Order

Michigan Supreme Court
Lansing, Michigan

August 30, 2024

164213-5

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

KATELYN ZWIKER, Individually and on Behalf of All Others Similarly Situated,
Plaintiff-Appellant,

v

SC: 164213
COA: 355128
Ct of Claims: 20-000070-MK

LAKE SUPERIOR STATE UNIVERSITY and LAKE SUPERIOR STATE UNIVERSITY BOARD OF TRUSTEES,
Defendants-Appellees.

____/

KEVIN HORRIGAN,
Plaintiff-Appellant,

v

SC: 164214
COA: 355377
Ct of Claims: 20-000075-MK

EASTERN MICHIGAN UNIVERSITY and EASTERN MICHIGAN UNIVERSITY BOARD OF TRUSTEES,
Defendants-Appellees.

____/

JAEL DALKE,
Plaintiff-Appellant,

v

SC: 164215
COA: 357275
Ct of Claims: 20-000068-MK

CENTRAL MICHIGAN UNIVERSITY and CENTRAL MICHIGAN UNIVERSITY BOARD OF TRUSTEES,
Defendants-Appellees.

____/

On October 5, 2023, the Court heard oral argument on the application for leave to appeal the February 10, 2022 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

VIVIANO, J. (*dissenting*).

These cases each concern students at public universities in Michigan whose education was disrupted by the onset of the COVID-19 pandemic in March 2020. The students seek partial reimbursement for tuition, student-services fees, and room and board payments. The Court of Claims' decisions to grant summary disposition for the three defendant universities fundamentally misconstrue the purported tuition agreement that each plaintiff signed upon registration.[1] The tuition agreements do not constitute a binding express contract because they fail to establish mutual assent as to the specific classes each university was obligated to provide the students. That obligation, including whether defendants were to provide the classes in any particular format, is controlled by an implied contract based on the registration materials, historical practice, and other relevant evidence. Likewise, the tuition agreements do not constitute binding express contracts as to student services and the associated fees. For these reasons, I respectfully dissent, would vacate the portion of the Court of Appeals opinion regarding tuition agreements, and would remand to the Court of Claims for further proceedings.

I. FACTUAL BACKGROUND

A. *ZWIKER v LAKE SUPERIOR STATE UNIVERSITY*

Upon completion of her course registration for the Spring 2020 semester, plaintiff Katelyn Zwiker paid defendant Lake Superior State University (LSSU) tuition for educational classes and fees for certain student services. The registration process included a financial responsibility agreement form, which provided, in relevant part:

> I understand that when I register for any class at Lake Superior State University, or receive any service from Lake Superior State University, I accept full responsibility to pay all tuition, fees and other associated costs assessed at any time as a result of my registration and/or receipt of services . . . . I further understand and agree that my registration and acceptance of these terms constitutes a promissory note agreement . . . .

The agreement also included an integration clause.

[1] For ease of reference, I use the phrase "tuition agreement" to refer to the document in each case that the Court of Appeals found to be a binding contract even though I do not agree that the agreement is binding for the reasons explained below.

Zwiker signed a separate housing contract, which provided that she would make payments in exchange for "living space, facilities, furnishings, and meals . . . ." The "times set for performance . . . [were] subject to change because of strikes, lockout or other labor disputes and disorders which may affect the health or safety of students or affect the educational function of the institution." If the "dates and times" of performance changed, the services were to be provided "in conformity with the purpose for which" the student entered into the contract. Additionally, LSSU would be excused from performance if it was "prevented from completing performance of any obligations" under the housing contract by an "act of nature," an "act of God," or "other occurrences whatsoever which are beyond the control of the parties[.]" The housing contract states that "[n]o refund is made for unused meals."

In response to Governor Gretchen Whitmer's March 10, 2020 executive order declaring a state of emergency in response to the COVID-19 pandemic, LSSU notified students that classes would be online-only, but on-campus housing and dining halls would remain open. LSSU encouraged students not to remain on campus, and Zwiker moved off campus for the remainder of the semester.

