ADVANCE SHEET HEADNOTE
May 6, 2024

2024 CO 27

No. 22SC499, *University of Denver v. Doe*—Summary Judgment—Breach of Contract—Enforceability of a Promise to Conduct a "Thorough, Impartial and Fair" Investigation of Any Sexual-Misconduct Claim—Covenant of Good Faith and Fair Dealing—Existence of an Extra-Contractual Tort Duty to Adopt and Implement Fair Procedures for Investigating and Adjudicating Sexual-Misconduct Claims.

John Doe took legal action against the University of Denver ("DU"), after the school expelled him for allegedly engaging in nonconsensual sexual contact with another student, Jane Roe. Specifically, through claims for breach of contract, breach of contract based on the covenant of good faith and fair dealing, promissory estoppel, and negligence, Doe challenged DU's investigation and adjudication of Roe's accusation. The district court granted DU's request for summary judgment, and Doe appealed. A division of the court of appeals affirmed in part and reversed in part.

The supreme court now affirms the division's judgment in part and reverses it in part. Like the division, the supreme court holds that the promise in DU's Office of Equal Opportunity Procedures ("OEO Procedures") of a "thorough,

impartial and fair" investigation, when considered in conjunction with the specific investigation requirements listed in those procedures, is sufficiently definite and certain to be enforceable under contract law. Further, in lockstep with the division, the court concludes that the record does not permit the entry of summary judgment for DU on Doe's general contract claim or on Doe's contract claim premised on the covenant of good faith and fair dealing. As the division determined, there are genuine disputes of material fact as to (1) whether DU adhered to the specific investigation provisions in the OEO Procedures and, by extension, (2) whether DU fulfilled its promise of a "thorough, impartial and fair" investigation.

But the court parts ways with the division on Doe's tort claim. The court holds that DU does not owe its students an extra-contractual duty to exercise reasonable care in adopting and implementing fair procedures related to the investigation and adjudication of sexual-misconduct claims. Therefore, DU is entitled to judgment as a matter of law on Doe's tort claim.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 27

Supreme Court Case No. 22SC499
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA1545

Petitioner:

University of Denver,

v.

Respondent:

John Doe.

Judgment Affirmed in Part and Reversed in Part
en banc
May 6, 2024

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE MÁRQUEZ concurred in part and dissented in part.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 "Summary judgment . . . is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial." 10A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 2712 (4th ed. 2016) (quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940)). Rather, it is a procedural tool that permits a party to avoid the time and expense of a trial when, based on the undisputed facts, it is entitled to judgment as a matter of law. Because summary judgment is a drastic measure that operates to deny litigants a trial, it should not be granted unless there is a clear showing that no genuine dispute of any material fact exists and that the moving party is entitled to judgment as a matter of law. Mindful of these guardrails, we must decide whether summary judgment is warranted on any pending claim in this case.

¶2 John Doe took legal action after the University of Denver ("DU") expelled him for allegedly engaging in nonconsensual sexual contact with another student, Jane Roe. Denying any wrongdoing, Doe challenged DU's investigation and adjudication of Roe's accusation. Doe advanced claims in both federal and state court against DU, several of its individual agents, and its board of trustees. His four state law claims—for breach of contract, breach of contract based on the covenant of good faith and fair dealing, promissory estoppel, and negligence—were brought in this case.

¶3 The district court granted the defendants' motion for summary judgment, and Doe appealed. A division of the court of appeals agreed in part and disagreed in part with the district court's order. *Doe v. Univ. of Denver*, 2022 COA 57, ¶ 100, 516 P.3d 946, 962 ("*Univ. of Denver*"). Contrary to the district court's determinations, the division concluded that (1) the promise of a "thorough, impartial and fair" investigation in DU's Office of Equal Opportunity Procedures ("OEO Procedures"), when considered in the context of the specific investigation provisions in those procedures, was sufficiently definite and certain to be enforceable under contract law, *id.* at ¶ 43, 516 P.3d at 954; (2) independent of the contractual duties established by the OEO Procedures, DU owed students like Doe a duty to adopt and implement, with reasonable care, fair procedures for the investigation and adjudication of sexual-misconduct claims, *id.* at ¶¶ 60–61, 516 P.3d at 957; and (3) the record did not permit the entry of summary judgment for DU on Doe's breach-of-contract and tort claims, *id.* at ¶ 99, 516 P.3d at 962. The division, however, agreed with the district court's ruling that DU's agents and trustees were entitled to summary judgment on Doe's negligence claim—the only claim brought against them—because they did not owe Doe or other students a tort-based duty. *Id.* at ¶ 61, 516 P.3d at 957. Accordingly, the division affirmed

the district court's summary judgment in part and reversed it in part.[1] *Id.* at ¶ 100, 516 P.3d at 962.

¶4 We, in turn, affirm the division's judgment in part and reverse it in part. Like the division, we hold that the promise in the OEO Procedures of a "thorough, impartial and fair" investigation, when considered in conjunction with the specific investigation requirements listed in those procedures, is sufficiently definite and certain to be enforceable under contract law. Further, in lockstep with the division, we conclude that the record does not permit the entry of summary judgment for DU on Doe's general contract claim or on Doe's contract claim premised on the covenant of good faith and fair dealing. As the division determined, there are genuine disputes of material fact as to (1) whether DU adhered to the specific investigation provisions in the OEO Procedures and, by extension, (2) whether DU fulfilled its promise of a "thorough, impartial and fair" investigation.

¶5 But we part ways with the division on Doe's tort claim against DU. We hold that DU does not owe its students an extra-contractual duty to exercise reasonable care in adopting and implementing fair procedures related to the investigation and

[1] The division's ruling regarding Doe's tort claim against the individual defendants is not before us because Doe did not file a cross-petition for certiorari. Further, although the district court granted DU summary judgment on Doe's promissory estoppel claim, that ruling is not before us because Doe did not appeal it.

adjudication of sexual-misconduct claims.[2] Therefore, like its codefendants, DU is entitled to judgment as a matter of law on Doe's tort claim.

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[2] We granted certiorari to review the following four issues:

1. [REFRAMED] Whether a sexual misconduct policy required by federal and Colorado law can constitute a contract between an institution of higher education and its students.
2. [REFRAMED] Whether a statement in a university's sexual misconduct policy that student sexual misconduct investigations will be "thorough, impartial and fair" is sufficiently definite to support a claim for breach of contract.
3. [REFRAMED] Whether a statement that student sexual misconduct investigations will be "thorough, impartial and fair" in a university's procedures is sufficiently definite to support a claim for breach of the implied covenant of good faith and fair dealing.
4. [REFRAMED] Whether a university owes its students a duty in tort to adopt fair policies and procedures for investigating and adjudicating claims of student sexual misconduct and to exercise reasonable care in following those procedures.

We added Issue 1 on our own after the Colorado Attorney General filed a pre-certiorari amicus brief sounding the alarm on the prospect of subjecting "both private and public institutions of higher education to liability for contractual claims." As it turns out, there was no fire. Following our decision to grant certiorari, the parties informed us that it is undisputed in this case that a university's sexual-misconduct policy, such as the one set forth in DU's OEO Procedures, *may* constitute a contract between the university and its students, even if the policy is required by law. And, consistent with the parties' position, we have previously recognized that, while a contract claim regarding "the general quality of educational experiences provided to students" typically fails, "[t]he basic relationship between a student and an educational institution is contractual in nature" and "[m]aterials actually provided to a student, including enrollment

I. Standard of Review

¶6 Whether a contract exists is a question of law we review de novo. *Radil v. Nat'l Union Fire Ins. Co. of Pittsburg, Pa.*, 233 P.3d 688, 692 (Colo. 2010). Likewise, whether a defendant owes a tort-based duty to the plaintiff is a question of law we review de novo. *Raleigh v. Performance Plumbing & Heating, Inc.*, 130 P.3d 1011, 1015 (Colo. 2006). And, relatedly, we review de novo a trial court's determination that a tort-based duty "does or does not exist." *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 465 (Colo. 2003), *as modified on denial of reh'g* (May 19, 2003).

