COURT OF APPEALS
DECISION
DATED AND RELEASED

March 19, 1996

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

NOTICE

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

No. 95-1110

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ALICIA MARIA FERNANDEZ,

Plaintiff-Appellant,

v.

MEDICAL COLLEGE OF WISCONSIN, INC., and HERBERT M. SWICK,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed*.

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

PER CURIAM. Alicia Maria Fernandez appeals from a judgment dismissing her complaint against the Medical College of Wisconsin, Inc., and Herbert M. Swick, and awarding the Medical College $11,167.25 on its counterclaim. Fernandez contends that there are questions of material fact concerning her claims for defamation and breach of contract and her claim that her dismissal from medical school was arbitrary and capricious. She also

contends that the complaint stated a claim for intentional infliction of emotional distress and that there is no legal bar to her claims for conversion, breach of fiduciary duty, and fraud. Finally, Fernandez contends that her breach of contract claim barred summary judgment against her on the Medical College's counterclaim. We reject her arguments and affirm the judgment.

FACTS

Fernandez was originally accepted as a student at the Medical College in 1983. After deferring her enrollment for one year, she withdrew during the first semester. She subsequently enrolled in, and withdrew from, Mayo Medical College. In 1987, Fernandez reapplied to the Medical College and was accepted. During the second semester following her re-admission, Fernandez was admitted to the school's five-year program. Near the beginning of her second year, she took a semester leave of absence because of scheduling problems. She later took an additional leave of absence for health reasons. Fernandez returned from this leave in January 1990. She received passing grades (including a low pass and a high pass) in the courses taken after that date.

In the summer of 1989, the Medical College's Academic Standing Committee warned Fernandez that it was concerned with her lack of academic progress and that failure to maintain satisfactory progress could result in dismissal. Fernandez was advised that she was required to complete the biochemistry course during the 1989-90 academic year and take the full sophomore course schedule during 1990-91. In an October 1990 letter, the Medical College's president advised Fernandez that she was required to take Part I of the National Board of Medical Examiners' (NBME) examination in June 1991. Days before the examination was scheduled, the Academic Standing Committee reiterated the requirement that Fernandez take the June NBME examination.

The June NBME examination at the Medical College was cancelled after copies of the examination were stolen. Swick, the Senior Associate Dean for Academic Affairs, sent a memo to the students who had been scheduled to take the examination. The memo notified them that, because of the cancellation,

the school was waiving its requirements concerning the examination.[1] Students were reminded that passing the examination was necessary for licensing, and they were encouraged to take the examination in September. Fernandez received a copy of the memo. She did not contact Swick or the Academic Standing Committee to ascertain if it applied to her, and she did not take the September examination.

In December 1991, the Academic Standing Committee met and reviewed Fernandez's status. According to the minutes of the meeting, the Committee voted "to dismiss" Fernandez for failure to satisfy previous mandates and for unsatisfactory professional behavior. Fernandez received notice that the committee "voted to conduct a dismissal hearing, to consider [her] dismissal" for a "pattern of conduct that indicates that [she was] not suited for the practice of medicine." The conduct identified in the notice was the failure to take the NBME examination as previously directed; a pattern of not taking other examinations in a timely fashion, if at all;[2] and repeated leaves for personal and academic reasons. The notice also provided that the committee would consider any other grounds that may be discovered. The hearing was set for January 13, 1992, although it was later postponed to January 23.

Prior to the hearing, the Academic Standing Committee notified Fernandez that it would also consider dismissal for unethical conduct; i.e., a long-standing pattern of dishonesty. The identified incidents, dating from September 1990, were misrepresentations regarding the reason for default on a student loan, disbursement of loan proceeds, the reason for not taking the September NBME examination, and the purpose of an emergency loan. The notice also alleged that a representation in a health insurance application was

[1] The Medical College required all students to take Part I of the NBME examinations in June of their sophomore year. Students who failed the examination were permitted to begin the junior year rotations, provided they took the examination again the following September. Failure to take and pass the September examination would preclude the student from further course work until he or she passed the examination. According to Swick's memo, the Medical College also waived this requirement for students who had previously failed the NBME examination.

[2] Fernandez had previously received an incomplete on a pathology course when she missed the final examination and two scheduled make-up tests. She ultimately took a special make-up examination and passed the course. Fernandez also missed two examinations in the biochemistry course, which she had not been required to make up.

contrary to information previously provided to the Medical College's employees. Fernandez was later notified that allegations regarding false pledges during an alumni "phonathon" would also be considered, as well as an allegation that she had misrepresented the facts regarding payment of her car loan.