B. *HORRIGAN v EASTERN MICHIGAN UNIVERSITY*

Plaintiff Kevin Horrigan signed a tuition agreement form and housing contract with defendant Eastern Michigan University (EMU) for the Spring 2020 semester. The tuition agreement was virtually identical, in relevant part, to the LSSU agreement quoted above. The housing contract authorized EMU to "remove a resident from university housing for reasons of health, safety, welfare, failure to remain actively enrolled, or if the student poses a significant disruption to the on-campus housing community." Under a separate provision similar to the one in LSSU's contract, the timing for performance was "subject to change due to . . . disorders which may affect the health or safety of students or affect the educational function of the institution," "provided that" the alternative dates conform to the purpose for which the students entered into the contract. EMU's housing contract also stated that "[r]efunds are not given for missed or unused meals."

EMU announced on March 11, 2020, that all classes would change to a remote format in response to the Governor's March 10, 2020 executive order. EMU closed residence and dining halls on March 31, 2020, in response to another executive order.

C. *DALKE v CENTRAL MICHIGAN UNIVERSITY*

Plaintiff Jael Dalke signed a similar tuition agreement and housing contract with defendant Central Michigan University (CMU). The tuition agreement provided that "[b]y completing registration at [CMU] for this semester, you agree to financial responsibility

for all charges, including tuition and fees on your student account." Unlike the LSSU and EMU tuition agreements, CMU's did not include an integration clause.

Under the housing contract, CMU agreed to provide Dalke with residence facilities and food services. And, like the other housing contracts, CMU's housing contract provided that "[t]his contract and times set for performance [thereof] are subject to change because of . . . disorders or circumstances beyond the university's control that may affect the health or safety of students or affect the educational function of the institution." It similarly reserved the right to provide the services at different dates and times, "provided that" the new dates "will be in conformity with the purpose for which [the] resident entered into the contract[.]" The contract provided examples of acceptable times: "during the academic year, spring session, summer school, conferences and so on."

On March 11, 2020, CMU announced that courses would only be offered remotely and encouraged students to move off campus if possible, but it stated that housing and dining services would remain open. In a follow-up e-mail on March 19, CMU told students that they could remain in campus housing until May 9, 2020, but could receive a refund for moving out early. On March 23, students received an e-mail from CMU stating that anyone who had moved off campus "should NOT return to campus to move out prior to their scheduled move-out appointment." Dalke moved out early and was provided a partial refund in the amount of $1,200.

II. PROCEDURAL BACKGROUND

Each plaintiff sued in the Court of Claims, alleging breach of contract and unjust enrichment regarding tuition for classes, fees for student services, and payment for room and board. Each defendant filed a motion for summary disposition. The trial court in CMU's case granted the motion under MCR 2.116(C)(10), the trial court in LSSU's case granted the motion under MCR 2.116(C)(8) and (10), and the trial court in EMU's case granted the motion under MCR 2.116(C)(8). The individual plaintiffs then appealed to the Court of Appeals, which consolidated the three cases.

The Court of Appeals affirmed the grants of summary disposition in a split, published decision. *Zwiker v Lake Superior State Univ*, 340 Mich App 448 (2022). Regarding tuition, the Court of Appeals majority held that defendants were entitled to full tuition payments when the students registered for courses, regardless of whether educational services were subsequently provided, because the tuition agreements were express contracts that stated tuition was conditioned on defendants allowing plaintiffs to register "or" on the universities' provision of services, rather than only on the latter. *Id*. at 475-476. Further, the Court of Appeals concluded that the tuition agreements were not incomplete, so parol evidence was not admissible to provide any details that were not found in the tuition agreements. *Id*. at 476-477. The Court of Appeals then characterized the plaintiffs' claimed contractual rights to in-person classes as a subjective "noncontractual

expectation" because nothing in the tuition agreement promised that method of instruction. *Id*. at 477-478. With that, the Court of Appeals majority affirmed each trial court decision to grant each defendant's motion for summary disposition regarding partial tuition reimbursement.

