

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1265

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MARQUETTE UNIVERSITY,

PLAINTIFF-APPELLANT,

v.

DEBBIE A. LAPERTOSA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
LEE E. WELLS, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Marquette University (Marquette) appeals from the trial court's order denying its motion for summary judgment, on its claim seeking to enforce a promissory note against a former student, Debbie A.

Lapertosa.¹ Marquette argues that case law prevents Lapertosa from raising a breach of contract defense because the *Marquette University School of Dentistry Student Handbook (Student Handbook)* and the *Marquette University School of Dentistry Bulletin (Bulletin)* constituted a contract between Lapertosa and Marquette, and Lapertosa failed to follow the appeal process contained in the handbook and bulletin, its summary judgment motion should have been granted. We agree; therefore, we reverse the trial court's decision.

I. BACKGROUND.

¶2 Marquette filed the instant action against Lapertosa seeking a money judgment against her when she defaulted on a promissory note issued by the school. Lapertosa executed the promissory note totaling \$16,000 to pay her tuition while she attended the School of Dentistry. The note became due, requiring the payment of the entire unpaid balance, including interest and any applicable penalties at Marquette's option, if she defaulted. After being dismissed from Marquette, Lapertosa defaulted by failing to make a single payment on the promissory note. Marquette commenced this action in an effort to recover the amount owed on the note.

¶3 The facts surrounding Lapertosa's academic history at Marquette are complicated. When Lapertosa entered the Marquette University School of

¹ Lapertosa filed a counterclaim asserting, *inter alia*, that Marquette breached its contract with her when its employees conspired to deprive her of her ability to obtain a degree in dental science by wrongfully and unlawfully causing her expulsion. In its motion for summary judgment, Marquette also sought dismissal of Lapertosa's counterclaim; however, the trial court did not rule on this part of the summary judgment motion, instead taking it under consideration. In its petition for leave to appeal the trial court's decision, which this court granted, Marquette confined its challenge to the trial court's denial of its motion for summary judgment on the complaint. Therefore, we shall not address Lapertosa's counterclaim, or that part of Marquette's summary judgment motion seeking dismissal of her counterclaim.

Dentistry in August of 1990, all incoming students, including Lapertosa, were given a copy of the *Bulletin* and the *Student Handbook*. The *Bulletin* and the *Student Handbook* set forth the school's rules and regulations including the policy regarding the dismissal of students. The *Bulletin* and the *Student Handbook* also outlined the appeals process for student academic appeals. Lapertosa's signed application for admission to the school indicated that she agreed to abide by all of Marquette's rules and regulations during her enrollment.

¶4 Lapertosa began to have academic problems during the fall semester of her sophomore year. During this semester, Lapertosa was absent from school for several weeks after undergoing gallbladder surgery. At the close of the fall semester, Lapertosa received grades of incomplete in three of her classes, a grade of "X" in another class, indicating that she was absent from the final examination, and, finally, in yet another class, a failing grade. After receiving her grades, Lapertosa met with the Associate Dean for Academic Affairs to discuss her academic status. Lapertosa was allowed to meet with the instructors for those courses in which she had received either an incomplete or failing grade to discuss plans for remediation. The Associate Dean also warned her of the serious nature of her academic situation and requested that she meet with him again in mid-February.

¶5 During the spring semester of 1992, Lapertosa was again absent from school for an extended period of time after her mother was hospitalized with a serious illness. On April 6, 1992, two-thirds into the spring semester, Lapertosa withdrew from Marquette. Marquette subsequently granted her request to repeat her sophomore year, but informed her that, during the summer term of the following year, she would have to successfully complete the requirements of the course she had failed during the fall semester.

¶6 Lapertosa returned to Marquette for the fall semester in 1992. However, at the end of the semester, she missed two final examinations, resulting in an incomplete in one class and a failing grade in the other. Lapertosa also received another incomplete in a third class. She again met with the Associate Dean to discuss her academic progress. Lapertosa claimed that she had been ill during the final exam week, causing her to miss her exams. The Associate Dean advised her to meet with her instructors to determine whether she would be able to remove the grades of incomplete and whether she could remediate the failing grade. The Associate Dean also informed Lapertosa that the Academic Progress Committee would be meeting that week to prepare a report, and that if there were any extenuating circumstances that had affected her performance, she should inform the Committee prior to the meeting.