At Fernandez's request, an Ad Hoc Hearing Committee was convened to consider the various allegations of dishonesty. Three members of the Ad Hoc Hearing Committee were also members of the Academic Standing Committee.

A joint hearing was held, at which Fernandez appeared with counsel. While Fernandez was personally allowed to call witnesses and cross-examine adverse witnesses, her attorney's participation was limited to making opening and closing statements and advising her during the proceedings. The hearing was tape recorded. In addition to documentary evidence and several witnesses, Swick summarized comments and statements from employees and complainants who were not present.

After the hearing, the Ad Hoc Hearing Committee met and found against Fernandez on the allegations concerning the insurance application, the alumni pledges, and the misrepresentations regarding disbursement of loan proceeds and payment on the car loan. The Academic Standing Committee, of which Swick was a member, then met. The Committee considered the Ad Hoc Hearing Committee's dishonesty findings to be relevant to Fernandez's credibility. It found that Fernandez was dishonest regarding her inability to remember writing a letter to the NBME. The committee also found that she repeatedly failed to demonstrate the expected level of professional responsibility by not taking examinations timely, by not accepting responsibility for her actions, and by disregarding specific mandates concerning the NBME examination without clarifying whether Swick's memo applied to her. Both committees concluded that Fernandez should be immediately discharged. An appeals subcommittee of the faculty rejected Fernandez's claims that the dismissal votes were unfair, incorrect applications of policies, or arbitrary and capricious actions.

Fernandez filed suit against the Medical College and Swick. She alleged claims of defamation and intentional infliction of emotional harm against both the Medical College and Swick.[3] She also alleges claims against the Medical College for breach of contract, arbitrary and capricious action, conversion of student loan money, breach of fiduciary duty, and fraud. The Medical College filed a counterclaim. It sought indemnification for its payment of a student loan it had guaranteed for Fernandez. The trial court granted the summary judgment motions filed by the Medical College and Swick. Additional facts will be set forth in the opinion as relevant.

STANDARD OF REVIEW

This court will reverse a trial court's decision granting summary judgment only if the trial court incorrectly decided a legal issue or if material facts are in dispute. ***Hammer v. Hammer,*** 142 Wis.2d 257, 263, 418 N.W.2d 23, 25 (Ct. App. 1987). All doubts on factual matters are resolved against the party moving for summary judgment, ***Grams v. Boss,*** 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980), and even on undisputed facts, summary judgment is not appropriate if reasonable persons can reach different inferences, ***Delmore v. American Family Mut. Ins. Co.***, 118 Wis.2d 510, 516, 348 N.W.2d 151, 154 (1984).

Appellate courts and trial courts follow the same methodology. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). First, the pleadings are examined to determine whether the complaint states a claim for relief. ***Id.*** If the complaint states a claim and the answer joins the issue, the court then examines the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. ***Id.*** If the summary judgment materials do not indicate that there is a material issue of fact and if the moving party is entitled to judgment as a matter of law, summary judgment must be entered. Section 802.08(2), STATS.

DEFAMATION CLAIM

[3] Fernandez also alleged a claim for invasion of privacy in violation of § 895.50, STATS. On appeal, however, she does not challenge the trial court's dismissal of this claim.

The trial court concluded that the charges and statements made against Fernandez during the dismissal hearing were capable of defamatory meaning. The court held, however, that the statements were privileged because the statements furthered the faculty's common interest in the academic and ethical qualifications of a medical student. The court also held that Fernandez had not presented sufficient facts to show an abuse of privilege.

Fernandez concedes that a conditional privilege existed. She contends that whether the privilege was abused presents a question of material fact. She argues that the evidentiary materials present sufficient facts from which a reasonable jury could infer that Swick and the Medical College acted in bad faith. To support her defamation claim, she cites to the following allegations drawn from the evidentiary materials:

1. Swick maintained a non-academic file for her;

2. A Medical College employee inquired of a creditor about the status of Fernandez's car loan after introducing herself as Fernandez's "financial consultant";

3. Swick ordered that a subsequent telephone conversation with the creditor be recorded;

4. Swick refused to acknowledge that his memo regarding the NBME examination could mislead her into believing she was not required to take the September examination;

5. The Academic Standing Committee's minutes reflect that the committee voted to dismiss Fernandez before a hearing was held;

6. Swick had discussed with an investigator the possibility that Fernandez stole the June NBME examination, and Swick later told the investigator that she was dismissed under adverse circumstances;

