No. 124,475

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

AZRIEL MINJAREZ-ALMEIDA and ANDREA VIERTHALER,
Individually and on Behalf of All Others Similarly Situated,
Appellants,

v.

KANSAS BOARD OF REGENTS,
Defendant,

and

KANSAS STATE UNIVERSITY,
Appellee.

SYLLABUS BY THE COURT

1.

The Kansas rules of civil procedure require a plaintiff's petition to include a short and plain statement of a claim that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.

2.

When a defendant moves for dismissal under K.S.A. 60-212(b)(6), the district court must resolve every factual dispute in the plaintiff's favor. The court must assume all the allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim based on the plaintiff's theory or any other possible theory. Dismissal is improper when the well-pleaded facts and inferences state *any* claim upon which relief can be granted.

3.

The Kansas Supreme Court has interpreted K.S.A. 46-903 and K.S.A. 46-907 to create a statutory requirement that claims based on implied contracts must be submitted to and considered by the Joint Committee on Special Claims before those claims may be presented in a lawsuit.

4.

Claims arising from express contracts are not subject to the procedure set forth in K.S.A. 46-903 and K.S.A. 46-907.

5.

In most instances, a district court ruling on a motion to dismiss may only consider the plaintiff's petition and any documents attached to it. But when a petition refers to an unattached document central to the plaintiff's claim, a defendant may submit—and a court may consider—an undisputedly authentic copy of the document without transforming the motion to dismiss into a motion for summary judgment.

6.

Kansas does not recognize a tort of educational malpractice.

7.

To maintain a breach-of-contract claim against a university, a plaintiff must do more than simply allege that the education was not good enough. But contract claims are not educational-malpractice claims when they point to an identifiable contractual promise that the university failed to honor.

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Opinion filed March 24, 2023. Affirmed in part, reversed in part, and remanded with directions.

Larkin Walsh, *W. Greg Wright*, *Rex A. Sharp*, and *Charles T. Schimmel*, of Sharp Law, LLP, of Prairie Village, and *Michael A. Tompkins*, pro hac vice, of Leeds Brown Law, P.C., of Carle Place, New York, for appellants.

Anthony F. Rupp, *Daniel Buller*, and *Nancy Musick*, of Foulston Siefkin, LLP, of Overland Park, and *Holly A. Dyer*, of the same firm, of Wichita, for appellee.

Before WARNER, P.J., GREEN and HILL, JJ.

WARNER, J.: In March 2020, the COVID-19 pandemic upended everyday life. In Kansas, in an effort to contain the spread of COVID-19, Governor Laura Kelly issued an emergency declaration and later a statewide stay-at-home order. Riley County, the home of Kansas State University's main campus in Manhattan, quickly followed with its own stay-at-home order. Across the country and around the world, offices and shops shuttered, courts closed, and classrooms emptied.

Life at universities was cast into uncharted territory. Colleges closed their campus facilities and residence halls. Students who had paid their tuition and fees for the semester and had attended classes in person for two months were directed to leave the campus and resume their studies online. It is safe to say that almost no one—not the university faculties, students, or administrations—had anticipated this unprecedented shift. Students' experience during the Spring 2020 semester was vastly different from the experience they envisioned when they paid their tuition and fees. But does that mean the students did not get what they paid for?

These consolidated cases present two putative class actions against Kansas State University, or K-State, by former students seeking partial fee and tuition refunds from the Spring 2020 semester because of pandemic-related campus closures. The district court dismissed the lawsuits, finding the students' petitions did not state any valid claim for relief. After reviewing the record and the parties' arguments, we find that the district court

properly dismissed the students' claims for unjust enrichment or money had and received. But the students' petitions stated plausible claims for breach of contract that should have been permitted to proceed. We thus reverse the portion of the district court's decision dismissing the students' breach-of-contract claims and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Azriel Minjarez-Almeida, Andrea Vierthaler, Noah Plank, and John Garfolo are former K-State undergraduate students who were seniors during the Spring 2020 semester. They paid tuition and various university fees for that semester. In March 2020, K-State suspended in-person classes and began transitioning to a remote format as part of its pandemic response. It cancelled other in-person events and activities on campus, moved students out of dorms, and generally shut down campus facilities. K-State's president announced that "[u]ntil further notice," there would be "no in-person, student-facing operations on [K-State] campuses." With few exceptions, students had to leave campus for the remainder of the semester.

Despite these disruptions, Minjarez-Almeida, Vierthaler, Plank, and Garfolo all completed their coursework and graduated at the end of the semester. This appeal follows from two lawsuits the students filed during the months after graduation—one seeking reimbursement of university fees after the March 2020 campus closures and one seeking partial refunds for tuition during the same period.

The Fee Lawsuit

Minjarez-Almeida and Vierthaler—the Fee Plaintiffs—sued K-State and the Kansas Board of Regents (the governing body that oversees Kansas state universities and colleges) in July 2020. The Fee Plaintiffs brought claims for breach of contract, unjust enrichment, conversion, and money had and received against K-State. They also asserted all these claims, except breach of contract, against the Board of Regents. Broadly

speaking, the Fee Plaintiffs alleged that K-State had closed campus facilities and denied access to campus services for roughly half the Spring 2020 semester but had not refunded the student fees for that period.

The Fee Plaintiffs attached to their petition K-State's 2019-2020 Comprehensive Tuition and Fee Schedule, a document the school publishes on its website that outlines the various tuition and fees students must pay. This Schedule has separate sections for "on-campus" students and "online" students, with different fees and costs for each category. Most of the fees listed on the Schedule simply have a fee title and an amount, without an explanation of what the fee is for. That said, the Schedule does include a section outlining "Mandatory Fees" for on-campus students at K-State's three campuses; there are no mandatory fees for online students.