¶7 An order granting summary judgment is subject to de novo review as well. *Edwards v. New Century Hospice, Inc.*, 2023 CO 49, ¶ 14, 535 P.3d 969, 972. Under C.R.C.P. 56(c), a party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." But, as we mentioned earlier, summary judgment "is a drastic remedy and is never

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agreements and catalogs, *may* become part of the agreement." *CenCor, Inc. v. Tolman*, 868 P.2d 396, 398 (Colo. 1994) (emphasis added); *see also id.* at 399 (explaining that claims that "educational institutions have failed to provide specifically promised educational services, such as a failure to offer any classes or a failure to deliver a promised number of hours of instruction, . . . have been upheld on the basis of the law of contracts"). Notably, after the parties advised us of their aligned views on Issue 1, the Attorney General did not file another brief to register his disagreement with the parties.

warranted except on a clear showing that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997). Thus, although summary judgment may expedite matters and save valuable resources, "it is not a substitute for trial"; it is suitable "*only* where there is no role for the fact finder to play *and* where the controlling law entitles one party or the other to a judgment in its favor." *Roberts v. Am. Fam. Mut. Ins. Co.*, 144 P.3d 546, 548 (Colo. 2006).

¶8 The party moving for summary judgment bears the burden of establishing the nonexistence of a genuine issue of material fact. *Edwards*, ¶ 16, 535 P.3d at 973. The party opposing summary judgment, by contrast, is entitled to the benefit of all favorable inferences that may reasonably be drawn from the facts. *Id.*; *see also Andersen v. Lindenbaum*, 160 P.3d 237, 240 (Colo. 2007) ("In considering evidence presented in opposition to a motion for summary judgment, '[evidence] can and should be rejected without a trial if, in the circumstances, *no reasonable person would believe it*.'" (emphasis added) (quoting *Seshadri v. Kasraian*, 130 F.3d 798, 802 (7th Cir. 1997))). The court must resolve "all doubts" in favor of the nonmoving party and against the moving party. *Edwards*, ¶ 16, 535 P.3d at 973.

II. Facts and Procedural History

¶9 "Because we are reviewing a grant of summary judgment in favor of [DU], we describe the facts in the light most favorable to [Doe]." *Greenwood Trust*,

938 P.2d at 1143; *see also Doe v. Univ. of Denver*, 1 F.4th 822, 825 (10th Cir. 2021) ("*Tenth Circuit Case*") (explaining that, in reviewing a district court's grant of summary judgment, an appellate court "consider[s] the facts and all reasonable inferences in favor of . . . the party opposing summary judgment"). In doing so, we express no opinion regarding the merits of Doe's allegations.

A. The Incident

¶10 Doe and Roe started attending DU as freshmen in the fall of 2015. After they began dating in January 2016, they sometimes spent the night together and engaged in sexual contact. They discussed having sexual intercourse several times but never did so. A month later, their relationship became lukewarm as Doe started distancing himself from Roe because he wasn't interested in an exclusive relationship with her.

¶11 One Friday evening in early March 2016, Roe consumed alcohol with friends—first at the dorms and then at a bar. She was so intoxicated that she could not remember leaving the bar and returning to her dorm. Around the same time, Doe was in his friend's room in the same dorm playing videogames and drinking. Like Roe, Doe was intoxicated. Roe wanted to talk to Doe about their relationship, so she tracked him down and attempted to convince him to come out of his friend's room. After Doe declined her request, she had one of his friends ask him to exit the room. Doe obliged, and Roe met him in the hallway, took him by the hand,

and led him to her room. There, they kissed and engaged in sexual contact. A fellow student, I.K., later reported that Roe came to I.K.'s room during the night because Doe had gotten sick and was now passed out on the floor of Roe's room.

¶12 Doe could not recall many details from the evening, but he said that he left Roe's room at some point to obtain condoms. According to Doe, however, when he returned with the condoms, he and Roe were unable to engage in sexual intercourse because they were too intoxicated.

¶13 What took place the next morning (Saturday morning) varies depending on who you ask. Roe says that when she woke up still feeling intoxicated, she was naked, and Doe was fondling her genitals and kissing her. She adds that Doe then put on a condom and had sexual intercourse with her without her consent.[3] Per Roe, she felt like she could not leave the room. Continuing, Roe says that she eventually indicated to Doe that she needed to leave and went into the bathroom, and that when she came out of the bathroom, they argued. According to Roe, Doe left while they were still arguing.

¶14 Doe, by contrast, says that he awoke to find Roe naked on top of him, encouraging him to engage in sexual intercourse. He states that she waited as he

[3] Roe recalls that when she told Doe during sexual intercourse that he should stop because it hurt, he responded that it was supposed to hurt because it was her first time.

put on a condom in front of her. And, continues Doe, they had consensual sexual intercourse "for a very brief time" before Roe abruptly left the room. According to Doe, when Roe came back to the room about ten minutes later, he turned down her request to talk. Per Doe, there were several reasons for this decision: (1) he was confused about why she had suddenly left the room; (2) he was already getting dressed and had made up his mind that he was going back to his room; and (3) he felt that their sexual encounter was a "set back," given that he'd been trying to distance himself from her. Doe adds that, upon arriving back at his room, he told his roommate, T.D., what had just occurred.

¶15 Shortly after Doe left Roe's room, Roe texted him. She was unhappy about his refusal to talk and sarcastically thanked him "for finishing our conversation." She then continued to text him, trying to convince him to "finish the conversation." Doe declined, telling her he needed "some time." Later that morning, Roe told a friend that she and Doe had sex. She made no mention of any improper conduct by Doe.

¶16 At a party that evening (still Saturday), Roe apparently overheard Doe tell another woman about his sexual encounter with Roe earlier that day. One of Roe's friends later reported that Roe was upset about that conversation.

¶17 The following night (Sunday night), Roe called Doe and inquired whether they had engaged in sexual intercourse in her room on Friday night, as she didn't

have any recollection of the evening. He responded that they had not. She then asked Doe to stop telling people about Saturday morning, though she assured him that "you didn't hurt me" and "you didn't take anything from me" (referring to her virginity).[4] He told her that he regretted having sex with her and thought the two should "give up" on their relationship because it "seemed unhealthy" and it "was not working out."

¶18 Two days later (on Tuesday), Roe texted Doe again and told him she had noticed some bruises she could not explain. He responded that he didn't know what caused the bruises, but that he didn't like what she was insinuating. Doe reminded her that she had invited him to her room and had taken some of his clothes off. He added that he "never coerced" her "to do anything" and that she had admitted as much when she told him in a previous conversation that, "[I] willingly gave it to [you]" (referring to her virginity).

¶19 She replied that she wasn't "insinuating anything" and was simply asking him to tell her what happened because she had marks in places on her body she didn't recall injuring. Roe told him he shouldn't "assume the worst." She then asked Doe to meet her in person, but he declined, explaining that he didn't think they should "talk at all" and that he didn't "want anything" from her. He added:

[4] Roe has conceded she made these statements.

"That, I think, is the misunderstanding." Later that same day, at a friend's prompting, Roe submitted to an examination by a Sexual Assault Nurse Examiner ("SANE"). A SANE report was prepared to document that examination.

¶20 At some point thereafter, Roe and Doe had an additional conversation about the incident. She shared with him that "someone else" had told her that what he had done constituted sexual assault. Doe asked Roe if she thought he'd sexually assaulted her. She responded that she was "letting other people" answer that question for her. Doe responded as follows: "[O]h my God, [Roe], there's a difference between regret and assault." In reply, Roe said that she felt like she was "holding a gun with one bullet and perfect aim," but that she was putting the gun down and simply seeking privacy.[5]

¶21 Sometime later, Roe heard Doe discuss the incident with others at a party. And, following spring break, she learned that Doe had shared details of their sexual encounter with more people. According to Roe, "[t]hat's when [she] decided to report."

¶22 It was during the last week of March 2016, several weeks after the incident, that Roe filed a complaint with DU's Office of Equal Opportunity ("OEO"). The OEO is the office at DU in charge of complaints filed pursuant to Title IX of the

[5] Roe has admitted she told Doe that she felt like she was "holding a gun with one bullet in it."

Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 ("Title IX"), including those submitted by students alleging sexual misconduct by other students. The OEO adopted and implemented the OEO Procedures.

B. The Pertinent OEO Procedures

¶23 The OEO adopted and implemented the OEO Procedures based on duties imposed on DU by federal and state law. Pursuant to requirements in Title IX, related regulations, *see* 34 C.F.R. §§ 106.44-45 (2019), and Colorado state law, *see* § 23-5-146(3)(d), C.R.S. (2023), the OEO Procedures include provisions regarding the investigation and adjudication of sexual-misconduct complaints.