7. Fernandez's only poor grade was received in a class taught by Swick and for which tests were not administered;

8. Swick's investigation of the allegations of dishonesty did not include speaking with Fernandez, the insurance agent who took the health insurance application, one of the doctors who disavowed a "phonathon" pledge, or the employee to whom Fernandez allegedly misrepresented the use of loan proceeds;

9. The Medical College withheld part of her student loan in January 1992 by overstating tuition and violating its policy of applying only one-half of loan proceeds to tuition;

10. Although he lacked authority over student loan disbursements, Swick offered to release additional student loan funds in January 1992 if Fernandez

provided information about her financial obligations, an offer which Fernandez refused;

11. Fernandez was denied the opportunity to copy materials from her file prior to the dismissal hearing;

12. The Medical College relied upon incidents that had been resolved several months before the initiation of dismissal proceedings;

13. Swick apparently met *ex parte* with the chair of the appeals subcommittee to provide additional, undisclosed information about the appeal; and

14. Swick violated the Medical College's rules of medical confidentiality by contacting a physician at the Student Health Center and obtaining medical information without Fernandez's permission.

The Medical College and Swick dispute several of Fernandez's allegations. For purposes of determining whether a party has defeated a motion for summary judgment, however, we assume the allegations to be true. *See* ***Grams***, 97 Wis.2d at 338-39, 294 N.W.2d at 477.

A conditional privilege to publish defamatory matter exists if the person publishing the information and the recipient of the information have a legitimate common interest. ***Zinda v. Louisiana Pacific Corp.***, 149 Wis.2d 913, 922, 440 N.W.2d 548, 552 (1989). The privilege may be lost, however, if it is abused. ***Id.*** at 924, 440 N.W.2d at 553. The RESTATEMENT 2D OF TORTS identifies five situations which may present an abuse of a conditional privilege, and the Wisconsin Supreme Court has endorsed its formulation. ***Id.*** at 924-25, 440 N.W.2d at 553. Abuse occurs (1) if the defendant knew the defamatory matter was false or he or she acts in reckless disregard of its truth or falsity, (2) if the defamatory matter is published for a purpose other than that for which the privilege is given, (3) if the statement is published to someone not necessary to the accomplishment of the privilege, (4) if the publication includes defamatory material not reasonably relevant to the purpose of the privilege, and (5) if the publication includes non-privileged material as well as privileged material. ***Id.***

If the publisher of the defamatory matter is motivated solely by spite or ill will, the publication is for a non-privileged purpose, and the privilege is abused. ***Ranous v. Hughes***, 30 Wis.2d 452, 469, 141 N.W.2d 251, 259 (1966). When the publication is made to protect the common interest, however, the fact that the publisher is also motivated by resentment or indignation does not destroy the privilege. ***Id.*** Thus, if the primary purpose of the publication is to promote a common interest, a defendant's secondary motive does not defeat the privilege. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 115, at 833-34 (5th ed. 1984).

The student handbook of the Medical College indicated that the requirements for a degree included competence in assuming responsibility for patient care and evidence of good judgment and integrity. It also warned that a student may be dismissed if judged to be unsuited to enter the profession for reasons of conduct, behavior, ethics, or quality of work. The Academic Standing Committee was expected to consider all available information to assess a student's intellectual ability, motivation, and personality before declaring a student unsuited to continue in medical school.

The information presented to the Academic Standing Committee and the Ad Hoc Hearing Committee was highly relevant to the common interest of the Medical College faculty of which Swick and the committees' members were a part. Even assuming Fernandez's allegations are true, they are not sufficient to show that promotion of the common interest was not the primary motivation for the publication of the defamatory matters during the hearing.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The trial court dismissed the third claim in Fernandez's complaint, concluding that it failed to state a claim for intentional infliction of emotional distress. The trial court held that because Fernandez did not allege that the anxiety, emotional trauma, and mental anguish she claimed to have suffered were "disabling," the pleading was inadequate.

Fernandez contends that the trial court erred because the notice pleading provision of § 802.02, STATS., does not require such precise pleading. Further, she contends that a fair inference from the terminology used is that the emotional distress was extreme and disabling. She argues that the allegations upon which she relied to argue that Swick and the Medical College abused the conditional privilege to publish defamatory matters also create a fact issue as to whether their conduct was extreme and outrageous and intended to cause emotional distress.