One of the mandatory fees for on-campus students at K-State's Manhattan campus is a "Privilege Fee." The Schedule indicates that students are exempt from paying this fee if they are "only enrolled in on-campus courses held more than 30 miles from campus and residing outside of a 30-mile radius of the Manhattan campus." The Schedule also states that students who do not pay the Privilege Fee are "ineligible to use campus services such as Lafene Health Center and Peters Recreation Complex."

In the Fee Petition's breach-of-contract claim, the plaintiffs alleged that they "entered into contractual agreements" with K-State, in which the plaintiffs "would pay fees for or on behalf of students, and in exchange, K-State would provide facilities, activities, services, and resources to students." They alleged that K-State did not provide the services and facilities they paid fees to access during the second half of the Spring 2020 semester. The Fee Plaintiffs sought—individually and on behalf of other similarly situated students—a pro-rata reimbursement of their Spring 2020 fees for the period when those services and facilities were no longer available.

The Tuition Lawsuit

A couple of months after the Fee Plaintiffs filed their petition, Plank and Garfolo—the Tuition Plaintiffs—also sued K-State and the Board of Regents. The Tuition Plaintiffs' first amended petition generally asserted that the students had enrolled in, and paid tuition for, in-person coursework for the Spring 2020 semester, but the university had unilaterally altered the nature of their classes in March of that year. The Tuition Plaintiffs asserted that "[t]he online learning options being offered to Kansas State's students are sub-par in practically every aspect" compared to a traditional in-person education. They cited a lack of teacher-student interaction and claimed to "have been deprived of the opportunity for collaborative learning and in-person dialogue, feedback, and critique" because of the shift online, along with losing physical access to campus facilities.

Similar to the Fee Plaintiffs, the Tuition Plaintiffs brought claims for breach of contract, conversion, unconstitutional taking, and unjust enrichment. For their contract claim, the Tuition Petition asserted that K-State had "entered into contractual arrangements with [the plaintiffs] to provide educational services, experiences, opportunities, and related services" for the Spring 2020 semester. They also asserted that K-State treated this agreement as a contract and assessed late fees when the students' tuition was not paid on time. The Tuition Plaintiffs sought pro-rata refunds of the tuition they paid for the Spring 2020 semester after the university ceased in-person instruction and facility access in March 2020.

Consolidation and Motions to Dismiss

The Fee Plaintiffs' and Tuition Plaintiffs' petitions thus alleged the existence of contractual agreements between the students and K-State. The petitions did not provide greater detail about those agreements, including whether the agreements were written or implied from the surrounding circumstances. Instead, the petitions stated more generally

that the students "entered into contractual agreements" and "entered into a binding contract" with K-State. Given these and other commonalities, the district court consolidated the two cases over the respective plaintiffs' objections.

K-State and the Board of Regents then moved to dismiss all claims against them, arguing the plaintiffs had failed to state any claim on which relief could be granted under K.S.A. 60-212(b)(6). Relevant here, K-State argued that the students had failed to allege the existence of a contract and that their contract claims were really impermissible educational-malpractice claims. K-State also argued that any implied-contract claims were barred because they had not first been submitted to a special legislative committee—the Joint Committee on Special Claims—which is a statutory prerequisite for asserting these claims against a state agency.

During its briefing on these motions, K-State produced two documents that were not attached to the plaintiffs' petitions: an excerpt from the online course catalog and a Financial Responsibility Agreement from the university's website. The university asserted that the catalog incorporated the Tuition and Fee Schedule attached to the Fee Petition; the attached excerpt from the catalog cautioned that "[t]he material in this catalog is provided for informational purposes and does not constitute a contract." The catalog went on to state that "courses, curricula, degree requirements, fees, and policies are subject to constant review and change without notice."

The second document K-State produced—the Financial Responsibility Agreement (or FRA)—stated that when students registered for a class or received a service from K-State, they agreed to pay the associated tuition, fees, and costs. It further explained that registration and acceptance of these terms created an agreement under which students paid "tuition, fees, and other associated costs" in exchange for "educational services" from the university. The FRA also contained a merger clause, stating that "[t]his agreement supersedes all prior understandings, representations, negotiations and

correspondence between the student and Kansas State University, constitutes the entire agreement between the parties with respect to the matters described, and shall not be modified or affected by any course of dealing or course of performance." It notes, however, that K-State may modify the terms of the FRA "if the modification is signed by" the student.

Neither the Fee Petition nor the Tuition Petition mentioned the FRA. Initially, all plaintiffs urged the district court to disregard that document, as it was outside the pleadings and thus should not be considered at the motion-to-dismiss stage. At oral argument before this court, an attorney for the plaintiffs stated that the plaintiffs were unaware of the FRA when they filed the lawsuits and only learned of the document when K-State attached it to its motion to dismiss in the Tuition Case and its reply in support of its motion in the Fee Case.

Dismissal for Failure to State a Claim

The district court granted both defendants' motions to dismiss. In the Fee Case, the court found that the Fee Plaintiffs had failed to plead the existence of a contract, noting they had not pointed to a "specific contractual promise" in the Fee Schedule or defined the nature of K-State's fee contract with the students. The court was unpersuaded that the Fee Schedule showed a contract because the schedule was missing "any language suggesting a promise that students would receive in-person access to any particular facility, activity, or service in exchange for payment of a fee."