¶7 On January 11, 1993, both the general faculty and the Academic Board met to discuss Lapertosa's academic performance. Three days later, the Dean of the Dental School wrote to Lapertosa informing her that both the Academic Board and the general faculty decided that she should be dismissed from the School of Dentistry due to her poor academic performance. However, Lapertosa was subsequently able to produce written documentation from her doctor to corroborate her claim that she had been ill during the final exam week. Consequently, Marquette considered her absence during final exams to be an excused absence. Moreover, her failing grade was changed to an "IX" for "incomplete course work and absent from the final examination." But Lapertosa's problems continued.

¶8 In February of 1993, the Director of the Division of Clinical Services wrote a memorandum to Lapertosa regarding her absences in two of her clinical "blocks." The Director advised Lapertosa that, in order to move on to her

junior year, she was required to successfully complete the two “blocks.” In April, another professor again wrote to Lapertosa informing her that she had not yet completed one of the “blocks” due to absenteeism. At the end of the spring semester, Lapertosa again received two grades of incomplete, an IX and an X. Lapertosa enrolled in the summer session which began in May.

¶9 On June 3, 1993, the Dean again wrote to Lapertosa informing her that both the general faculty and the Academic Board decided that she should be dismissed from the School of Dentistry because, while repeating her sophomore year, she failed to complete her required course work in a timely fashion. Lapertosa appealed this decision to the Academic Board. The Dean wrote to Lapertosa, informing her that the Academic Board had considered her appeal, but that the Board had voted to uphold its decision that she be dismissed from the School of Dentistry.

¶10 Lapertosa then retained the services of an attorney who wrote the school seeking to appeal the Academic Board’s decision to dismiss Lapertosa. In his letter, Lapertosa’s attorney asserted, “Ms. Lapertosa is currently enrolled in summer school at the School of Dentistry and is midway through her coursework which she has every expectation of successfully completing.” Unfortunately, Lapertosa did not do well in summer school.

¶11 In August of 1993, the school wrote to Lapertosa regarding her appeal of the Academic Board’s most recent decision to dismiss her. In the letter, she was informed that the school could not find “any serious procedural errors in the fashion in which the Academic Board reached its conclusion to dismiss you from the School of Dentistry” and, as a consequence, her appeal was being denied and her dismissal upheld. Nevertheless, Lapertosa’s case was referred back to the

Dean of the Dental School so that the Academic Board could review her progress in the summer session and reconsider her dismissal when school reconvened in the fall. In September of 1993, Lapertosa received another letter from the Dean of the Dental School informing her that, based on her absenteeism during the summer session, her dismissal was considered final.

¶12 The terms of the promissory note Lapertosa had executed with Marquette called for the repayment of the loan nine months after Lapertosa ceased to be at least a half-time student at the School of Dentistry. After nine months passed and the note went into repayment status, Lapertosa failed to make a single payment. Marquette then brought the instant action, seeking a money judgment for the amount of the promissory note. Lapertosa answered denying that she had defaulted, and arguing that her performance under the promissory note was excused due to Marquette's breach of its contractual obligation. In her answer, Lapertosa claimed that Marquette breached its contract with her by acting in bad faith when its professors and instructors conspired to deprive her of her degree by causing her expulsion from the dental school.

¶13 Marquette subsequently moved for summary judgment on its complaint and sought dismissal of Lapertosa's counterclaim. After a hearing on Marquette's motion, the trial court found that Marquette had sufficient reason for dismissing Lapertosa from the School of Dentistry based on her academic performance. However, the trial court theorized that the reason she performed so poorly academically could have been because of her accusations that her instructors engaged in unfair, arbitrary and capricious conduct towards her. The trial court found that this "cloud of facts" made it impossible for the court to grant summary judgment because there was a genuine issue of material fact as to whether Marquette, through its employees, treated Lapertosa arbitrarily and

capriciously. Further, the trial court disagreed with Marquette's contention that the *Student Handbook* and the *Bulletin* created a contract, and Lapertosa's failure to follow the procedures outlined in them precluded her from asserting a breach of contract defense based on the alleged arbitrary and capricious conduct of Marquette's employees.

II. ANALYSIS.

¶14 Marquette submits that the trial court erred in denying its motion for summary judgment by finding that Lapertosa's failure to follow the procedures for appealing academic decisions found in the *Student Handbook* and the *Bulletin* did not bar her from asserting a breach of contract defense based on Marquette's arbitrary and capricious actions. Marquette also argues that the trial court erred in denying its motion for summary judgment by finding that Lapertosa's allegations of mistreatment by her instructors created a genuine issue of material fact. As a result, the trial court declared that the reasons Marquette gave for dismissing Lapertosa might not, in fact, be the actual reasons for her dismissal. We agree with Marquette's argument that the *Student Handbook* and *Bulletin* created a contract. Further, we conclude that because Lapertosa failed to follow the academic appeal procedures found in the *Student Handbook* and *Bulletin*, she is precluded from raising a defense to the breach of contract suit.