For the same reasons, the Court of Appeals unanimously affirmed the trial court's decisions regarding other miscellaneous student-services fees. For Dalke's fee claim, the Court of Appeals more specifically found that CMU "established that the programs that received support from the student-services fee continued during the Spring 2020 semester." *Id*. at 483.

As to the housing contracts regarding room and board services, the Court of Appeals unanimously held that the pandemic was reasonably foreseeable, thereby defeating the plaintiffs' frustration-of-purpose reimbursement claim. *Id*. at 480-482.[2] The Court of Appeals also held that LSSU did not breach its contract when it encouraged, but did not require, students to move off campus. *Id*. at 482.

Judge SWARTZLE wrote separately, concurring as to the majority's dismissal of plaintiffs' claims for reimbursement of the student-services fees and room and board payments but dissenting as to the dismissal of plaintiff's claim for breach of contract involving the tuition agreement. *Id*. at 488 (SWARTZLE, J., concurring in part and dissenting in part). Judge SWARTZLE concluded that there was a question of fact regarding whether the students received the educational services that they bargained for under the tuition agreements. *Id*. at 494. He disagreed with the majority's conclusion that defendants were entitled to tuition payment merely because plaintiffs completed registration. Rather, plaintiffs bargained for specific classes taught in a specific format—separate and apart from the offering of registration or the awarding of credits—so a university could not charge full tuition based on mere registration if the university subsequently failed to offer courses in the agreed-upon format. *Id*. at 488-489.

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[2] "The frustration-of-purpose doctrine provides an excuse for nonperformance of a contractual obligation." *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 159 (2007). I conclude that the Court of Appeals did not clearly err when concluding that this doctrine is inapplicable here. Each housing contract included a provision that specifically contemplated a public-health emergency and provided for certain procedures in response to such an emergency. Thus, the Court of Appeals decision appears consistent with the requirements for the frustration-of-purpose doctrine as recognized in Michigan. See *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 135 (2003) (requiring that, for the doctrine to apply, "the non-occurrence of the frustrating event"—in this case, the pandemic—must be "a basic assumption on which the contract was made") (quotation marks and citation omitted).

This Court ordered oral argument on plaintiffs' application for leave to appeal and directed the parties to address "whether the plaintiffs are entitled to any reimbursement for payments made to the defendants for tuition, room and board, or any associated fees or costs for the winter/spring 2020 semester." *Zwiker v Lake Superior State Univ*, 510 Mich 937 (2022).

III. DISCUSSION

A. EDUCATIONAL SERVICES IN EXCHANGE FOR TUITION PAYMENT

Plaintiffs claim that defendants committed breach of contract by changing the method of educational instruction from in-person classes to online learning. To prevail on their claim for breach of contract, plaintiffs must establish "that (1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 100 (2016).

For the reasons below, I conclude that the trial court in EMU's case erred by finding an express contract and failing to consider relevant evidence regarding the existence and terms of an implied contract for Horrigan's tuition payments in exchange for educational services. Next, while the trial court in CMU's case considered Dalke's registration materials, it erred by requiring all obligations to be expressly included in those materials. Similarly, the trial court in LSSU's case considered Zwiker's registration materials, but failed to do so in the light most favorable to Zwiker. The Court of Appeals did not identify and rectify those errors. Thus, I would vacate the Court of Appeals' decision affirming the Court of Claims orders, and I would remand to the Court of Claims for further proceedings to resolve the questions of fact regarding the existence and terms of an implied agreement.