The court also dismissed the Fee Plaintiffs' unjust-enrichment and money-had-and-received claims against K-State. The court found that Kansas law required the plaintiffs to submit these claims, which are often described as implied-by-law or quasi-contract claims, to the Joint Committee on Special Claims before suing in district court,

and their failure to do so required dismissal. Finally, the court dismissed the Fee Plaintiffs' conversion claim, along with all its claims against the Board of Regents.

The district court did not rely on the FRA for these rulings, as that document was not attached to or referenced by the Fee Petition. The court similarly refused to consider the course-catalog excerpt and several internet links in the Fee Petition, including a link to a Frequently Asked Questions page on K-State's website. The court acknowledged that, after many clicks, a person could find a more detailed breakdown of the mandatory Privilege Fee, but it described the general links to K-State's website as a "rabbit hole of information" that would not prevent dismissal.

Turning to the Tuition Case, the district court found the Tuition Plaintiffs' contract claims to be camouflaged educational-malpractice claims, emphasizing general allegations in the Tuition Petition that online education was less effective and less valuable than in-person instruction. The court further found that even if these claims did not allege educational malpractice, the Tuition Petition—like the Fee Petition—did not identify a specific promise for in-person education in exchange for tuition. The court also noted that, while unnecessary to support its decision, the FRA did not promise in-person learning.

The court dismissed the Tuition Plaintiffs' implied-contract claims against K-State for the same reasons it dismissed the Fee Plaintiffs' implied-contract claims—they had not been submitted to the Joint Committee on Special Claims. And the court dismissed the Tuition Plaintiffs' remaining conversion and taking claims, and all claims against the Board of Regents.

Both groups of plaintiffs then moved together for leave to file an amended petition. They sought to incorporate both petitions into one and to add materials—like statements from K-State's website and the various links the district court refused to

consider—to cure any deficiencies in their claims. The district court denied the motion. This appeal followed.

DISCUSSION

This case is one of many in which students are seeking tuition and fee refunds from colleges and universities because of these institutions' responses to the COVID-19 pandemic. A growing number of federal and state appellate decisions have addressed similar claims and have reached varying conclusions. Kansas district courts have also dealt with lawsuits concerning other universities, with differing results. But while these institutions' actions were largely unprecedented before the pandemic, the framework for deciding the legal issues associated with those actions—particularly in the context of a motion to dismiss—are far from new.

The law favors resolving claims on their merits. See *Garcia v. Ball*, 303 Kan. 560, 568, 363 P.3d 399 (2015); *State v. Auman*, 57 Kan. App. 2d 439, 440, 455 P.3d 805 (2019). But not all petitions present questions that should undergo discovery or require a trial. Motions to dismiss under K.S.A. 60-212 allow courts to resolve claims early—before a responsive pleading is filed—when issues can be determined as a matter of law at the outset of a case.

K.S.A. 2022 Supp. 60-212(b)(6) allows a petition to be dismissed if it "fail[s] to state a claim upon which relief can be granted"—that is, when the petition raises no legally supportable claims. But relief under this section is the exception, not the rule. Kansas courts thus must be careful not to impose overly burdensome pleading requirements. The Kansas rules of civil procedure only require a plaintiff to include "a short and plain statement of the claim showing [the plaintiff] is entitled to relief and a demand for judgment." *John Doe v. M.J.*, 315 Kan. 310, 317, 508 P.3d 368 (2022); see K.S.A. 2022 Supp. 60-208(a)(1). Put another way, the rules merely require a petition to

include "'a short and plain statement of a claim that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.'" 315 Kan. at 317.

For this reason, when a defendant moves for dismissal under K.S.A. 60-212(b)(6), the district court "'must resolve every factual dispute in the plaintiff's favor.'" *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019). This means that the court assumes all the allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim "based on [the] plaintiff's theory or any other possible theory." *Cohen v. Battaglia*, 296 Kan. 542, 546, 293 P.3d 752 (2013). Dismissal is improper when the well-pleaded facts and inferences "'state *any* claim upon which relief can be granted.'" *Kudlacik*, 309 Kan. at 790.

Because motions to dismiss necessarily involve legal questions that must be resolved on the face of the petition, appellate courts employ these same principles and give no deference to the district court's evaluation of the case. *Cohen*, 296 Kan. 542, Syl. ¶ 1. We thus accept the facts the Fee Plaintiffs and Tuition Plaintiffs allege in their respective petitions as true, drawing all reasonable inferences in their favor. 296 Kan. 542, Syl. ¶ 2. And we now must decide "whether those facts and inferences state a claim based on plaintiff's theory or any other possible theory." 296 Kan. 542, Syl. ¶ 2.

The Fee Plaintiffs and Tuition Plaintiffs appeal the district court's dismissal of their claims against K-State for breach of contract, unjust enrichment, and money had and received. They argue that, given Kansas' notice-pleading requirements, the allegations in their petitions were sufficient to allow these claims to continue. And they argue that they should have been permitted to amend their petitions to address any perceived deficiencies. They do not appeal the decision to dismiss their conversion and taking claims against K-State or any of their claims against the Board of Regents.

We conclude that the district court did not err when it dismissed the plaintiffs' claims for unjust enrichment and money had and received. The Kansas Supreme Court has held that these claims, which are based on theories of implied contract, must be presented to the Joint Committee on Special Claims before they may be included in a lawsuit. But the district court erred when it dismissed the plaintiffs' breach-of-contract claims, as these were claims based on a written agreement that plausibly could be interpreted in their favor.