¶24 As pertinent here, the OEO Procedures state that when a sexual-misconduct complaint alleging a violation of a school policy is filed, DU makes an initial assessment. OEO Procedures at XI.A. If that assessment determines that "Corrective Action and/or Outcomes" may be appropriate, the school "initiate[s] an investigation." *Id.* at XI.E. DU must designate an investigator—either an employee or an outside person—to conduct any investigation. *Id.* An investigator "must be impartial and free of any actual conflict of interest." *Id.*

¶25 After explaining that "[t]he investigation is designed to provide a fair and reliable gathering of the facts," the OEO Procedures promise that "[t]he investigation will be thorough, impartial and fair." *Id.* Of particular significance

in this case, following this promise, multiple specific provisions delineate the precise investigation process contemplated by the OEO Procedures:

> The investigator will conduct interviews as necessary, review documents, and any other relevant information concerning the alleged discriminatory acts. The parties may provide any relevant information to the investigator, including the names of witnesses to contact and/or documents to review at any time before the investigation is closed. The [c]omplainant and [r]espondent will have an equal opportunity to be heard, to submit information, and to identify witnesses who may have relevant information. Witnesses must have observed the acts in question or have information relevant to the incident and cannot be participating solely to speak about an individual's character. Investigators will review and determine the weight and materiality of all submitted information and including the necessity of interviewing potential witnesses.
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> After [DU] decides to move forward with an investigation and the complainant's initial interview is completed, the [r]espondent will be notified by Title IX or Equal Opportunity staff that an investigation has been initiated. They will be notified in writing and invited to an informational meeting to review the process and the resources available to them throughout the process . . . . After the respondent has completed the informational meeting or the initial ten (10) business days from receiving notice have passed, the respondent will be invited to complete an initial interview with an investigator. . . . In most cases, investigators will have follow-up questions for the complainant and respondent after their respective initial interviews. . . .

OEO Procedures at XI.E.

¶26 At the conclusion of the investigation, the investigator must prepare a "written report that summarizes the information gathered and synthesizes the areas of agreement and disagreement between the parties." *Id.* at XI.F. Before the

report is finalized, however, the complainant and respondent must be given an opportunity to review a preliminary draft of the report and offer comments (oral or written). *Id.* The investigator must ultimately "make a finding as to whether there is sufficient information to establish, by a preponderance of the evidence, that a [school] policy violation occurred." *Id.* The final written report must include "the determination of responsibility and the rationale for the determination." *Id.*

¶27 When there is a determination of responsibility for a school policy violation, the OEO refers the matter to the appropriate administrator for "Corrective Action or Outcomes." *Id.* at XI.H.1. If the respondent is a student, the matter must be referred to the Outcome Council. *Id.* at XI.I. The OEO Procedures instruct the Outcome Council to "mak[e] a neutral and impartial review of investigations and findings, and impos[e] outcomes (sanctions)." *Id.* at XIII.B.1. In general, a determination of nonconsensual sexual contact results in dismissal from the university. *Id.* at XIII.D.

¶28 After the Outcome Council has rendered a decision, it must issue a letter describing the outcome of the investigation and the respondent's appeal options. *Id.* at XIII.E. "Appeal decisions are final." *Id.* at XIII.F.

C. DU's Investigation and Adjudication of Roe's Complaint

¶29 Upon receiving Roe's complaint in late March 2016, the Title IX Coordinator at DU immediately reached out to her to schedule an informal meeting, which took

place the following month. DU thereafter designated two employees to conduct an investigation. In late April, the Title IX Coordinator gave Doe notice of the complaint and imposed a "no contact order" against him with respect to Roe. However, Doe did not receive details about Roe's complaint until much later.

¶30 In early May, Doe participated in a formal interview with the investigators. He asked them to interview five individuals who, in his view, had material information: two fellow students, his therapist, his legal counsel, and his mother. Although the investigators interviewed all eleven witnesses identified by Roe, they did not interview a single witness identified by Doe.

¶31 In addition to considering the statements made by Roe, Doe, and Roe's eleven witnesses, the investigators reviewed the portions of the SANE report submitted by Roe. The incomplete SANE report provided by Roe indicated that she had a dozen observable abrasions and contusions on her body. But Roe did not share (1) photographs of those abrasions and contusions, (2) any summaries by the SANE nurse and the attending physician, or (3) her written statement to the SANE nurse regarding the source of her injuries. And, notably, the portions of the SANE report she submitted to the investigators did not include any medical analysis as to the possible cause or age of her injuries.

¶32 Consistent with the OEO Procedures, the investigators issued a preliminary draft of their report, which contained a summary of their interviews and a brief

statement of their findings. This was the first notice Doe received of Roe's *specific* allegations. Doe was disappointed to learn that the investigators had not interviewed any of his witnesses. He again requested that they do so. Doe was also troubled by the preliminary report's reliance on the incomplete SANE report provided by Roe, which necessarily told only part of the story.

¶33 The investigators subsequently interviewed Doe's therapist, with whom he had discussed Roe's allegations. But they declined to interview his remaining four witnesses, even though two of them (Doe's roommate and Doe's close friend) were students who (1) were with Doe on the Friday night when Roe tracked him down and took him back to her room, and (2) discussed the incident with him right after it happened.

¶34 Doe's therapist wrote a letter to DU raising questions about the investigation's integrity. Specifically, she complained that the investigators' summary of her interview was inaccurate and that the investigator who interviewed her was biased against Doe and seemed to have prejudged the case.

¶35 Thereafter, the investigators submitted their final report. They acknowledged failing to interview four of Doe's witnesses. But they explained that it was unnecessary to do so because they "had already interviewed witnesses [who] could corroborate the information that [Doe] expected them to provide." As for the SANE report, the investigators conceded that they had relied on the

selective portions submitted by Roe. They noted that, although they'd asked Roe for the complete SANE report, she'd submitted only portions of it. Lastly, the investigators omitted any mention of the letter from Doe's therapist criticizing the investigation's trustworthiness.

¶36 The final report ultimately concluded that "it is more likely than not that [Doe] engaged in nonconsensual sexual contact with [Roe] on the morning in question." Doe was later informed that the Outcome Council had "determined that dismissal" from DU was "the only reasonable outcome" and that such dismissal was effective immediately.

¶37 Doe appealed, alleging that the investigators' "strong bias" affected their ability to conduct a "fair and equal investigation," and that the sanction imposed was "disproportionate to the violation." The appeal, however, was denied as not meeting "appeal criteria." This constituted "a final decision, with no further route of appeal."

D. The Litigation

¶38 Doe first brought suit in the United States District Court for the District of Colorado against DU, its trustees, and the individuals responsible for the investigation and adjudication of Roe's Title IX complaint. He advanced multiple claims, including federal law claims for violations of his rights under Title IX and his procedural due process rights under the Fourteenth Amendment. *Doe v. Univ.*

of Denver, No. 17-cv-01962-PAB-KMT, 2019 WL 3943858, at *3 (D. Colo. Aug. 20, 2019), *rev'd and remanded*, 1 F.4th 822 (10th Cir. 2021). In addition, he pled state law claims for breach of contract (including breach of the covenant of good faith and fair dealing), promissory estoppel, and negligence. *Id.* DU and its codefendants moved for summary judgment on all claims. *Id.* The court granted their motion with respect to the federal claims. *Id.* at *10–11. And, in the absence of federal law claims, the court dismissed the state law claims without prejudice. *Id.* at *12. Doe then appealed the dismissal of his Title IX claim to the United States Court of Appeals for the Tenth Circuit.

¶39 While his federal appeal was pending, Doe filed a new cause of action in state district court. In it, he renewed the four state law claims that had been dismissed in federal court. The defendants again moved for summary judgment, and the court granted their motion.

¶40 First, the state district court adopted the view that "the core" of Doe's breach-of-contract claims was that DU had failed to fulfill its promise under the OEO Procedures to conduct a "thorough, impartial and fair" investigation. The court agreed with DU that this promise was nothing more than a "vague aspirational goal[]" that was "incapable of meaningful determination" and "unenforceable in contract." Although the court acknowledged that Doe's complaint included allegations that the investigation did not proceed as

prescribed "by more particular requirements of the OEO Procedures," it gave those allegations short shrift, ruling that they were "either demonstrably false . . . or . . . immaterial."

¶41 Second, the court held that the defendants did not owe Doe an extra-contractual, "tort-based duty to perform the investigation non-negligently." Therefore, the court found that Doe's negligence claim, too, failed as a matter of law.

¶42 Following the state district court's dismissal of his complaint, Doe appealed to the state court of appeals. While that appeal was pending, the Tenth Circuit reversed the federal district court's grant of summary judgment on the Title IX claim. *Tenth Circuit Case*, 1 F.4th at 824–25. The Tenth Circuit held that "a genuine dispute of material fact" existed with respect to Doe's claim that DU had "discriminated against him on the basis of sex during its sexual-misconduct investigation and its resulting decision to expel him." *Id.* at 828.