1. THE TUITION AGREEMENTS DO NOT CONSTITUTE EXPRESS BINDING CONTRACTS

Plaintiffs argue in this Court that the parties entered into an implied agreement for educational services in exchange for tuition payments, the terms of which are determined by evidence outside the four corners of the tuition agreements. In the Court of Appeals, however, plaintiffs argued that the parties entered into an express but incomplete contract and that extrinsic evidence was necessary to fill the gaps. The Court of Appeals rejected that argument, holding that by signing the tuition agreement documents the parties entered into an express contract with a full integration clause that precludes consideration of such evidence. I conclude that, because the tuition agreements lack mutuality of assent, the Court of Appeals improperly construed those documents as an express contract. Instead, I

agree with plaintiffs that the relationship between the parties should be analyzed as an implied contract.[3]

As a threshold matter, we must determine whether an express contract exists between the parties.[4] "A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Bank of America*, 499 Mich at 101 (quotation marks and citation omitted). "Mutuality of agreement requires 'assent' to an exchange's 'material' terms." *Stackpole Int'l Engineered Prod, Ltd v Angstrom Auto Group, LLC*, 52 F4th 274, 280 (CA 6, 2022), citing *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548-549 (1992); see also *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372 (2003) ("Where mutual assent does not exist, a contract does not exist."). Thus, unless "the promises and performances to be rendered by each party are set forth with reasonable certainty," the purported agreement is unenforceable due to indefiniteness. *Nichols v Seaks*, 296 Mich 154, 159 (1941).

I conclude that the tuition agreement documents fail to establish the element of mutual assent because they do not provide reasonable certainty as to the university's obligations. None of the tuition agreements specifies which classes each university was obligated to offer or the format in which the classes would be offered. Instead, each agreement simply provided that, by completing registration, the student was obligated to

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[3] I note that plaintiffs' theory of the case has not been consistent during this litigation. In the trial court, they argued for both an express and implied contract, but then in the Court of Appeals focused only on the express contract. Because plaintiffs now renew their implied-contract argument, plaintiffs' misframing of the issues in the Court of Appeals is not dispositive. See *Mack v Detroit*, 467 Mich 186, 209 (2002) ("The jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions."). Though plaintiffs arguably abandoned their implied-contract argument, given that the Court of Appeals issued a published opinion on this important issue, I conclude that this Court should exercise its authority to decide whether the parties' obligations are controlled by an express or implied contract. While the issue is unpreserved, the record is adequate to determine whether an express contract exists and to determine whether there is a question of fact regarding the existence and terms of an implied contract. See *People v Washington*, 501 Mich 342, 352 n 21 (2018) ("[T]his Court can consider an 'unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented,' as is the case here."), quoting *McNeil v Charlevoix Co*, 484 Mich 69, 81 n 8 (2009).

[4] This is so because this Court has held that "[a]n implied contract cannot be enforced where the parties have made an express contract covering the same subject matter." *Scholz v Montgomery Ward & Co*, 437 Mich 83, 93 (1991).

pay tuition. But the specific classes that each student would choose and subsequently attend is a material—perhaps the *most* material—term of the tuition agreement. The terms "educational services" and "classes" in the tuition agreement documents clearly refer to some type of classes, but it would be unreasonable to conclude that the parties intended to allow the universities to enroll the students in literally *any* type of class upon registration. With such free range, a university could enroll an engineering student in a modern dance class even though the student registered exclusively for engineering classes. That clearly was not the parties' intent. *McIntosh v Groomes*, 227 Mich 215, 218 (1924) ("The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate."). See also *Ninivaggi v Univ of Del*, 555 F Supp 3d 44, 51 (D Del, 2021) (Bibas, J., sitting by designation) ("[T]here is some implied limit on the school's freedom to change its teaching," even though "universities have wide latitude to change course details."). Indeed, without knowing the classes for which each student registered, the parties could not determine how much each student owed in tuition.[5] Without reasonable certainty as to which classes the universities were obligated to provide, the tuition agreement documents failed to establish mutuality of assent on perhaps the most material term of the purported agreements. The Court of Appeals majority's opinion, therefore, was based on the same flawed conclusion as the trial court's: that the tuition agreements were express, binding contracts.