1. *Kansas law requires people who are asserting implied-contract claims to submit their demands to the Joint Committee on Special Claims before they can file suit.*

As a general rule, the State is immune from incurring civil liability unless it waives this protection. This means that the State can decide when someone may sue it and can set procedural requirements and conditions for lawsuits when they are permitted. As arms of the State, public universities like K-State enjoy this same immunity from suit. See *Wilson v. Kansas State University*, 273 Kan. 584, 586-87, 44 P.3d 454 (2002).

Most often, the legislature defines the contours the State's sovereign immunity—as well as the waiver of immunity and any attendant procedures or conditions for maintaining lawsuits—through statute. *Siple v. City of Topeka*, 235 Kan. 167, 170, 679 P.2d 190 (1984). Between 1970 and 1979, Kansas statutes explicitly declared that the State was immune from "liability and suit" on cases arising from implied (but not express) contracts. See K.S.A. 46-901 (Weeks 1973); L. 1979, ch. 186, § 33 (repealing K.S.A. 46-901, effective July 1, 1979). Unlike express contracts, which are memorialized by oral or written words, implied contracts are established by the parties' conduct or imposed by other equitable considerations. See *Mai v. Youtsey*, 231 Kan. 419, 422, 646 P.2d 475 (1982) (discussing contracts implied in fact through actions or implied in law for equitable reasons). There is no question that the plaintiffs' claims for unjust enrichment and money had and received fall within this category, as both allege the

existence of contracts implied by law. As we discuss later, the parties dispute whether the plaintiffs' breach-of-contract claims involve express or implied contracts.

Beginning in 1979, the legislature recognized a limited waiver of some implied-contract claims while it at the same time established procedures that must be followed before someone could assert those claims against the State. K.S.A. 46-903 implicitly recognizes the possibility that such claims may be permitted but states that the legislature must authorize any payment toward a claim or judgment for breach of implied contract if the funds would come from the state treasury or a special state fund. And K.S.A. 46-907 states that before the legislature can authorize any such payment, any implied-contract claim must be submitted to a special legislative committee—the Joint Committee on Special Claims:

> "All claims proposed to be paid from the state treasury or any special fund of the state of Kansas, which cannot be lawfully paid by the state or any agency thereof except by an appropriation of the legislature shall be submitted to the joint committee on special claims against the state before final action thereon is taken by either house of the legislature." K.S.A. 46-907.

The Kansas Supreme Court has considered the interaction of K.S.A. 46-903 and K.S.A. 46-907 in only two published opinions, both filed in the decade after the statutes were adopted. In both instances, the court held that these two provisions created a condition precedent to filing most implied-contract claims against the State, and the failure to follow these procedures required dismissal of the affected claims.

- In *Wheat v. Finney*, 230 Kan. 217, 221, 630 P.2d 1160 (1981), the court found that K.S.A. 46-903 and K.S.A. 46-907 together create "a statutory requirement that claims based on implied contracts be filed" with the Joint Committee on Special Claims. The *Wheat* court held that filing with the Committee and allowing the

Committee to process the claim were "conditions precedent to the maintenance of an action" in court for these claims. 230 Kan. at 221. In other words, "[a]n action may not be maintained against the State without first filing a claim on which payment is denied." 230 Kan. at 221.

- A few years later, the court reaffirmed this conclusion in *Sharp v. State*, 245 Kan. 749, 754, 783 P.2d 343 (1989). There, the court emphasized that claims based on implied contract in general—and unjust enrichment in particular—must be dismissed unless those claims are submitted to and considered by the Joint Committee on Special Claims before the initiation of the lawsuit.

The students did not follow these procedures before filing this case—neither the Fee Plaintiffs nor the Tuition Plaintiffs submitted any of their claims to the Joint Committee on Special Claims. But the plaintiffs offer three reasons why they believe their claims may proceed despite these procedural deficiencies.

First, the plaintiffs assert that it is unclear whether their claims are subject to these procedural requirements because there remains an open question whether any reimbursement of fees or tuition would come from the state treasury. But Kansas law directs that when a state university receives tuition and fee payments, the money "shall be deposited in the state treasury." K.S.A. 76-719(b). And as K-State points out, the legislature has, at least once, authorized a tuition refund through appropriations legislation. See L. 2011, ch. 118, § 8; see also *Holt v. Wesley Medical Center, LLC*, No. 00-1318-JAR, 2002 WL 1067677, at *4 (D. Kan. 2002) (unpublished opinion) (finding that judgment against state medical school would come from state treasury, not endowment); *Mayer v. Fort Hays State University*, No. 3:05-CV-1123(AVC), 2006 WL 8448069, at *3 (D. Conn. 2006) (unpublished opinion) (applying Kansas law and citing *Holt* for the same proposition).

Second, the plaintiffs point out that there appear to be at least some instances when a university may provide refunds (such as when a student withdraws from a course) without legislative action. But there is no indication that withdrawing from a course raises a claim based on an implied contract. Rather, as we discuss later in this opinion, these claims are governed by a written contract between the university and its students and thus are not required to go through the process identified in K.S.A. 46-903 and K.S.A. 46-907.

Third, the plaintiffs assert that the Kansas Supreme Court's reading of K.S.A. 46-903 and K.S.A. 46-907 in *Wheat* and *Sharpe*—requiring them to file a Joint Committee claim *before* suing—adds a procedural hurdle not otherwise found in those statutes. As they point out, the plain text of the statutes has no language requiring someone to file a claim with the Joint Committee on Special Claims before a lawsuit is filed. Rather, the language only requires someone to file a request with the Committee before the legislature may approve any payment of a claim. The plain language of these statutes does not discuss the timing of a lawsuit within this process.