¶43 A division of our court of appeals subsequently affirmed the state district court in part and reversed it in part. *Univ. of Denver*, ¶ 100, 516 P.3d at 962. The division sided with Doe on his contract and tort claims against DU, reversing the grant of summary judgment for the university. *Id.* But it decided that DU was the only defendant that owed Doe a tort-based duty, so it affirmed the grant of summary judgment for the individual defendants on Doe's negligence claim (the

only claim brought against them). *Id.* Because the division concluded that genuine issues of material fact precluded summary judgment on Doe's contract and negligence claims against DU, it remanded for further proceedings on those three claims. *Id.*

¶44 DU sought our review, and we granted certiorari.

III. Analysis

A. Doe's Breach-of-Contract Claims

¶45 Doe has advanced two contract claims against DU—one generally asserting breach of contract, and one premised on the covenant of good faith and fair dealing. We address each in turn, considering in the process whether DU is entitled to summary judgment on either claim. Before doing so, however, we take a short recess to set forth some basic tenets of contract law.

1. Some Basic Tenets of Contract Law

¶46 It is now axiomatic in Colorado that a plaintiff suing for breach of contract bears the burden of proving the following elements by a preponderance of the evidence: (1) the existence of a contract, (2) the plaintiff's performance of the contract or justification for nonperformance, (3) the defendant's failure to perform the contract, and (4) the plaintiff's damages as a result of the defendant's failure to perform the contract. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). Here, we deal with the first element—the existence of a contract.

¶47 One of the first lessons in law school is that the formation of a contract requires mutual assent to the terms of the contract and legal consideration for which the parties bargained. *See Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 603 (Colo. 1999); *see also Marquardt v. Perry,* 200 P.3d 1126, 1129 (Colo. App. 2008) ("A contract is formed when an offer is made and accepted . . . and the agreement is supported by consideration."). Mutual assent to the terms of the contract refers to "a meeting of the minds." *IHS Markit, Ltd. v. Colliers Int'l WA, LLC*, No. 19-cv-00876-JLK, 2021 WL 5104672, at *7 (D. Colo. Oct. 12, 2021). Hence, without a meeting of the minds, there can be no contract.

¶48 When we interpret a contract, our goal is to determine and effectuate the parties' intent. *French v. Centura Health Corp.*, 2022 CO 20, ¶ 25, 509 P.3d 443, 449. The language of an instrument itself is our primary guidepost in discerning that intent. *Id.* We must construe the language of a contract "in harmony with the plain and generally accepted meaning of the words employed." *Id.*

¶49 Nearly eighty years ago, we recognized that there must be "certainty" in the language of a contract. *Newton Oil Co. v. Bockhold*, 176 P.2d 904, 908 (Colo. 1946). Certainty is a "fundamental contractual requirement." *Id.* "If the parties fail to agree to sufficiently definite and certain terms, there is no meeting of the minds, and hence, no valid contract." *Schmidt v. Frankewich*, 819 P.2d 1074, 1077 (Colo. App. 1991). Courts cannot enforce a contract when its language "is too uncertain

to gather from it what the parties intended." *Bockhold*, 176 P.2d at 908 (quoting *Ryan v. Hanna*, 154 P. 436, 436 (Wash. 1916)). Not surprisingly, then, we have condemned contracts with ambiguous terms. *Stice v. Peterson*, 355 P.2d 948, 952 (Colo. 1960).

¶50 In determining whether a term is ambiguous, we must look at the contract "as a whole." *State Farm Mut. Auto. Ins. Co. v. Stein*, 940 P.2d 384, 387 (Colo. 1997). "The meaning of a contract is found by examination of the entire instrument and not by viewing clauses or phrases in isolation." *U.S. Fid. & Guar. Co. v. Budget Rent-A-Car Sys., Inc.*, 842 P.2d 208, 213 (Colo. 1992).

¶51 Like most jurisdictions, Colorado "recognizes that every contract contains an implied duty of good faith and fair dealing." *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995). "The covenant may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party." *Id.* However, the covenant may not contradict any terms or conditions for which a party has bargained. *Id.* Whether a party acted in good faith is a question of fact to be determined on a case-by-case basis. *Id.* at 499.

2. Doe's General Breach-of-Contract Claim

¶52 Taking its cue from the district court's analysis, DU contends that a statement in a university's sexual-misconduct policy promising that any investigation will be "thorough, impartial and fair" is not sufficiently definite or

certain to ensure the requisite meeting of the minds for contract formation. And, echoing the district court's conclusion, DU maintains that the promise of such an investigation in the OEO Procedures is simply too vague and aspirational to be enforced under contract law.

¶53 But the district court set up a straw man and then knocked it down. We don't consider any contractual term in isolation, detached from other terms in the agreement. *See U.S. Fid. & Guar. Co.*, 842 P.2d at 213. Consequently, here, we cannot glean the parties' contractual intent by ignoring all but one term in the OEO Procedures and then reading that term without any context. This is where the district court faltered. It arrived at the wrong answer—that Doe could not prevail on his general breach of contract claim as a matter of law—because it asked the wrong question—whether the promise of a "thorough, impartial and fair" investigation, alone, was sufficiently definite and clear to be enforceable as a contractual term. Instead, the district court should have asked whether the contractual provisions in the OEO Procedures governing investigations (including but not limited to the promise to conduct a "thorough, impartial and fair" investigation), considered as a whole, were sufficiently definite and certain to be enforceable.

¶54 That the district court viewed DU's alleged failure to conduct a "thorough, impartial and fair" investigation as "the core" of Doe's general breach-of-contract

claim is of no moment. That is certainly not the only allegation Doe has advanced in support of his general breach-of-contract claim. And there is no core-of-a-claim exception to the principle prohibiting courts from interpreting one term in a contract unfastened from the rest of the contract's terms.

¶55 When we view the promise of a "thorough, impartial and fair" investigation in conjunction with the specific investigation provisions, it becomes readily apparent that the promise is sufficiently definite and certain to be enforceable in contract law. The specific provisions delineate precisely what the parties contemplated when they agreed to a "thorough, impartial and fair" investigation.[6] We turn to those specific investigation provisions now.

a. We Cannot Disregard the Specific Investigation Provisions in the OEO Procedures

¶56 Immediately after promising that any investigation will be "thorough, impartial and fair," the OEO Procedures list very specific investigation provisions to ensure that this promise will be fulfilled. Pursuant to these specific

[6] Courts are split on whether contractual terms like "basic fairness" and "fundamental fairness" are sufficiently definite and certain to be enforceable. *Compare Goodman v. President & Trs. of Bowdoin Coll.*, 135 F. Supp. 2d 40, 57 (D. Me. 2001), *with Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1465 (10th Cir. 1994). Like the division, we abstain from resolving whether the promise to conduct a "thorough, impartial and fair" investigation, without more, is sufficiently definite and certain to be enforceable under Colorado law. *See Univ. of Denver*, ¶ 44, 516 P.3d at 954–55. We need not, and thus do not, address this question.

investigation provisions, an investigator is required to conduct whatever interviews are necessary, review all pertinent documents, and consider any other relevant information. *Id.* An investigator is also dutybound to determine "the weight and materiality" that each item of evidence deserves. *Id.* On the flip side of the coin, an accuser and an accused are entitled to submit any relevant information, including the names of witnesses who should be interviewed and the documents that should be reviewed. *Id.* And an accuser and an accused must be afforded "an equal opportunity to be heard, to submit information, and to identify witnesses who may have relevant information." *Id.*

¶57 Thus, the OEO Procedures do more than merely promise a "thorough, impartial and fair" investigation. They also contain specific investigation requirements related to that overarching promise. DU does not argue that these specific investigation requirements are vague and aspirational. They aren't. And pursuant to Colorado law, they must be read in tandem with the all-embracing promise of a "thorough, impartial and fair" investigation.

¶58 In our view, the division was spot-on in its analysis of Doe's general breach-of-contract claim. Like the division, we look at the investigation provisions in the OEO Procedures as a whole and thus interpret the promise of a "thorough, impartial and fair" investigation in the context of the more specific terms addressing investigations. Doing so compels us to reach the same conclusion as

the division: The promise of a "thorough, impartial and fair" investigation is sufficiently definite and certain to be enforced under contract law.

