on academic probation (D30 p. 7). Therefore, the policy’s language was not “aspirational or vague,” but rather was “concrete, mandatory, and unmistakable.” *Doe*, 2022 WL 4043458, at *30.

The University was obligated to place Mr. Carter on academic probation and allow him to proceed with his Year 2 coursework but failed to do so. This breached its promise.

Therefore, Mr. Carter made sufficient allegations to state a claim for breach of contract for this reason too. Granting the defendants’ motions to dismiss was error.

This Court should reverse the trial court’s judgment and remand the case for further proceedings.

VI. The trial court erred in dismissing Mr. Carter's breach of contract claim *because* the defendants' argument that Mr. Carter failed to state a claim on which relief could be granted misapplied the law to the facts alleged in Mr. Carter's amended petition, taken as true and given their broadest reading, as the University and its administrators made an identifiable contractual promise they did not honor *in that* the University and administrators for the Program promised Mr. Carter that any repeated coursework would qualify to have his grade point average adjusted so that his newest grades would replace the previous one earned, but then after he completed the coursework they informed Mr. Carter that he no longer qualified for the adjustment.

Preservation Statement

Mr. Carter made the argument in this point in his opposition to the University's motion to dismiss (D40 pp. 7-8), his opposition to Dr. Harris's motion to dismiss (D52 pp. 7-9), and his motion to set aside or vacate the judgment (D58 pp. 7-10). Therefore, it is preserved for appellate review. *Mayes*, 430 S.W.3d at 267.

* * *

The University policy and administrative communications also promised Mr. Carter that his initial grade would be replaced by his most recently earned grade and his GPA would be adjusted accordingly. Despite this after he completed the coursework, he was informed he did not qualify for a GPA adjustment. This also was an actionable breach of contract.

Mr. Carter incorporates his explanation from Point III, above at pp. 54-57, that the law of Missouri permits students to bring breach of contract actions against a university where the student identifies a contractual promise the university made and failed to honor. He also incorporates his explanation from Point IV, above at pp. 61-63, that policies using mandatory language and imposing an obligation on the University to act a certain way are not aspirational in nature and can be the basis of a breach of contract claim.

Here, under the ACP, Mr. Carter was required to retake cell biology and functional anatomy, as well as completing several other high-level biology classes (D30 p. 10). According to the ACP, the elective biology courses would be factored into his science GPA (D30 p. 10). Administrators also promised that if Mr. Carter successfully completed the two courses he was required to retake, he would qualify for a similar GPA adjustment (D30 pp. 9-10).

Dr. Harris, the Assistant Dean for the Medical School, specifically stated in a phone call with Mr. Carter's father that the ACP was necessary and that Mr. Carter's "repeated coursework would help bolster [his] science GPA" (D30 p. 9). And Ms. Kleffner, the education coordinator for Year 1 and 2 medical students, also promised Mr. Carter in an e-mail that he would qualify for an adjustment (D30 pp. 4, 11).

The University's COE Manual corroborated the administration's representations. It specifically stated that "[i]f a science course is repeated, **only** the final grade **is** used in the science GPA calculation (the initial grade

earned in a repeated course will be dropped only from the cumulative science calculation)” (D30 p. 10) (emphasis added).

But this did not happen. Instead, shortly after March 8, 2013, Ms. Kleffner informed Mr. Carter that he did not qualify for a GPA adjustment in functional anatomy because his original grade was too high (D30 p. 11). Then, in October 2013, she left a voicemail informing Mr. Carter that his new grade in cell biology also no longer would replace his previous failing grade in GPA calculations “due to accreditation demands” (D30 p. 11). Ms. Kleffner also informed Mr. Carter that not only would the elective courses he was required to take be omitted from his science GPA, the classes would “no longer count towards his undergraduate degree in biology,” either (D30 pp. 11-12). Despite this, she maintained that Mr. Carter was still required to completed these courses if he wanted to remain in the Program (D30 p. 12).

The University’s COE Manual created “the basis of a legally cognizable contractual relationship between an institution and its students” *Lucero*, 400 S.W.3d at 5. Taking Mr. Carter’s “averments as true and liberally grant[ing him] all reasonable inferences,” *City of Lake St. Louis*, 324 S.W.3d at 759, the language of the policy was not “aspirational in nature.” *Soueidan.*, 926 F.3d at 1035. The use of the word “only” paralleled by the word “is” clearly denotes a single grade will be used to calculate a student’s GPA and *that* grade *is* the most recent one earned. There is nothing aspirational or vague about the policy. Rather it creates a “concrete, mandatory, and unmistakable” obligation to adjust a student’s science GPA with the most recent grade earned. *Doe*, 2022 WL 4043458, at *30.

Therefore, the University had a clear obligation to adjust Mr. Carter's science GPA according to his most recent grades.

Additionally, as in *Niedermeyer*, Mr. Carter formed a contract with the University and its administrators, so, "it was not within the power of the [university] to alter or abridge those rights by withdrawing the proposition" contained in the ACP. 61 Mo. App. at 662. "The elements required to form a valid contract in Missouri are 'offer, acceptance, and bargained for consideration.'" *Baier v. Darden Restaurants*, 420 S.W.3d 733, 737 (Mo. App. 2014) (citation omitted). Just like the course catalog in *Niedermeyer* formed the basis of an offer, the ACP and the representations of what the ACP required administrators to do also was an offer that could be accepted. 61 Mo. App. at 662. Once Mr. Carter entered into the ACP, he accepted that offer, and his rights became fixed. *Id.* Therefore, it was not within the power of the [University] "to alter or abridge those rights by withdrawing the proposition" contained in the ACP. *Id.*

For this was a breach, too. The University did not comply with its obligations under its own policy and so the contract it formed with Mr. Carter. Dismissing Mr. Carter's breach of contract claim was error.

This Court should reverse the trial court's judgment and remand the case for further proceedings.

Conclusion

The Court should reverse the trial court's judgment dismissing Mr. Carter's breach of contract claim and remand this case for further proceedings on that claim.

Respectfully submitted,

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Certificate of Compliance

I certify that I have prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b), as this brief contains 15,492 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on November 13, 2025, I filed a true and accurate Adobe PDF copy of this brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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