We acknowledge that the interpretation of K.S.A. 46-903 and K.S.A. 46-907 in *Wheat* and *Sharpe* appears to be rooted more in a practical application of sovereign immunity than in the plain text of those statutes. And "[r]eliance on the plain and unambiguous language of a statute is the best and only safe rule for determining the intent of the creators of a written law." *State v. Spencer Gifts, LLC*, 304 Kan. 755, Syl. ¶ 2, 374 P.3d 680 (2016). But even if we were to agree with the students' reading of these statutes, "[t]he Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the Kansas Supreme Court is departing from its previous position." *Snider v. American Family Mutual Insurance Co.*, 297 Kan. 157, Syl. ¶ 5, 298 P.3d 1120 (2013). While our Supreme Court has had few occasions to consider these statutes, it has given no indication that it is departing from its holdings in *Wheat* and *Sharpe*. See *Karr v. State*, No. 73,111, unpublished opinion filed October 27, 1995,

slip op. at 8-10 (reaffirming *Wheat* and *Sharpe*). We therefore must follow the Kansas Supreme Court's interpretation of K.S.A. 46-903 and K.S.A. 46-907.

Because the plaintiffs did not file their implied-contract claims—for unjust enrichment and money had and received—with the Joint Committee on Special Claims before initiating their lawsuits, *Wheat* and *Sharp* dictate that those claims cannot go forward. The district court properly dismissed those claims under K.S.A. 60-212(b)(6).

2. *The district court erred when it dismissed the plaintiffs' claims for breach of contract at this early stage in the case.*

The question that remains is whether the plaintiffs' respective claims for breach of contract suffer the same fate as their unjust-enrichment and money-had-and-received claims. We conclude they do not.

As we have indicated, both the Fee Plaintiffs and the Tuition Plaintiffs alleged in their petitions that K-State breached its contract with K-State students when it closed its campuses in March 2020 in response to the pandemic. The district court did not specifically rule whether these breach-of-contract claims were based on an express or implied contract. But unlike its discussion relating to the plaintiffs' claims of unjust enrichment and money had and received, the court made no indication that the breach-of-contract claims should have been submitted to the Joint Committee on Special Claims. Rather, the court analyzed—and dismissed—the contract claims on their merits.

On appeal, K-State argues that the plaintiffs' breach-of-contract claims alleged an implied contract based on the conduct and understandings of the university and its students. Thus, it asserts, these claims also required consideration by the Joint Committee on Special Claims. But this assertion is belied by the university's own filings, which included the FRA.

2.1. *The FRA is an express contract.*

The FRA is a written contract between a K-State student and the university, largely focusing on the student's financial responsibilities. In broad terms, the FRA states that a student who registers for classes or receives service from the university agrees to pay all tuition, fees, and costs, and K-State in turn agrees to provide "educational services":

> "Payment of Fees/Promise to Pay
>
> "I understand that when I register for any class at Kansas State University or receive any service from Kansas State University, I accept full responsibility to pay all tuition, fees and other associated costs assessed 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 (i.e., a financial obligation in the form of an educational loan as defined by the U.S. Bankruptcy Code at 11 U.S.C. §523(a)(8)) in which Kansas State University is providing me educational services, deferring some or all of my payment obligation for those services, and I promise to pay for all assessed tuition, fees and other associated costs by the published or assigned due date.
>
> "I understand and agree that if I drop or withdraw from some or all of the classes for which I register, I will be responsible for paying all or a portion of tuition and fees in accordance with the published tuition refund schedule at Kansas State University. I have read the terms and conditions of the published tuition refund schedule and understand those terms are incorporated herein by reference. I further understand that my failure to attend class or receive a bill does not absolve me of my financial responsibility as described above."

The FRA imposes penalties if the student does not hold up his or her financial end of the bargain, establishing late fees and allowing the university to prevent the student from registering for future classes or graduating. And the FRA states that it "constitutes the entire agreement between [the student and K-State] with respect to the matters described" and can only be modified by K-State with the student's signature.

In attaching the FRA to its written arguments concerning its motions to dismiss, K-State has admitted that the parties' relationship is governed by an express contract. Thus, K.S.A. 46-903 and K.S.A. 46-907's procedures for considering claims based on implied contracts do not apply. The question that lingers is whether the FRA provides a potential avenue for relief that should have survived dismissal—that is, whether the FRA can be reasonably interpreted to encompass the plaintiffs' contract claims. If so, the district court's dismissal of those allegations as a matter of law was improper.

2.2. *The parties' arguments regarding the FRA continue to evolve.*

The confusion as to the role the FRA should—or can—play in the plaintiffs' lawsuits is understandable. Our review of the record shows that the parties' positions regarding the FRA have been in a near-constant state of flux as these consolidated cases have progressed through the court system.

K-State attached the FRA to its memorandum supporting its motion to dismiss in the Tuition Case and referenced it in its reply in the Fee Case. K-State asserted that the FRA was an "express agreement" that controlled the parties' relationship. K-State also asserted that although the FRA indicated that K-State was to provide "educational services," it did not specifically require those services to be "'in person,' 'on campus,' or even as outlined in the Comprehensive Tuition and Fee Schedule." The plaintiffs argued that because neither set of plaintiffs attached the FRA to their respective petitions, the district court should not consider this document when analyzing K-State's motion to dismiss. As we have indicated, the district court found that the FRA was unnecessary to resolve K-State's motions to dismiss.