¶59 DU nevertheless complains that the division failed to identify which specific investigation provisions in the OEO Procedures inform the interpretation of the promise to conduct a "thorough, impartial and fair" investigation. *See Univ. of Denver*, ¶ 45, 516 P.3d at 955 ("We . . . do not identify which specific investigation procedures inform the contractual term providing for a 'thorough, impartial and fair' investigation."). But *all* the specific investigation provisions—i.e., all the provisions describing how the investigation contemplated by the OEO Procedures must be conducted—necessarily inform the interpretation of the promise of a "thorough, impartial and fair" investigation. Of course, some specific investigation provisions will be more pertinent than others in any given case based on how a particular investigation was carried out.

¶60 The decision by the United States District Court for the Eastern District of Pennsylvania in *Doe v. Trustees of the University of Pennsylvania*, 270 F. Supp. 3d 799 (E.D. Pa. 2017), is helpful. There, the student disciplinary procedures promised, among other things, "a thorough and fair investigation." *Id.* at 813. In determining the parties' intent, the court explained that it could not consider that promise "in isolation." *Id.* at 812. Rather, reasoned the court, the promise of "a thorough and fair investigation" had to be interpreted "in the context of the Disciplinary

Procedures as a whole." *Id.* at 811–12. More to the point, the promise of "a thorough and fair investigation" had to be read in conjunction with the description of *all* the precise procedures that the investigating officer and his team were required to follow. *Id.* at 813.

¶61 The court concluded that "the 'fair' investigation" the parties had envisioned was "that which is set forth in the paragraphs of the Procedures immediately following the promise of such an investigation." *Id.* at 814. Absent "any other indication" as to what a "'fair' investigation" would entail, reasoned the court, it was unwilling to rule "that the parties intended to impose any additional requirements than those specifically set forth in the procedures." *Id.* Accordingly, the court ruled that, to the extent the plaintiff's complaint relied on obligations independent of those spelled out in the specific investigation provisions within the disciplinary procedures, it failed to state a breach-of-contract claim upon which relief could be granted. *Id.* at 814–15.

¶62 Unlike the plaintiff in *Trustees of the University of Pennsylvania*, Doe has asserted that DU deprived him of a "thorough, impartial and fair" investigation based on alleged violations of the specific investigation provisions set forth in the OEO Procedures. The district court recognized as much. And with good reason: Many allegations in Doe's complaint are tethered to the specific investigation provisions in the OEO Procedures. But the court nevertheless granted DU's

motion for summary judgment on Doe's general breach-of-contract claim because it found that those allegations were "either demonstrably false . . . or . . . immaterial." Our review of the record, however, leads us to conclude otherwise.

b. Doe's Allegations Regarding the Specific Investigation Provisions Are neither Demonstrably False nor Irrelevant

¶63 The district court's finding to the contrary notwithstanding, Doe's allegations regarding the specific investigation provisions are neither demonstrably false nor irrelevant. Four such allegations prove the point.

¶64 First, Doe has alleged, with record support, that the investigators interviewed all eleven witnesses identified by Roe but only one of the five witnesses he identified. And Doe reminds us that the investigators initially failed to interview any of his witnesses; it was only after he reviewed the investigators' preliminary report and made a second request for interviews of his witnesses that the investigators interviewed his therapist. As mentioned, Doe's roommate and Doe's close friend were among the four witnesses not interviewed, even though (1) they observed "interactions between [Doe] and [Roe] in the hours surrounding the alleged assault," and (2) Doe discussed the incident with them "very shortly after it happened." *Tenth Circuit Case*, 1 F.4th at 832.

¶65 The investigators' final report conceded that these two witnesses were not interviewed. So, Doe's allegation is anything but demonstrably false.

¶66 Still, the final report tried to downplay the relevance of this failure by explaining that these witnesses likely had "duplicative" information. Such conjecture, however, is directly contradicted by what Doe told the investigators the witnesses intended to say. Besides, as the Tenth Circuit explained, "the same could be said for [Roe's] eleven witnesses [whom] investigators opted to interview." *Id.* And, to the extent the investigators wanted to limit the number of witnesses interviewed given the sensitive nature of the allegations, that concern didn't stop them from interviewing all eleven witnesses identified by Roe. Regardless, Doe's witnesses were already aware of the allegations, so the concern about unnecessarily spreading sensitive information was neither here nor there.

¶67 Second, Doe has alleged, again with record support, that the investigators considered only the portions of the SANE report selected by Roe, thereby disregarding other portions of that report. Here, again, the investigators' final report admitted that this allegation is true.

¶68 The allegation is also relevant. During their depositions, the investigators stated that Roe provided only portions of the SANE report, even though they had requested the full SANE report. But they acknowledged that they didn't ask her to give them authorization to access the full SANE report. In other words, the investigators conceded that they made little effort to obtain the information omitted by Roe from the SANE report. Yet they recognized—both in their final

report and in their deposition answers—that the omitted portions of the SANE report may well have contained material information. True, it is possible that, had the investigators asked Roe for authorization to obtain the full SANE report, she may have declined to provide it to them anyway. But we'll never know now because they didn't ask.

¶69 Not surprisingly, this, too, gave the Tenth Circuit heartburn. *Id.* at 833–34. That tribunal observed that the complete SANE report would have included "summaries by the SANE nurse and the attending physician," as well as "the patient's written statement regarding the source of the injuries." *Id.* at 833. Yet, despite lacking the date of the injuries and their medical cause, and perhaps other material information, the investigators nevertheless determined that the self-serving portions of the SANE report submitted by Roe "seem[ed] to corroborate [her] assertion that [Doe] was 'manipulating' her body by 'grabbing and pushing' her legs aside before forcibly putting his penis inside of her." Contrary to the investigators' suggestion, Doe's objection to the omission of information in the SANE report was not an exercise in speculation; rather, it was a criticism of their blind reliance on Roe's edited copy of that report and their failure to consider all material information.

¶70 Third, Doe has alleged, with support in the record, that the investigators failed to consider any improper motivation Roe may have had in accusing him of

sexual assault. To be sure, Roe may not have had any improper motivation. But viewing the factual record in the light most favorable to Doe, as we must, we cannot say that this allegation is demonstrably false.

¶71 In discussing the investigators' failure to consider Roe's potentially improper motivation, the Tenth Circuit raised an eyebrow, noting that she waited weeks to file her complaint and that she admitted to investigators that she did so only after becoming aware that he had told others about their sexual encounter. *Tenth Circuit Case*, 1 F.4th at 833. Notably, Roe initially did not tell her classmates that she thought Doe had sexually assaulted her or that her sexual interaction with him was nonconsensual. *Id.* She simply told multiple people that she and Doe had engaged in sexual intercourse. *Id.* "It was not until later—after [Roe] saw [Doe] talking to another young woman at a party—that she began telling people the encounter was not consensual." *Id.*

¶72 This allegation is not irrelevant either. That Roe may have had an improper motivation for filing her complaint is obviously relevant, as it could compromise the credibility of her statements to the investigators.

¶73 And fourth, Doe has alleged that the investigators afforded Roe favorable treatment and deprived him of an equal opportunity to be heard, submit information, and identify witnesses. This allegation is supported by the greater weight the investigators seemingly gave to Roe's witnesses and self-selected

portions of the SANE report, as compared to Doe's witnesses and his concerns about Roe's potentially improper motivations. As such, this allegation is not demonstrably false. And it is not immaterial either because the disparate treatment the investigators allegedly afforded Roe and Doe arguably supports his view that this investigation was biased.

¶74 In short, the allegations Doe has advanced regarding the specific investigation provisions are not demonstrably false or immaterial. Nor are they inconsequential for purposes of our summary judgment analysis. Au contraire, as we detail next, they raise genuine issues of material fact.

c. Doe's Allegations Regarding the Specific Investigation Provisions Raise Genuine Issues of Material Fact

¶75 Evidence that the investigators *interviewed one hundred percent* of Roe's witnesses but *failed to interview eighty percent* of Doe's witnesses (even though at least *fifty percent* of the witnesses who were not interviewed represented that they possessed information related to Roe's complaint) would allow a factfinder to reasonably conclude that DU violated the specific provisions in the OEO Procedures requiring an investigator to assess "the necessity of interviewing potential witnesses," to conduct all "necessary" interviews, to review "all submitted information," and to "determine the weight and materiality of all submitted information." OEO Procedures at XI.E. The same evidence regarding

witness interviews would permit a factfinder to reasonably conclude that DU failed to adhere to the specific provision in the OEO Procedures stating that the parties must be able to submit any relevant information to investigators, including the names of witnesses who should be interviewed. *Id.* We infer that this provision requires investigators to actually interview any relevant witnesses identified by a party. Otherwise, what's the point of ensuring a party can submit the names of relevant witnesses?