¶15 Our review of a trial court's decision on summary judgment is *de novo*. See *Green Springs Farms v. Kersten*, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). We follow the same summary judgment methodology as the trial court. See *id.* That methodology has been described in many cases. See, e.g., *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). Therefore, we need not repeat it here, except to say that summary judgment must be granted if the

evidentiary material demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” WIS. STAT. RULE 802.08(2) (1997-98).²

¶16 Marquette’s complaint alleged that: Lapertosa executed a promissory note for the repayment of various amounts she borrowed from Marquette; the note called for repayment beginning nine months after the date she ceased to be at least a half-time student; a default made the entire principal due and payable at Marquette’s option. Further, it pled that once the note went into repayment following her dismissal, she failed to make a single payment, thus defaulting on the note, resulting in her being liable for the principal balance, late fees, and accrued interest in the amount of \$17,997.48. Lapertosa answered, denying that she had defaulted, and arguing that Marquette was not entitled to summary judgment because her performance under the promissory note was excused when Marquette, through its professors and instructors, breached its contractual obligations to her by wrongfully conspiring to deprive her of a degree in dental science by arbitrarily and capriciously causing her expulsion from the

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

dental school.³ In its summary judgment submissions, Marquette countered that Lapertosa could not assert a breach of contract defense because the *Student Handbook* and the *Bulletin* created a contract and she failed to follow the appeal procedures in them.

¶17 Marquette argues that the facts here are identical to those found in *Cosio v. Medical College of Wisconsin, Inc.*, 139 Wis. 2d 241, 245, 407 N.W.2d 302 (Ct. App. 1987), and Lapertosa is precluded from raising her breach of contract defense because she failed to follow the appeal procedures set forth in the *Student Handbook* and the *Bulletin*. We agree.

¶18 This court has recognized that a school's bulletin or student handbook can create a contractual relationship between the student and the institution. Further, once a contract is created, every contract implies a duty of good faith and fair dealing between the parties and a promise against arbitrary or unreasonable conduct. See WIS JI—CIVIL 3044. Our review of the record confirms that a contract was created between Marquette and Lapertosa by the

³ Lapertosa alleged several instances of arbitrary and capricious conduct by her instructors. Specifically, Lapertosa asserted that: (1) she went to see one of her instructors regarding a problem she was having with another instructor and he allegedly told her that she might have better success if she sat on the instructor's lap; (2) when the grade that one of her instructors had given her was changed by the Academic Board, the instructor retaliated by refusing to accept the two projects she completed during the semester and requiring her to do two new projects, and only agreeing to give her a written final exam instead of an oral final exam after she protested for months; (3) one of her instructors intentionally failed to record her grades in his master grade book; (4) she was forced to wait hours to have her work checked by her instructors when her classmates waited only ten to fifteen minutes to have their work checked; (5) when she became suspicious that one of her instructors was not grading her fairly, she tested her suspicion by switching exams with a classmate unbeknownst to the instructor, who, thinking he was grading her classmate's exam, gave her a passing grade, while at the same time giving her classmate a failing grade, thinking he was grading Lapertosa's exam; (6) the same instructor took her property from her assigned work station and withheld it for a week without informing her why; and (7) another instructor purposefully and intentionally downgraded her on a project when certain classmates turned in identical projects but received substantially higher grades.

Student Handbook and the *Bulletin* when Marquette promised to provide dental instruction and training, and Lapertosa promised to abide by the rules and regulations at all times during her education and to pay tuition and fees to Marquette.

¶19 In *Cosio*, the court stated that a student who does not abide by the rules contained in the contract created by the handbook, by following procedures the handbook establishes to resolve grievances, cannot later complain about the grievances. See *Cosio*, 139 Wis. 2d at 244-48 (holding that “the trial court providently granted summary judgment because [] no issue of fact is presented relating to [the school’s] breach of contract or warranty of good faith because [the defendant] failed to use the remedy provided by contract to” address his complaints). Therefore, Lapertosa is precluded from raising Marquette’s alleged breach of contract because she failed to follow the remedies set forth in the *Bulletin* and the *Student Handbook*. Because Lapertosa failed to follow these procedures, she is precluded from asserting that Marquette breached its contract with her based on the alleged arbitrary and capricious conduct of its employees.

¶20 Therefore, because under *Casio* Lapertosa’s defense based on her breach of contract claims was precluded, Marquette was entitled to summary judgment. We remand this case to the trial court for entry of an order consistent with this decision.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