On appeal, the plaintiffs' brief continued to argue that the district court should not have considered the FRA, as it was not attached to or incorporated by the Fee Petition or

Tuition Petition. But the plaintiffs also asserted that the FRA "obligates K-State to provide 'services' but does not define them." Thus, the plaintiffs claimed, the FRA raised additional questions regarding the parties' intent and expectations as to what the "educational services" in the FRA were meant to encompass. K-State's brief asserted that the FRA should supersede any other implied contractual agreements that the plaintiffs alleged to exist regarding tuition and fees. It did not specifically address the plaintiffs' argument that the phrase "educational services" was ambiguous, but rather asserted that the absence of any indication in the FRA that those services would be provided in a particular format (such as in person, remote, or asynchronous) showed that these details were not part of the contract. And K-State continued to argue that the breach-of-contract claims in the plaintiffs' petitions were for implied, not express, agreements.

As this case awaited oral argument, these positions shifted again. The plaintiffs alerted the court to a recent decision by the United States Court of Appeals for the Fifth Circuit—*King v. Baylor University*, 46 F.4th 344 (5th Cir. 2022)—that analyzed this same FRA language in a similar lawsuit against Baylor University. The district court in *King* had found that Baylor continued to provide "educational services" to students under Baylor's FRA (which essentially contained identical language to K-State's FRA) even when providing remote instruction and thus granted Baylor's motion to dismiss the plaintiffs' breach-of-contract claim. 46 F.4th at 360. The appellate court reversed. The *King* court emphasized that at the motion-to-dismiss stage, the district court must resolve all factual questions in favor of the plaintiff. *King* thus held that the district court should have given the plaintiff's claims the benefit of the doubt if the FRA could be reasonably interpreted to support her argument. See 46 F.4th at 361-63.

The Fee Plaintiffs and Tuition Plaintiffs urged this court during oral argument to analyze the language of the FRA as the Fifth Circuit did in *King*. K-State argued that the *King* decision was an outlier among courts who had considered this question and should not play a role in our analysis, particularly because the plaintiffs had not attached the

FRA to their petitions or presented their argument regarding the interpretation of "educational services" to the district court.

These evolving arguments highlight a tension between two principles that guide our appellate process. As a court of review, we ordinarily do not consider arguments that were not first raised to the district court; the plaintiffs here urged the district court to disregard the FRA since it was not attached to the petition and did not raise arguments regarding its interpretation. *State v. Shopteese*, 283 Kan. 331, 339, 153 P.3d 1208 (2007). At the same time, Kansas law is clear that dismissal is improper if a plaintiff's petition states "'*any* claim upon which relief can be granted.'" *Kudlacik*, 309 Kan. at 790.

We are also cognizant that the shifting nature of the parties' arguments is shaped by the timing of when K-State introduced the FRA into the litigation. K-State attached the FRA to its memorandum supporting its motion to dismiss in the Tuition Case and referenced it in its reply supporting its dismissal motion (after both parties had already submitted lengthy written arguments) in the Fee Case. Thus, it is not surprising that the arguments regarding this document have morphed as the case has proceeded. Indeed, this timeline provides an example of why a district court should exercise caution in dismissing a party's claims too early in a case.

In most instances, a district court ruling on a motion to dismiss may only consider the plaintiff's petition and any documents attached to it. See *Sperry v. McKune*, 305 Kan. 469, 480, 384 P.3d 1003 (2016); see K.S.A. 2022 Supp. 60-210(c). But when a petition "refers to an unattached document central to the plaintiff's claim, a defendant may submit—and a court may consider—an undisputedly authentic copy of the document without transforming the motion to dismiss into a motion for summary judgment." *Crosby v. ESIS Insurance*, No. 121,626, 2020 WL 6372266, at *2 (Kan. App. 2020) (unpublished opinion), *rev. denied* 314 Kan. 854 (2021). No one argues that the FRA is not a valid contract or asserts that the document attached to K-State's motion to dismiss

the Tuition Petition is not an authentic representation of that agreement. Thus, the district court should have considered the language of the express contract between the parties before concluding that the plaintiffs' breach-of-contract claims failed to state a valid claim for relief.

2.3. *The FRA's reference to "educational services" can be reasonably interpreted to support the plaintiffs' breach-of-contract claims, as they are pleaded.*

We now turn to the language of the FRA, in comparison with the plaintiffs' allegations in the Fee Petition and Tuition Petition. The plaintiffs' petitions alleged that they had entered into contracts with K-State:

- The Fee Plaintiffs alleged in their petition that they "entered into contractual agreements with . . . K-State, which provided [they] would pay fees for or on behalf of students, and in exchange, K-State would provide facilities, activities, services, and resources." The petition alleges that the Fee Plaintiffs paid these fees, but K-State "breached its contracts . . . when it moved classes online, cancelled on-campus events and activities, closed campus and stopped providing facilities, activities, services, and resources for which the fees were intended to pay."

- The Tuition Plaintiffs alleged in their first amended petition that K-State "agreed to . . . provide an in-person and on-campus live education as well as the services and facilities to which the tuition they paid pertained throughout those semesters." The Tuition Petition indicated that K-State "held the timely payment of tuition out as a contract and enforced the same against students for non-payments," including a late fee if they failed to make timely tuition payments. The plaintiffs alleged that they made the required tuition payments, but K-State breached the contract when it closed the campus and required online coursework in the second half of the Spring 2020 semester.

Contrary to K-State's assertions, the allegations in these petitions relating to the parties' contracts do not exclude an express-contract claim. The allegations are not, as a matter of law, inconsistent with the FRA—the express contract governing the payment of tuition and fees. And contrary to K-State's assertions in its brief, there is no requirement under Kansas law for the plaintiffs to attach the FRA to their petitions or quote the FRA's language to survive a motion to dismiss. See K.S.A. 2022 Supp. 60-209(h). The better course, when a written contract is produced as part of a dismissal motion at the earliest stages in the litigation, is to allow plaintiffs to amend their petition so they may conform their allegations to the written agreement.