¶76 Likewise, evidence that the investigators relied on the portions of the SANE report selected by Roe, without seeking the missing information or weighing its absence, would allow a factfinder to reasonably conclude that DU contravened the specific provisions in the OEO Procedures requiring investigators to review *all* relevant documentary information and to assess its materiality. *Id.* The investigators' decision to accept at face value and consider out of context the limited portions of the SANE report provided by Roe would allow a factfinder to reasonably conclude that the investigators were derelict in their duty to assess all relevant documentary information. In addition, such acceptance arguably transgresses the specific provisions in the OEO Procedures that require an investigator to ascertain the weight and materiality to be attributed to each evidentiary item. *Id.*

¶77 Similarly, evidence that the investigators failed to consider Roe's potentially improper motivation for filing her complaint would allow a factfinder to reasonably conclude that DU breached the specific provisions in the OEO Procedures requiring consideration of relevant information. *Id.* Indeed, the specific provisions stress that an investigator will review *all* relevant information. *Id.*

¶78 Finally, the record as a whole would permit a factfinder to reasonably conclude that DU violated the specific provision in the OEO Procedures requiring that the parties be given an equal opportunity to be heard, submit information, and identify witnesses. *Id.* There is at least some evidence that the investigators offered Doe fewer opportunities to participate in this investigation than they offered Roe.

¶79 This discussion is by no means intended to be exhaustive. The point is that, through allegations that are neither demonstrably false nor irrelevant, Doe has raised genuine disputes of material fact that are directly related to whether DU violated the specific provisions in the OEO Procedures and, by extension, whether it fulfilled its promise to conduct a "thorough, impartial and fair" investigation. On this record, then, the district court should not have entered summary judgment in favor of DU on Doe's general breach-of-contract claim.

d. We Are Not Persuaded by DU's Waiver Contention

¶80 DU protests, arguing that Doe did not appeal the district court's determination regarding the university's compliance with the specific investigation provisions. According to DU, Doe "performs a sleight of hand to argue indirectly what he may not argue directly: that the record purportedly presents questions of fact regarding the University's compliance" with the specific investigation provisions, "thereby precluding entry of summary judgment." The only issue Doe presented to the court of appeals, maintains DU, is whether the district court erred in finding that the promise of a "thorough, impartial and fair" investigation is too vague to create contractually enforceable duties.[7] Hence, postulates DU, Doe has waived any contention regarding the specific investigation provisions.

¶81 As a preliminary matter, the district court did not find that DU complied with the specific investigation provisions. It found that Doe's allegations

[7] We understand the grant of summary judgment on Doe's general breach-of-contract claim to have been predicated, first and foremost, on the district court's determination that the promise in the OEO Procedures of a "thorough, impartial and fair" investigation was too vague and aspirational to be enforceable under Colorado contract law. Indeed, the district court reasoned that this claim was "not cognizable" because the "contractual command[]" related to a "thorough, impartial, and fair" investigation is a "vague aspirational goal[]" whose "violation is incapable of meaningful determination." Thus, based on our reading of the district court's order, Doe's appeal tracked the primary basis of the grant of summary judgment for DU on his general breach-of-contract claim.

regarding DU's transgressions of those provisions were demonstrably false or irrelevant. And we've now addressed that part of the district court's order.

¶82 More importantly, as we've explained, we cannot interpret DU's promise to conduct a "thorough, impartial and fair" investigation in isolation. *See U.S. Fid. & Guar. Co.*, 842 P.2d at 213. Instead, Colorado law requires us to construe that broad-brush promise in the context of the OEO Procedures as a whole. *Id.* Therefore, we cannot answer the second question on which we granted certiorari (whether the promise of a "thorough, impartial and fair" investigation is sufficiently definite and certain to be contractually enforceable) without considering the specific investigation provisions. And after concluding that the promise of a "thorough, impartial and fair" investigation, when considered in conjunction with those specific investigation provisions, is sufficiently definite and certain to be enforceable under contract law, we must complete the analysis and decide whether DU is nevertheless entitled to summary judgment.

¶83 What's more, DU itself raised the issue of the specific investigation provisions in this court. As it relates to Doe's general breach-of-contract claim, DU's petition for certiorari broadly asked us to decide, among other things, whether "the Court of Appeals err[ed] in reversing the District Court *on . . . any other basis*?" (Emphasis added.) This necessarily encompasses the division's conclusion that Doe's allegations raised genuine disputes of material fact as to

whether DU complied with the specific investigation provisions. And while our reframing no doubt narrowed the scope of the issue, DU is hardly in a position to cry foul now. DU cannot, in one breath, urge us to review the division's *entire* analysis on Doe's general breach-of-contract claim, and then in the next breath, complain that part of that analysis is off the table. DU falls prey to the old adage, "you can't have your cake and eat it too."

¶84 In any event, were we to do as proposed, it would be as useful to DU as a fork in a sugar bowl. If we refrained from deciding whether there are genuine issues of material fact regarding DU's compliance with the specific investigation provisions, the division's conclusion on that front—that such genuine issues do, in fact, exist—would remain undisturbed.

3. Doe's Breach-of-Contract Claim Premised on the Covenant of Good Faith and Fair Dealing

¶85 The covenant of good faith and fair dealing is applicable here because some of the OEO Procedures vested DU's investigators with discretion. *See Ervin*, 908 P.2d at 498 (indicating that the covenant of good faith and fair dealing may be relied upon only if the manner of performance of a specific contract term permits discretion on the part of a party). For instance, under the OEO Procedures, the investigators enjoyed some discretion in determining "the necessity of interviewing potential witnesses" and "the weight and materiality of all submitted information." OEO Procedures at X.IE.

¶86 We need not delve deeply into this claim. For the same reasons that summary judgment was not appropriate on Doe's general breach-of-contract claim, we conclude that summary judgment was not appropriate on Doe's breach-of-contract claim premised on a violation of the duty of good faith and fair dealing. Accordingly, the district court erred in granting DU summary judgment on this claim.

B. Doe's Negligence Claim Against DU

¶87 The division concluded that, independent of any contractual duty, DU owed Doe a tort-based duty to use reasonable care in adopting and implementing fair procedures related to the investigation and adjudication of sexual-misconduct claims. *Univ. of Denver*, ¶¶ 60–61, 516 P.3d at 957. DU counters that this was error.[8] Before resolving this disagreement, we pause to review some basic tenets of tort law.

1. Some Basic Tenets of Tort Law

¶88 To prevail on a negligence claim, a plaintiff must establish "a legal duty of care on the defendant's part, breach of that duty, injury to the plaintiff, and causation, i.e., that the defendant's breach caused the plaintiff's injury."

[8] Doe brought his negligence claim against all the defendants. Recall, however, that the division affirmed the district court's grant of summary judgment for the individual defendants on this claim. As mentioned, Doe did not file a cross-petition for certiorari. Therefore, that part of the division's judgment is now final.

HealthONE v. Rodriguez ex rel. Rodriguez, 50 P.3d 879, 888 (Colo. 2002). A negligence claim will fail if it is rooted in "circumstances for which the law imposes no duty of care upon the defendant." *Id.*

¶89 The American law of torts aims "to protect all citizens from the risk of physical harm to their persons or to their property." *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000). Consequently, an individual wrongfully injured at the hands of another may be entitled to compensation under tort law. *Coats v. Dish Network, L.L.C.*, 2013 COA 62, ¶ 34, 303 P.3d 147, 154. "Tort obligations generally arise from duties imposed by law." *Town of Alma*, 10 P.3d at 1262.

¶90 In determining, as a matter of law, whether a duty exists, we must ask "whether the plaintiff's interest that has been infringed by the conduct of the defendant is entitled to legal protection." *Observatory Corp. v. Daly*, 780 P.2d 462, 466 (Colo. 1989) (quoting *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 317 (Colo. 1980)). "A court's determination that the defendant did or did not owe a legal duty to the plaintiff is 'an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is [or is not] entitled to protection.'" *Id.* (alteration in original) (quoting *Univ. of Denver v. Whitlock*, 744 P.2d 54, 57 (Colo. 1987)). This requires the exercise of a "prudential judgment" based on the particular circumstances of the case. *Id.*

2. DU Owes Its Students No Tort-Based Duty

¶91 In urging us to refuse to recognize a new tort-based duty of care, DU maintains that such a duty would be inappropriate in light of other duties already in existence. We agree.