The first step in the summary judgment methodology is to determine if the complaint states a claim for relief. ***Green Spring Farms***, 136 Wis.2d at 315, 401 N.W.2d at 820. The following is a summary of the factual allegations in the complaint. Swick advised Fernandez that the Academic Standing Committee would conduct a dismissal hearing based on a pattern of conduct indicating that she was "not suited for the practice of medicine." She was advised of the details of the claimed pattern of conduct and of the procedures for the hearing. Swick instructed another employee to contact her creditor and obtain information about a debt by claiming to be Fernandez's "financial consultant." As a result of this contact, the employee obtained personal and confidential financial information about Fernandez which was used to her detriment in the dismissal proceedings. During the dismissal hearings, the procedures contained in Fernandez's contract with the Medical College were not followed, and Swick acted as both witness and prosecutor. The committees' dismissal decisions were upheld on appeal. Further, the Medical College wrongfully withheld $623 of student loan proceeds by overstating tuition. With regard to the third claim, the complaint specifically alleged that they intended to and did "inflict emotional harm upon" her and, as a result, she "experienced extreme anxiety, emotional trauma, and mental anguish."

A claim for intentional infliction of emotional distress was recognized in ***Alsteen v. Gehl***, 21 Wis.2d 349, 124 N.W.2d 312 (1963). The ***Alsteen*** court concluded that "[o]ne who by extreme and outrageous conduct intentionally causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it." ***Id.*** at 358, 124 N.W.2d at 317 (emphasis in original omitted). To recover, a plaintiff must show that the defendant intends for his or her behavior to cause emotional harm. ***Id.*** at 359, 124 N.W.2d at 318. The plaintiff must also establish that the conduct was extreme and outrageous; i.e., "a complete denial of the plaintiff's dignity as a

person." ***Id.*** at 359-60, 124 N.W.2d at 318. Additionally, the plaintiff must show that he or she suffered an extreme disabling emotional response to the conduct and that the conduct was the cause of the response. ***Id.*** at 360, 124 N.W.2d at 318. To be severe emotional distress, plaintiff's emotional response to the defendant's actions must leave him or her unable to function in other relationships: temporary discomfort is not sufficient. ***Id.*** at 360-61, 124 N.W.2d at 318.

For purposes of determining if the complaint states a claim for intentional infliction of emotional distress, the case law suggests that the factual allegations sufficiently allege that Fernandez suffered an extreme disabling emotional response. *See* ***Slawek v. Stroh***, 62 Wis.2d 295, 314-16, 215 N.W.2d 9, 20-21 (1974) (defendant's counterclaim alleged plaintiff's acts caused "great mental anguish, suffering and humiliation" and defendant was "held up to ridicule, shame, contempt and embarrassment"). The complaint does not, however, allege conduct that is so extreme and outrageous that the average member of the community must regard it as being a "complete denial of the plaintiff's dignity as a person." As a matter of law, the conduct alleged does not state a claim for intentional infliction of emotional distress.

BREACH OF CONTRACT CLAIM

Fernandez contends the Medical College violated the hearing procedures and, by doing so, breached the contract created by its student handbook. She also contends that the Medical College violated the duty of good faith implied in the contract. To support the breach-of-contract claim, Fernandez cites the minutes of the Academic Standing Committee's meeting held before the hearing, which reflect that the committee voted "to dismiss" her. She also cites late notice of an allegation, limited access to documents in her file, and the Medical College's provision of an incomplete witness list. Additionally, she objects to the limited role imposed upon her attorney and to Swick's presentation of hearsay statements to support some allegations. She argues that although issues regarding dishonesty were to be considered by the Ad Hoc Hearing Committee, the Academic Standing Committee considered allegations of misconduct in its decision, including an incident of which she was not given prior notice. Fernandez also alleges that the procedures of the appeals subcommittee were violated when Swick apparently held an *ex parte* meeting with the chair of the subcommittee to provide "further background" about the

case and when he attended the subcommittee's hearing, although he was not designated to represent the Academic Standing Committee. To support her bad faith claim, Fernandez relies on the items enumerated in the discussion of defamation.