Under the FRA, students agree to pay tuition, fees, and costs in exchange for "educational services" from K-State. There is no question that this agreement is an enforceable contract between the plaintiffs and the university. But it is unclear what the parties intended these "educational services" to include. We are not persuaded by K-State's argument that "educational services" is synonymous with credit hours or recites an even more amorphous responsibility to provide "educational services" in the abstract. Presumably, the term connotes some meaningful agreement. For example, the FRA does not indicate that the "educational services" the university is agreeing to provide include the specific classes a student registers for. But if a student enrolls in a three-hour calculus course, it would be unreasonable to suppose that the university could unilaterally transform that course to a linguistics class midway through the semester. Rather, the students enroll in particular classes and reasonably expect to take those classes.

Nevertheless, it is unclear—and indeterminate at this stage in the case—whether the "educational services" the students contracted to receive included things like facility access or in-person instruction. The plaintiffs point to various statements in K-State publications and on the K-State website to support their argument regarding the services they expected to receive. K-State points to other statements disclaiming additional contractual terms. But at the motion-to-dismiss stage, a district court must resolve these

inferences in favor of the petition and must consider whether a petition states a claim based on "any . . . possible theory." *Cohen*, 296 Kan. 542, Syl. ¶ 2.

Because the FRA's reference to "educational services" can be reasonably interpreted to encompass the plaintiffs' claims, the district court erred when it dismissed the petitions for failure to state a claim. See *King*, 46 F.4th at 363 (examining agreement with identical language and remanding for district court to consider whether "educational services" is ambiguous). Additional facts are necessary to determine what the parties intended to be included as the "educational services" K-State was providing under that contract. We thus reverse the decision to dismiss the breach-of-contract claims and remand for further factual development.

2.4. *The breach-of-contract claims, as they are pleaded, do not allege claims of educational malpractice.*

The district court also noted in its order dismissing the case that the allegations in the Fee Petition and Tuition Petition more resembled an attack on their education and university operations than contract claims, and thus actually attempt to recover for educational malpractice. In particular, the court noted that the Tuition Plaintiffs' allegations focused on the quality of their education during the Spring 2020 semester, not any contractual promise.

Kansas does not recognize a tort of educational malpractice. *Finstad v. Washburn University of Topeka*, 252 Kan. 465, 477, 845 P.2d 685 (1993). An educational-malpractice claim "almost exclusively centers on a school's failure to provide an effective education." *Florez v. Ginsberg*, 57 Kan. App. 2d 207, 212, 449 P.3d 770 (2019). Kansas law does not permit a student to sue a university over issues with "classroom methodology, theories of education, or the quality of education he received," or for dissatisfaction over "academic performance or the lack of expected skills." 57 Kan. App. 2d at 212. And a student cannot bring a claim questioning the "internal operations,

curriculum or academic decisions" of a university. 57 Kan. App. 2d at 212; see *Jamieson v. Vatterott Educational Center, Inc.*, 473 F. Supp. 2d 1153, 1159-61 (D. Kan. 2007).

There are myriad public-policy reasons why Kansas refuses to recognize such a tort. These claims would lack a measurable standard of care. There would be inherent uncertainty about damages. Recognizing educational malpractice could cause a flood of litigation. And courts should not oversee day-to-day school operations. *Finstad*, 252 Kan. at 477. But these considerations do not mean any student lawsuit against a university is automatically an educational-malpractice claim. When a claim does not implicate these policy concerns, courts are less likely to construe it as an educational-malpractice claim. *Florez*, 57 Kan. App. 2d at 213-14.

Courts have applied this principle in the contract context, too. "[W]hen students allege that educational institutions have failed to provide specifically promised services—for example, a failure to offer any classes at all or a failure to deliver a promised number of hours of instruction—such claims have been upheld on the basis of the law of contracts." *Jamieson v. Vatterott Educational Center, Inc.*, 259 F.R.D. 520, 538 (D. Kan. 2009). To state a contract claim, a student must allege the school failed "to provide some objective, specifically promised service," not just attack "the general quality of [the school]'s educational services." 259 F.R.D. at 539.

And courts considering pandemic-related refund claims have drawn this same distinction. For example, the Seventh Circuit noted that "to maintain a breach of contract claim against a university, a plaintiff must do more than simply allege that the education was not good enough." *Gociman v. Loyola University of Chicago*, 41 F.4th 873, 882 (7th Cir. 2022). But the *Gociman* court did not characterize students' contract claims as educational-malpractice claims when they "point[ed] to an identifiable contractual promise that the university failed to honor—the promise to provide in-person classes and access to on-campus facilities and resources." 41 F.4th at 882.

Whether the students adequately pleaded such a promise in their petitions is a separate question. Breach-of-contract claims allege that "the university contractually promised to provide students an in-person educational experience," and "the university breached that promise." 41 F.4th at 882. Resolution of these allegations "does not require a court to evaluate the reasonableness of the university's conduct in providing remote educational services during the pandemic, or second-guess the professional judgment of the university." 41 F.4th at 882.

Here, the Fee Plaintiffs did not plead educational-malpractice claims. They do not attack the quality of their education or question the wisdom of university operations. Rather, these students allege that K-State failed to provide services they paid for—access to campus services and facilities. In other words, at this stage in the proceedings, they allege a contract claim.