¶92 Like many other jurisdictions, we have deemed it fit to "[l]imit[] tort liability when a contract exists between [the] parties" because any potential nonperformance "can be adequately addressed by rational economic actors bargaining at arms length to shape the terms of the contract." *Town of Alma*, 10 P.3d at 1262. As we observed in *Town of Alma*, "[c]ontract law is intended to enforce the expectancy interests created by the parties' promises so that they can allocate risks and costs during their bargaining." *Id.* Precluding tort remedies in these situations makes sense because it "holds parties to the terms of their bargain." *Id.* "In this way, the law serves to encourage parties to confidently allocate risks and costs during their bargaining without fear that unanticipated liability may arise in the future, effectively negating the parties' efforts to build these cost considerations into the contract." *Id.* This is precisely the purpose of the economic loss rule—to ensure predictability in commercial transactions. *Id.*

¶93 At least two federal circuits have considered and rejected negligence claims advanced by plaintiffs like Doe following sanctions imposed by a university for sexual misconduct pursuant to its disciplinary rules. In *Doe v. University of Dayton*,

766 F. App'x 275, 278 (6th Cir. 2019) (unpublished opinion), for example, the plaintiff sued the University of Dayton alleging that he was wrongfully accused of sexually assaulting a fellow student, and then wrongfully suspended after an unfair investigation. The plaintiff there brought multiple claims, including a tort claim for negligence. *Id.* at 289. But the Sixth Circuit affirmed the order dismissing that claim. *Id.* The court determined that the claim was flawed because the duties the university owed to the plaintiff were "found in the terms of the [Student] Handbook and in Title IX itself." *Id.* Any alleged violations of that handbook, explained the court, should be "analyzed in their proper place, as potential breaches of contract." *Id.* Inasmuch as there was no dispute that the student handbook constituted a contract, the plaintiff's negligence claim could not prevail. *Id.* Likewise, any alleged violations of Title IX were to be "analyzed in their proper place, under recognized Title IX rubrics—not as freestanding tort claims." *Id.* Because there was no dispute that the plaintiff could pursue an action for failure to adhere to the duties imposed by Title IX, his negligence claim could not prevail. *Id.*

¶94 Similarly, in *Doe v. Trustees of Boston College*, 892 F.3d 67, 74 (1st Cir. 2018), a sanctioned student and his parents sued the trustees of Boston College and certain officials employed by that school; the plaintiffs alleged that improper disciplinary action had been taken with respect to the sanctioned student based on an

accusation of sexual assault by another student during an off-campus school event. As pertinent here, the district court granted the defendants summary judgment on the plaintiffs' negligence claims, ruling that neither the school nor any of the individual defendants owed the plaintiffs a duty of care. *Id.* at 79. Affirming that part of the summary judgment order, the First Circuit agreed that the school and the individual defendants did not owe the plaintiffs "any independent duty of care." *Id.* at 94. The court noted that neither side disputed that the contractual relationship between the sanctioned student and the university had arisen from the "Student Guide and the Conduct Board Procedure," which prescribed the disciplinary process. *Id.* And because it was clear that the disciplinary proceedings had arisen from that contractual relationship, Boston College "did not owe the [plaintiffs] any additional independent duty outside of the[] existing contractual relationship." *Id.* Thus, "[a]ny remedy for a breach of this contractual obligation must sound in contract, not in tort." *Id.*

¶95 We agree with these well-reasoned decisions and likewise conclude that DU does not owe its students a tort-based duty to use reasonable care in adopting and implementing fair procedures related to the investigation and adjudication of sexual-misconduct claims. It is undisputed in this case that the OEO Procedures constitute a contract between DU and its students, and we've now determined that the investigation provisions contained therein, when considered together as a

whole, are sufficiently definite and certain to be enforceable under contract law. The OEO Procedures bind the school and the students. Any alleged violations of those provisions must be analyzed in their proper place—as potential breaches of contract. And any remedy for such violations must lie in contract, not in tort. By precluding a duplicative tort remedy in this situation, we enforce contractual expectations, encourage the confident allocation of risks and costs in a contractual relationship, hold parties to the terms of their bargain, and ensure predictability in commercial transactions.

¶96 Beyond its contractual obligations under the OEO Procedures, DU also has duties deriving from statutes and regulations. Indeed, DU has sought to comply with its obligations under Title IX, related regulations, and section 23-5-146 through the development and implementation of the OEO Procedures. Significantly, Doe has a remedy under federal law, even in the absence of a contract or tort claim. Title IX provides an individual private cause of action, *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979), and Doe has availed himself of that potential remedy through his federal case, which is currently awaiting trial. Any alleged violations of Title IX must be analyzed in their proper place—under Title IX rubrics, not under tort rubrics—and any remedy for such violations must lie in Title IX, not in tort.

IV. Conclusion

¶97 Ours is the third appellate court to do a double take upon reviewing an order granting summary judgment for DU and against Doe. As this opinion reflects, we are taken aback by some aspects of DU's investigation of Roe's complaint. But like our fellow appellate jurists, we ultimately pass no judgment on the merits of Doe's claims. Instead, we simply address whether DU is entitled to summary judgment on any of the pending claims. We conclude that there are disputed issues of material fact regarding Doe's breach-of-contract claims, so DU is not entitled to judgment as a matter of law on those claims. However, because we also conclude that DU does not owe its students an extra-contractual tort-based duty to use reasonable care in adopting and implementing fair procedures related to the investigation and adjudication of sexual-misconduct claims, DU is entitled to judgment as a matter of law on Doe's negligence claim. Accordingly, the matter is remanded to the court of appeals with instructions to return it to the district court for reinstatement of Doe's breach-of-contract claims and further proceedings consistent with this opinion.

JUSTICE MÁRQUEZ concurred in part and dissented in part.

JUSTICE MÁRQUEZ, concurring in part and dissenting in part.

¶98 I respectfully dissent in part. I agree with the majority that, in order to determine whether the University of Denver's Office of Equal Opportunity Procedures ("OEO Procedures") are sufficiently definite to be enforceable, we must consider the specific provisions of those procedures. Maj. op. ¶ 56. I further agree that those "specific provisions delineate *precisely* what the parties contemplated when they agreed to a 'thorough, impartial and fair' investigation." Maj. op. ¶ 55 (emphasis added). In other words, the way to determine whether the investigation was "thorough, impartial and fair" is by evaluating the parties' compliance with the specific provisions. But the overarching description of the process as "thorough, impartial and fair" does not impose additional contractual duties beyond those reflected in the specific investigation provisions.

¶99 However, the majority's analysis ends up doing exactly that: instead of relying on the specific procedures to supply the meaning of the phrase "thorough, impartial and fair," the majority leans on that phrase to impose additional contractual duties beyond those required by the specific investigation provisions. The majority then erroneously concludes that a genuine dispute of material fact exists as to whether these judicially created, additional duties were breached. Moreover, the disputed facts the majority identifies are not material to John Doe's breach-of-contract claim. Rather, they are relevant (at most) only to Doe's good

faith and fair dealing claim. For these reasons, I cannot join Part III.A of the majority's opinion.

I. The Specific Investigation Provisions Define What Is a "Thorough, Impartial and Fair" Investigation

¶100 I agree with the majority that the meaning of a contract is gleaned from examining the contract as a whole and that phrases within the whole should not be read in isolation. Maj. op. ¶ 50 (citing *U.S. Fid. & Guar. Co. v. Budget Rent-A-Car Sys., Inc.*, 842 P.2d 208, 213 (Colo. 1992)). But I would add that "[i]t is a basic principle of contract interpretation that a more specific provision controls the effect of more general provisions in a contract." *Massingill v. State Farm Mut. Auto. Ins. Co.*, 176 P.3d 816, 825 (Colo. App. 2007).

¶101 By not accounting for the weight of more specific contractual language, the majority uses the whole-document rule of interpretation to work backward. The majority acknowledges that the introductory and overarching term "thorough, impartial and fair" is defined by looking to the specific investigation provisions. Maj. op. ¶ 55 ("The specific provisions delineate precisely what the parties contemplated when they agreed to a 'thorough, impartial and fair' investigation."). But the majority ultimately uses the phrase "thorough, impartial and fair" to interpret and *expand* the duties contained in the more specific provisions. I disagree.

¶102 The phrase "thorough, impartial and fair" in the OEO Procedures is too vague to be enforceable on its own. Its inclusion merely offers a statement of the parties' intended purpose of the OEO Procedures. In turn, the specific investigation provisions establish the means for accomplishing that purpose. But the phrase "thorough, impartial and fair" does not expand the duties imposed by the OEO Procedures' specific investigation provisions.

II. There Is No Genuine Dispute of Facts Material to Doe's Breach-of-Contract Claim

¶103 As the majority notes, Doe has alleged that the University of Denver ("DU") breached specific investigation provisions of the OEO Procedures. Thus, the question is whether there is a genuine dispute of material fact as to whether DU breached any of those provisions. The majority concludes that there is. I disagree. The facts alleged by Doe on which the majority relies do not tend to prove a breach of the specific investigation provisions.