Wisconsin has recognized that a college's bulletin and student handbook can create a contractual relationship between the student and the college. ***Cosio v. Medical College of Wisconsin, Inc.***, 139 Wis.2d 241, 245, 407 N.W.2d 302, 304 (Ct. App. 1987). We are not persuaded, however, that the traditional rules of contract construction should apply when the underlying issue is dismissal for academic shortcomings. Schools are educational institutions, and a decision to dismiss for academic reasons rests on the school officials and faculty's subjective judgment that a student lacks the necessary ability to perform at expected levels. ***Board of Curators v. Horowitz***, 435 U.S. 78, 88-90 (1978). The decision is a collective evaluation of cumulative information that is not readily subjected to the adversary process. ***Id.*** at 90. Courts are not qualified to pass upon the academic qualifications of students. *See* ***Mahavongsanan v. Hall***, 529 F.2d 448, 450 (5th Cir. 1976), *aff'd*, 579 F.2d 245 (5th Cir. 1978) (per curiam). Absent a voluntary undertaking, even procedural due process does not mandate that a student in a public institution receive a hearing when dismissed for academic reasons. ***Horowitz***, 435 U.S. at 90. Thus, educational contracts are unique and should be construed to allow the school the greatest flexibility in meeting its educational responsibility. *See* ***Jansen v. Emory University***, 440 F.Supp. 1060, 1062 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978) (per curiam).

Considered in light of the need for flexibility in interpretation of educational contracts, Fernandez's breach-of-contract claim does not withstand the summary judgment motion. The procedures for academic dismissal by the Academic Standing Committee and the appeals subcommittee were published in the student handbook. Additionally, a year prior to the allegations against Fernandez, the Medical College had adopted policies and procedures for hearing charges of academic misconduct by an Ad Hoc Hearing Committee.

The Academic Standing Committee's procedures provided that a hearing would be held between five and fifteen days after the student was given notice of the charges. The procedures allowed for representation by legal counsel, allowed the student advance access to the file pertaining to the case,

and provided the student a right to present and to confront witnesses. The chairperson's rulings on questions of procedure and admissibility of evidence would be conclusive.

The procedures for hearing charges of dishonest, unethical, or irresponsible behavior by an Ad Hoc Hearing Committee provided that dismissal could only occur after a formal hearing. The Senior Associate Dean for Academic Affairs was responsible for presenting the charges and the evidence to the committee. The student had the right to appear, to present evidence and witnesses, to question witnesses, and to make statements to the committee. Both the student and the Senior Associate Dean could utilize legal counsel, but neither counsel could question witnesses.

Although the meeting minutes suggest a premature vote to dismiss rather than a vote to hold a hearing, we consider the alleged breach inconsequential because Fernandez was accorded a hearing on all charges. The initial notice also warned that the committee would consider any additional matters that later came to their attention. This language was sufficient to apprise Fernandez that additional allegations could be added when discovered, whether two days before, or immediately prior to, the hearing. Last minute allegations also present the possibility of additional witnesses. The additional objections Fernandez raises regarding the hearing procedures, i.e, denial of counsel's right to question witnesses, presentation of hearsay statements, and limited access to her file, were consistent with or at least not in direct conflict with the published procedures.

The procedures for the appeals subcommittee provided that the issues for appeal from the Academic Standing Committee were limited to whether there had been an unfair or incorrect application of the Medical College's policies regarding student performance or whether the dismissal decision was arbitrary and capricious. The appeals subcommittee is confined to considering the committee's report and any statements by the student and/or legal counsel. Also, a representative of the committee or its counsel could appear to explain the basis for the decision. The hearing before the appeals subcommittee is closed, and the only persons permitted to attend were members of the subcommittee, the student, his or her faculty advisor and/or legal counsel, a representative of the Academic Standing Committee and/or its counsel, and the person recording the proceedings. The policies and

procedures of the Ad Hoc Hearing Committee provided that appeal was allowed only in the event of dismissal, and the standard appeal mechanism applied.

Swick's *ex parte* communication of background information to the chairperson of the appeals subcommittee would clearly be a violation of this procedure. The summary judgment materials, however, provide no evidence that this occurred. A letter purporting to schedule a meeting is not evidence that the meeting was actually held. We see no reason to presume that the chairperson would consent to or attend a meeting that would violate procedures, and Fernandez has not provided any authority requiring this court to do so. Even interpreted in the light most favorable to Fernandez, the letter is only evidence that Swick attempted an *ex parte* communication.

Similarly, Fernandez argues that Swick attended the appeals subcommittee hearing in violation of the appeals subcommittee's procedures. Although she alleges that his attendance was unauthorized, she does not present any evidentiary materials to show he actively participated in the hearing. We are not willing to conclude that mere attendance, without more, is so contrary to the appeals subcommittee's procedures as to constitute a material breach of contract.