The Tuition Plaintiffs' claim presents a closer question. Parts of the Tuition Petition undoubtedly assail the quality of their remote education, calling it "sub-par" and asserting it lacked "collaborative learning and in-person dialogue, feedback, and critique." See *Lindner v. Occidental College*, No. CV 20-8481-JFW(RAOx), 2020 WL 7350212, at *7 (C.D. Cal. 2020) (construing claims with identical language as educational-malpractice claims). And the Tuition Plaintiffs lament that online classes "do not require memorization or the development of strong study skills given the absence of any possibility of being called on in class."

But our focus at this early stage is not on the Tuition Petition generally, but on the viability of the Tuition Plaintiffs' breach-of-contract claim. And the Tuition Plaintiffs have pleaded enough to survive a motion to dismiss. The core of their claim is that they contracted to pay tuition in exchange for an in-person education, and they paid, but K-State did not fully deliver on its promise. Ultimately, the Tuition Plaintiffs claim not

just "that their education was *bad*, but that [the university] breached a promise to provide a specific type of education." *Ninivaggi v. University of Delaware*, 555 F. Supp. 3d 44, 52 (D. Del. 2021).

We pause to emphasize the narrowness of this decision. With the deference that Kansas law requires courts to give petitions when evaluating a motion to dismiss, we conclude that the educational-malpractice doctrine does not bar the plaintiffs' breach-of-contract claims—as they are pleaded—as a matter of law. As the nature of the plaintiffs' allegations and claimed damages are discovered, it may become evident that plaintiffs are pursuing educational-malpractice claims masquerading as contract claims. For example, if the damages sought require the district court to assess the quality of the educational experience, methods, and instruction, those facts would tend to show that the claims are really impermissible educational-malpractice claims. Claims that merely allege that the plaintiffs did not receive what they were contractually promised and seek a refund of the difference between the cost of online and in-person education are not.

Finally, in oral argument, members of this court expressed some skepticism regarding whether the Tuition Plaintiffs suffered any damages from K-State's alleged breach of contract. After all, the Tuition Plaintiffs note that they received credit for the courses they took during the Spring 2020 semester and graduated from the university with their degrees. The Tuition Plaintiffs do not allege that those degrees should not have been conferred or that the course credits they received were unearned. And the Tuition and Fee Schedule attached to the Fee Petition shows that the cost per credit hour for courses taken by Kansas residents on K-State's campuses is actually lower than the cost of online coursework. The district court expressed similar misgivings in its decision. But other than speculating as to the nature of the plaintiffs' contractual damages as part of its educational-malpractice discussion, K-State's motions to dismiss do not assail the nature of the plaintiffs' damages. Thus, this matter is not before us at this time.

In short, we limit our consideration to the allegations in the Fee Petition and Tuition Petition and the parties' arguments. The district court erred to the extent it interpreted the plaintiffs' contract claims, as they are pleaded, as claims of educational malpractice.

3. *We do not address the parties' remaining claims.*

The plaintiffs also argue that the district court should have allowed them to amend their petitions, rather than dismiss their claims outright. But amendment would not change the fact that the plaintiffs had not submitted their implied-contract claims to the Joint Committee on Special Claims before filing suit. And because we are reversing the district court's decision dismissing the students' breach-of-contract claims and remanding the case so litigation of this claim may proceed, it is unnecessary to determine whether the district court should have granted the students' postjudgment motion to amend their petitions. While the district court's refusal to allow an amendment may have been precipitous given that the students only received the FRA partway through the motion-to-dismiss briefing, their original petitions stated claims for breach of contract.

As a final aside, K-State makes a passing argument in its brief that if the plaintiffs are asserting claims based on an express contract, those claims should have been brought as administrative actions governed by the Kansas Judicial Review Act (KJRA), not in an independent lawsuit against the university. The KJRA applies to breach-of-contract claims and requires claimants to exhaust their administrative remedies before suing. K.S.A. 77-612; *Schall v. Wichita State University*, 269 Kan. 456, 482-83, 7 P.3d 1144 (2000). A court can excuse this requirement "to the extent that the administrative remedies are inadequate" or do not exist at all. K.S.A. 77-612(d); *Colorado Interstate Gas Co. v. Beshears*, 18 Kan. App. 2d 814, 821, 860 P.2d 56 (1993), *rev. denied* 256 Kan. 994 (1994).

Other than broadly noting that K-State is a state entity, the university offers no explanation for what administrative procedure the plaintiffs should have followed to pursue claims under the KJRA. (In fact, the petitions allege that students sought refunds from the university for the second half of the Spring 2020 semester, but those requests were denied.) The district court did not address this argument in its decision. And the single paragraph K-State devotes to this issue in its brief is insufficient to apprise us of any error or defect. See *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017) (points raised incidentally in a brief are deemed abandoned).

4. *We summarize our conclusions.*

We affirm the district court's dismissal of the plaintiffs' claims for unjust enrichment and money had and received because these claims were not presented to the Joint Committee on Special Claims before the plaintiffs filed their respective lawsuits.

We reverse the district court's dismissal of the plaintiffs' claims for breach of contract and remand for further proceedings, including a determination as to what the parties intended to be included as the contracted-for "educational services" under the Financial Responsibility Agreement.

We conclude that these claims for breach of contract, as they are currently pleaded, are not educational-malpractice claims. But if it appears as the case progresses that the plaintiffs are truly seeking damages for alleged educational malpractice, those claims must be dismissed.

The Kansas rules of civil procedure require a petition to include "a short and plain statement of the claim showing [the plaintiff] is entitled to relief and a demand for judgment." *John Doe*, 315 Kan. at 317. The plaintiffs have met that pleading threshold

for their breach-of-contract claims. The district court erred when it granted K-State's motion to dismiss those claims under K.S.A. 60-212(b)(6).

Affirmed in part, reversed in part, and remanded with directions.