2. THE COURT OF CLAIMS FAILED TO PROPERLY CONSIDER THE EXISTENCE AND TERMS OF AN IMPLIED CONTRACT

Without an express contract regarding tuition payments and the specific educational services that would be provided, any contractual duties of the parties regarding those services must derive from an implied contract. That is how courts across the country have viewed the relationship between students and schools. See *Gociman v Loyola Univ of Chicago*, 41 F4th 873, 888 (CA 7, 2022) (St. Eve, J., concurring in part and dissenting in part) ("Express contracts between students and schools are exceedingly rare."), citing *Ross v Creighton Univ*, 957 F2d 410, 417 (CA 7, 1992). Indeed, it has been observed that "[c]ourts forced to evaluate the legal nature of the student-university relationship have reached . . . a general consensus that an implied contract is created by the institution's acceptance of the student and the student's commitment of the tuition money . . . ." Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?*, 41 Am U L Rev 267, 277 (1992).

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[5] Although LSSU provided a $6,000 flat "One-Rate Tuition" fee for students taking 12 to 17 credits, LSSU would still need to know the classes for which each student registered to determine whether a student is subject to the flat rate.

"A contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding, of men, show a mutual intention to contract." *Erickson v Goodell Oil Co*, 384 Mich 207, 211-212 (1970).[6] More specifically,

> [a] contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction. The existence of an implied contract, of necessity turning on inferences drawn from given circumstances, usually involves a question of fact, unless no essential facts are in dispute. [*Id*. at 212 (citations omitted).]

The most relevant evidence in these cases is the course catalog, the registration portal—including the documents, webpages, or other registration materials that each student used to register for classes, and the historical practice of how classes were provided. See *Gociman*, 41 F4th at 884-885 (considering course catalog, online registration portal, pre-pandemic practice, and higher tuition for in-person classes); *Jones*, 51 F4th at 114-116 (considering the course catalog, credit hour policy which promised "contact time" between students and professors, higher tuition for in-person classes, historical practice of in-person instruction, and marketing materials).[7] Of course, plaintiffs do not argue that the universities failed to provide the classes for which they registered, but instead argue that once the pandemic began the universities did not provide the classes in *the format* for which the students registered. The threshold question, then, becomes whether the relevant evidence manifested a mutual assent regarding the instructional format in which each plaintiff's classes would be provided.

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[6] " 'There are two kinds of implied contracts: one implied in fact, and the other implied in law. The first does not exist unless the minds of the parties meet, by reason of words or conduct. The second is *quasi* or constructive, and does not require a meeting of minds, but is imposed by fiction of law, to enable justice to be accomplished, even in case no contract was intended.' " *Genesee Drain Comm'r v Genesee Co*, 504 Mich 410, 434 n 9 (2019) (opinion by MARKMAN, J.), quoting *Cascaden v Magryta*, 247 Mich 267, 270 (1929). This case does not concern a contract implied in law.

[7] CMU cites *Cuddihy v Wayne State Univ Bd of Governors*, 163 Mich App 153, 157-158 (1987), to argue that "student handbooks, course catalogs, or other informational materials and brochures cannot create a contract between a university and a student." That argument is unpersuasive because *Cuddihy* held only that a single statement by an academic adviser did not create an enforceable promise that guaranteed the plaintiff would soon graduate; *Cuddihy* did not hold that course catalogs and similar documents are *incapable* of creating a contract implied in fact. See *id*. at 157-158.

Because the Court of Appeals did not even consider this evidence, its analysis was incomplete. The Court of Claims in each case also erred, albeit for slightly different reasons. In EMU's case, the trial court erred by failing to consider any evidence other than the tuition agreement. In CMU's case, the trial court considered evidence outside the tuition agreement, but concluded that CMU did not have a duty to provide classes in a certain format because "[n]one of [the registration materials] include the required elements of a contract. None contain a promise that, with the payment of tuition, CMU would exclusively provide in-person instruction." That analysis is erroneous because it assumes that term must be explicitly stated in the registration materials. To the contrary, I believe there is a question of fact concerning whether an implied agreement exists between the parties and whether—based upon the course catalog, registration materials, and historical practices—the parties agreed that classes would be provided in an in-person format.