DISMISSAL WAS ARBITRARY AND CAPRICIOUS

In her argument that the decision to dismiss her was arbitrary and capricious, Fernandez again raises the factual allegations made to support her defamation and breach-of-contract claims. Clearly, what she wants is for the trial court to litigate the correctness of the committees' decisions. In her appellate brief, concerning the four charges which the Ad Hoc Hearing Committee found to be supported by the evidence, she states, "Whether the remaining charges, as to which Ms. Fernandez was found guilty in violation of [the Medical College's] professional ethics policy, constitute sufficient reasons for dismissal, should be a matter-of-fact [sic] finding to be left to a jury ...."

The test of whether an academic dismissal is arbitrary and capricious is whether a school lacks a sufficient reason for the dismissal. ***Cosio***,

139 Wis.2d at 247, 407 N.W.2d at 305. If a school has a sufficient reason, a court will not interfere with the decision. ***Id.***

The Ad Hoc Hearing Committee found that Fernandez had engaged in a pattern of dishonesty, and the Academic Standing Committee found that she failed to demonstrate the expected level of professional responsibility, failed to accept responsibility for her actions, and disregarded mandates. In light of the committees' findings, we cannot say that the Medical College lacked a sufficient reason for the dismissal. Fernandez is not entitled to have a jury second-guess the school's committees.

CLAIMS FOR CONVERSION AND BREACH OF FIDUCIARY DUTY

After the dismissal proceedings were initiated, the Medical College received proceeds from a student loan for Fernandez in the amount of $5,520. The school applied $500 to repay an emergency loan from the Medical College, applied $4,820 to pay tuition, and disbursed $200 to Fernandez. Tuition was actually $4,197. Fernandez contends that the Medical College's retention of the $623, which was the amount she was overcharged for tuition, provides a basis for claims of conversion and breach of fiduciary duty. Fernandez contends that federal student aid regulations prohibited the Medical College from withholding the $623 without her written consent.

The trial court concluded that Fernandez's claim for improper retention of loan monies was based on 34 C.F.R. § 682.604, which governs loan disbursements. The trial court concluded, however, that neither the Higher Education Act of 1965 nor its implementing regulations create a private right of action. Therefore, the complaint failed to state a claim regarding the withholding of the $623.

Fernandez does not contend that the federal legislation or regulations create a private cause of action. She contends, however, that this conclusion does not prohibit or limit her right to seek recovery under state law for claims of conversion or breach of fiduciary duty.

The difficulty with Fernandez's argument is that she has provided no authority, except the federal statute and regulations, for her argument that she had an unqualified right to the $623 that the Medical College withheld and that the Medical College was a fiduciary with respect to the loan proceeds. If the statute and regulations do not provide a private action, they can not be relied upon to provide the missing authority. The record does not contain copies of the loan documents. Consequently, there is nothing in the record to support a conclusion that she was unconditionally entitled to the $623 or that the Medical College held the funds in trust for her. The trial court properly granted the Medical College summary judgment on the claims of conversion and breach of fiduciary duty.

FRAUD CLAIM

Fernandez's fraud claim is based on the statement of the amount of tuition shown on the receipt for the student loan proceeds. The trial court rejected the claim, relying on its conclusion that the federal legislation and regulations do not create a private right of action. Fernandez contends that a state law claim for fraud (or intentional misrepresentation) is not barred.

A claim of intentional misrepresentation requires a showing that the defendant knowingly or recklessly made a false representation of fact and that a defendant intended to deceive the plaintiff and to induce the plaintiff to act on the deception to his or her pecuniary loss. ***Ollerman v. O'Rourke Co.***, 94 Wis.2d 17, 25, 288 N.W.2d 95, 99 (1980). Moreover, the plaintiff must have believed the misrepresentation and relied upon it to his or her detriment. ***Id.***

The summary judgment materials establish that Fernandez does not have a claim for intentional misrepresentation. It is undisputed that she knew that the amount of the tuition reflected on the receipt was incorrect and that she made numerous demands for release of the $623. Fernandez neither believed nor detrimentally relied upon the misrepresentation.

CHALLENGE TO JUDGMENT ON GUARANTY

Fernandez does not contest that the Medical College guaranteed a loan she obtained from M&I Bank, that she defaulted on the loan, or that the Medical College honored its guaranty and paid the bank. She contends that her inability to perform her contract with M&I Bank was caused by the breach of contract committed by the Medical College when it dismissed her. She argues that the Medical College's breach of contract bars its equitable subrogation right to recover the amounts it paid under the guaranty. We have concluded, however, that Fernandez's breach-of-contract claim was properly dismissed. Therefore, Fernandez has no defense to the Medical College counterclaim, and the trial court's grant of summary judgment was proper.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.