¶104 First, Doe claims that the investigators breached the investigation provision stating that the "[i]nvestigators will review and determine the weight and materiality of all submitted information and including the necessity of interviewing potential witnesses." OEO Procedures at XI.E. To support this claim, Doe alleges that the investigators interviewed all eleven witnesses identified by Jane Roe but only one of the five witnesses Doe identified. The undisputed facts supported by the record, even when construed in favor of Doe, do not tend to

prove that the investigators breached this requirement. By alleging that the investigators declined to interview four of Doe's proposed witnesses, the complaint necessarily admits that the investigators "review[ed] and determine[d] . . . the necessity of interviewing [his] potential witnesses," as required by the OEO Procedures at XI.E.

¶105 Second, Doe claims that the investigators breached their duty to "review all facts gathered to determine whether the information is material to the determination of responsibility given the nature of the allegation." OEO Procedures at XI.F. Doe alleges that the investigators relied on the portions of the Sexual Assault Nurse Examiner ("SANE") report that had been selected by Roe without reviewing the full SANE report. This allegation, however, does not tend to prove that the investigators failed to "review all facts *gathered* and determine which information [was] material to the determination of responsibility," as required by the OEO Procedures at XI.F. (Emphasis added.)

¶106 The investigators reviewed the portions of the SANE report made available to them, and it appears that they determined that this information was material to the determination of responsibility. Those actions fulfilled their duty under the cited investigation provision. Doe points to no specific provision that required Roe to submit (or the investigators to demand) the entire report.

¶107 Third, Doe claims that the investigators failed to consider his assertion that Roe's accusation of Doe was improperly motivated. He bases this claim on the provision in the OEO Procedures that lists and describes prohibited conduct. Included in that list is "retaliation," which it defines as "any act or attempt to retaliate against or seek retribution from any individual . . . involved in the investigation and/or resolution of a report under these Procedures." OEO Procedures at V.B.9. The provision further clarifies that "[a]ctions are considered retaliatory if they are motivated by disclosure of real or perceived University-related misconduct pursuant to these Procedures." *Id.*

¶108 As the district court correctly noted, the alleged retaliatory behavior—Roe's threat that she had a "gun with one bullet and perfect aim"—occurred *before* the initiation of the investigation. Even according to Doe, at the time of Roe's alleged threat, no investigation had been initiated and neither Doe nor Roe were yet "involved in the investigation . . . of a report under [the OEO Procedures]." Logically then, Roe's *subsequent* decision to initiate a Title IX complaint against Doe could not have constituted "retaliation" as that term is defined in the OEO Procedures.

¶109 Doe's true quarrel appears to be with Roe's alleged improper motivation to initiate her complaint in the first place. But Doe does not ground this claim in the OEO Procedures' prohibition against "Groundless and Malicious Complaints."

OEO Procedures at V.B.10 (providing that "[a]nyone who abuses these Procedures . . . by bringing groundless or malicious complaints or intentionally giving false information during the course of a review violates these Procedures"). Instead, hamstrung by Doe's failure to mention this provision, the majority relies on his factual allegations to find a genuine dispute as to whether Roe's complaint constituted retaliation under the OEO Procedures at V.B.9. The mismatch between Doe's allegations and the cited contractual provision only underscores the lack of any genuine dispute concerning retaliatory conduct.

¶110 Regardless of its label, Doe's third claim faces a more fundamental problem. Both the "Retaliation" and "Groundless and Malicious Complaints" provisions describe prohibited conduct, meaning conduct that could prompt an investigation by the Office of Equal Opportunity. Neither imposes a specific duty on the investigators during the investigation process.

¶111 Fourth, Doe claims that the investigators deprived him of an equal opportunity to be heard and instead afforded Roe favorable treatment. Doe roots this claim in the portion of the OEO Procedures that says the complainant and respondent "will have an equal opportunity to be heard, to submit information, and to *identify* witnesses who may have relevant information." OEO Procedures at XI.E (emphasis added). As factual support for this claim, Doe again alleges that the investigators selectively interviewed witnesses favorable to Roe and failed to

interview witnesses identified by Doe. But Doe alleges no facts that support the conclusion that he was denied an equal opportunity to "*identify* witnesses who may have relevant information" as required by the OEO Procedures at XI.E. (Emphasis added.)

¶112 And, as explained above, the investigators had the right and obligation to determine which witnesses were necessary to interview. Read together, this provision means that, as it relates to witnesses, the "opportunity to be heard" proceeds in a particular order. First, Doe and Roe each had the right to identify witnesses. Next, investigators had the right and duty to decide which of those witnesses, if any, to interview. At that point, both Doe and Roe had a right for those selected witnesses to be heard. But Doe does not allege a violation of any of these specific rights. As with his witnesses claim (the first claim discussed), his only allegation is that the investigators, exercising the discretion conferred on them by the OEO Procedures, did not determine that all his proffered witnesses were necessary. And, as with the first claim discussed, this allegation does not support a breach of contract claim.

¶113 In sum, the alleged facts do not tend to prove a breach-of-contract claim—even when construed in the light most favorable to Doe. Rather, they seem to support a claim that the investigators did not perform their specific duties "thorough[ly], impartial[ly] and fair[ly]." But as discussed above, the "thorough,

impartial and fair" language does not, and cannot, expand the duties imposed by the more specific investigation provisions.

III. Doe's Allegations Concerning Retaliation and the Opportunity to Be Heard Do Not Support a Claim for Breach of the Implied Duty of Good Faith and Fair Dealing

¶114 The implied duty of good faith and fair dealing applies "only when the manner of performance *under a specific contract term* allows for discretion on the part of either party." *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995) (emphasis added).

¶115 Because a good faith and fair dealing claim must be rooted in an explicit contractual term, the district court properly granted summary judgment on Doe's good faith and fair dealing retaliation claim. As explained above, the definition of "retaliation" in the OEO Procedures does not impose on DU a specific contractual obligation during the investigation process; therefore, there is no corresponding implied duty of good faith and fair dealing.

¶116 Additionally, Doe's allegations related to his opportunity-to-be-heard claim do not support a good faith and fair dealing claim. As explained above, the promise of "an equal opportunity to be heard, to submit information, and to identify witnesses who may have relevant information" operates in tandem with the investigators' duty to "determine the necessity of interviewing potential witnesses." OEO Procedures at XI.E. To the extent Doe's opportunity-to-be-heard

claim is based on his right to "identify witnesses," there is no corresponding implied duty of good faith and fair dealing because that provision does not vest the investigators with discretion. *See id.* And to the extent Doe's opportunity-to-be-heard allegations regard the investigators' decision of which witnesses to interview, they are duplicative of the allegations he made in support of his witnesses claim.

¶117 That said, I acknowledge that the facts alleged by Doe in support of his witnesses claim do raise a genuine dispute of material fact as to whether the investigators violated the implied duty of good faith and fair dealing in determining which witnesses were necessary to interview. I reach the same conclusion regarding the facts underpinning Doe's SANE-report claim (the second claim discussed in Part II of this dissent).

¶118 The investigation provisions on which Doe's witnesses and SANE-report claims are based vest the investigators with significant discretion. Doe's alleged facts raise the question of whether the investigators exercised this discretion in a way that denied Doe his reasonable expectations under the contract. *See Amoco Oil Co.*, 908 P.2d at 498 (limiting the applicability of the implied duty of good faith and fair dealing to contract provisions that require discretion by one party); *City of Golden v. Parker*, 138 P.3d 285, 292 (Colo. 2006) ("The good faith performance

doctrine attaches to contracts 'to effectuate the intentions of the parties or to honor their reasonable expectations.'" (quoting *Amoco Oil Co.*, 908 P.2d at 498)).

¶119 For this reason, I join the majority in its decision to affirm the division's decision denying summary judgment on Doe's good faith and fair dealing claim, but only so far as it pertains to the investigators' handling of Doe's witnesses and the SANE report.

IV. Conclusion

¶120 Because "thorough, impartial and fair" is defined solely by the specific investigation provisions of the OEO Procedures, and because Doe's alleged facts do not establish a breach of those provisions, I would reverse the division and affirm the district court's grant of summary judgment in favor of DU on (1) Doe's breach-of-contract claim and (2) his breach of the implied duty of good faith and fair dealing claim to the extent it relies on his retaliation and opportunity-to-be-heard allegations. Accordingly, I respectfully dissent in part.