Finally, in LSSU's case, Zwiker presented screenshots of LSSU's course catalog that showed certain courses would be provided in the "Traditional Campus Instructional Method." Yet the trial court granted LSSU's motion for summary disposition under MCR 2.116(C)(10) after finding that it was "not clear" and "little more than conjecture" that plaintiff had registered for any of those courses for the Spring 2020 semester. That holding misapplies the court rule, which required the trial court to view Zwiker's evidence "in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120 (1999).[8] Thus, because there are questions of fact regarding defendant's contractual obligations, I would vacate the Court of Appeals majority's holding regarding plaintiffs' tuition claims and remand these cases to the Court of Claims for further proceedings to determine whether an implied contract exists that obligated each university to provide in-person classes.[9]

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[8] Moreover, the record does not show that LSSU presented any evidence showing that information specifying the format of each class was *not* provided to students. The absence of such evidence is dispositive because LSSU, as the movant, had the initial burden to show that the contract did not include the instructional format as a material term. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996) (explaining the shifting burdens under a summary disposition motion pursuant to MCR 2.116(C)(10)).

[9] EMU argues that this Court should not review its decision to transition from in-person classes to remote classes because the transition was a "genuinely academic decision" that required the universities to "exercise professional judgment." *Regents of Univ of Mich v Ewing*, 474 US 214, 225 (1985). While I would not resolve this issue without the benefit of decisions from the lower courts, I note that multiple federal courts have rejected similar arguments that *Ewing* precludes the type of claim at issue here. See *Jones v Administrators of Tulane Ed Fund*, 51 F4th 101, 110 (CA 5, 2022); *Hernandez v Illinois Institute of Tech*, 63 F4th 661, 670 (CA 7, 2023).

B. STUDENT SERVICES IN EXCHANGE FOR FEES

In rejecting plaintiffs' claims for reimbursement of student-services fees against EMU and LSSU, the Court of Appeals simply collapsed its analysis into its discussion of the tuition agreements. In short, the Court of Appeals held that Horrigan (an EMU student) and Zwiker (an LSSU student) became liable for all student-services fees upon registration, not upon the provision of the corresponding services. *Zwiker*, 340 Mich App at 475-476 ("[T]he tuition contracts assessed fees as the result of registration, not as the result of receiving services."). And because the Court of Appeals held that the tuition agreement was a fully integrated express contract, it also held that extrinsic evidence was inadmissible to determine the specific services (and corresponding fees) for which the parties contracted. *Id*. at 477.

The Court of Appeals improperly affirmed in these cases for reasons similar to those discussed above regarding the tuition agreements. While the parties may have intended to be bound to exchange fees for some student services, the lone term "services" gave no indication regarding *which* student services the universities were obligated to provide. The parties cannot reasonably be said to have intended the students to pay for literally *any* type of service. Mutuality of assent regarding student services is therefore missing from EMU's and LSSU's tuition agreement documents. Remand in those cases is necessary to determine the existence and terms of any implied contract regarding student services.

In contrast, the trial court in CMU's case properly resolved this issue. The court considered evidence outside of the tuition agreement documents when considering the two types of fees that Dalke identified—a $225 "Student Services Fee" and a $150 "Parking Pass Fee." CMU presented evidence that it continued offering the underlying services during the pandemic. Dalke did not present any evidence to establish a genuine material issue of fact. The trial court in CMU's case, therefore, properly granted the university's motion for summary disposition on Dalke's student-services fees claim.

IV. CONCLUSION

For those reasons, I would vacate the Court of Appeals judgment in part. The tuition agreement documents were not binding express contracts because they failed to specify which classes the universities were obligated to provide and in what format, and therefore lacked the necessary mutuality of assent. The Court of Claims in each case failed to properly consider other evidence to evaluate the existence and terms of an implied contract. Similarly, EMU's and LSSU's tuition agreement documents lacked mutual assent as to which student services would be provided, and therefore were not binding contracts. Only

the trial court in CMU's case properly considered the issue regarding student services. I would therefore vacate the Court of Appeals judgment and remand to the Court of Claims for further proceedings. I respectfully dissent.

BERNSTEIN, J., joins the statement of VIVIANO, J.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 30, 2024

Clerk

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