IN THE SUPREME COURT OF FLORIDA

Case No. SC01-969

On Review of a Final Decision
of the Third District Court of Appeal

SOUTHEASTERN UNIVERSITY OF THE
HEALTH SCIENCES, INC., d/b/a
COLLEGE OF OSTEOPATHIC MEDICINE,

Petitioner,

v.

KEITH M. SHARICK,

Respondent.

AMICUS BRIEF OF UNIVERSITY OF MIAMI, THE INDEPENDENT COLLEGES AND UNIVERSITIES OF FLORIDA, AND THE AMERICAN COUNCIL ON EDUCATION

Stephen H. Grimes
Susan L. Kelsey
Holland & Knight LLP
Post Office Drawer 810
Tallahassee, Florida 32302

Counsel for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

MISCELLANEOUS

INTEREST OF AMICI

Amici Curiae, the University of Miami ("University"), the Independent Colleges and Universities of Florida ("ICUF"), and the American Council on Education ("ACE") (collectively the "Amici"), provide this brief in support of the Appellant, Southeastern University of the Health Sciences. The Amici have an acute interest in the resolution of the issues in this case. This Court's decision will affect directly the University and each of ICUF's and ACE's members in Florida. Because the practical and legal ramifications of this Court's decision are of substantial interest and importance to private and independent universities and colleges statewide, if not nationwide, Amici believe that consideration of this Brief would be appropriate and helpful to the Court's resolution of the issue presented.

University of Miami

The University of Miami, chartered in 1925, is a privately-supported, non-sectarian institution that currently enrolls over 13,600 students in approximately 100 undergraduate, 85 master's, and 55 doctoral and professional areas of study. As such, this Court's resolution of the issues in this case will have a direct impact on the University's programs.

ICUF

The Independent Colleges and Universities of Florida was formed in 1965 to

advance the interests of its members, all of which are not-for-profit, Florida-chartered institutions accredited by the Southern Association of Colleges and Schools. Today, ICUF has grown to twenty-seven (27) members.[1] These ICUF member institutions enroll twenty-eight percent (28%) of the students attending four-year institutions in Florida and produce thirty-one percent (31%) of the baccalaureate, master's, doctoral, and professional degrees awarded in Florida each year. As such, ICUF's members have an interest in the resolution of issues in this appeal.

The American Council on Education

The American Council on Education is a non-profit organization that represents approximately 1,800 public and private colleges and universities across the United States, as well as over 175 non-profit education associations and organizations. Because of its focus on and concern for higher education nationwide, including Florida, ACE respectfully submits that it offers a distinct perspective that will assist the Court in this

[1] Barry University, Bethune Cookman College, Clearwater Christian College, Eckerd College, Edward Waters College, Embry-Riddle Aeronautical College, Flagler College, Florida College, Florida Hospital College of Health Sciences, Florida Institute of Technology, Florida Memorial College, Florida Southern College, International College, Jacksonville University, Lynn University, Nova Southeastern University, Palm Beach Atlantic College, Ringling School of Art and Design, Rollins College, Saint Leo College, Saint Thomas University, Southeastern University, Stetson University, The University of Tampa, University of Miami, Warner Southern College, and Webber College.

proceeding.

STATEMENT OF THE CASE AND FACTS

The Amici adopt the statement of case and facts of Petitioner as set forth in its Initial Brief. Amici also rely upon the factual recitation in the opinion set forth in Sharick v. Southeastern Univiversity, 780 So. 2d 136 (Fla. 3d DCA 2000).

SUMMARY OF THE ARGUMENT

The District Court of Appeal has created an unprecedented remedy for a defective academic judgment. The "implied-in-fact" agreement between Sharick and Southeastern University related solely to the provision of educational services in return for his tuition, effort, and performance. Yet, the court below expanded the implied agreement beyond educational services to one that assured the student a non-contractual entitlement to future income and profits as a physician. Damages for monies necessary to obtain a degree sought are appropriate; damages for future income and profits that might be earned with the degree are not.

Colleges and universities provide students with education services, which are reflected in the degrees that may be conferred. They do not, however, provide a legal guarantee of future success in a student's particular endeavor, whatever that might ultimately be. If an institution does not meet its contractual obligation to provide appropriate education services, the student can seek appropriate remedies including

reinstatement, lost tuition, or other losses directly associated with the breach.

The student cannot, however, extrapolate a breach of an implied-in-fact contract into an entitlement to wide-ranging, speculative non-contractual losses from his or her lost potential career. Earnings that might be received after obtaining a degree would be merely speculative future income that may or may not be related to a degree not yet attained, and should not be recoverable.

Damages in the form of lost future income are more akin to tort-based damages that are inappropriate absent clear evidence that the educational contract included a promise of a future job or employment in a particular position. A degree, by itself, is not a guarantee of a job or employment that transforms the educational contract into an insurance policy covering a student's future success. Instead, a degree merely provides a student with the opportunity to exercise his or her own initiative in the future to pursue those jobs or positions for which the degree is required or may be deemed valuable.

In addition, courts should be hesitant to "imply" contractual remedies that the parties neither agreed upon nor reasonably would have accepted. Unlike tort remedies, contract remedies are limited to those upon which the parties agreed or reasonably would have agreed under the circumstances. Just as courts must avoid imputing terms and conditions into an "implied-in-fact" contractual relationship, they must also avoid imposing "remedies" beyond the parties' mutual expectations. Here, it is neither

reasonable nor supportable to create a contractual remedy that imposes a potentially huge damage award for a purportedly "lost" career when the parties did not contemplate or consent to such a draconian remedy. While it may be reasonable to imply a mutual expectation that a student should receive a degree upon successful completion of studies, the law does not support as an implied "contractual" remedy an award of speculative earnings for a future career that may or may not flow from the degree itself.

Finally, a rule of law that permits students to seek monies beyond tuition and other direct out-of-pocket losses would create unintended consequences. The potential lure of immense future damages, no matter how speculative, for what a student feels is an unjustified grade or academic mistreatment nevertheless will foster the perception that students who fail in the classroom can succeed in the courtroom. Contractual entitlement to educational services does not also create an entitlement to future earnings that might (or might not) result from a particular grade or success in a degree program. Risk management concerns counsel against broad measures of damages, which would inhibit legitimate academic decisions and adversely affect the affordability and availability of insurance coverage for academic institutions. As a policy matter, the scope of damages in cases involving purported breaches of implied educational service contracts should be strictly limited to prevent a barrage of lawsuits seeking extra-contractual remedies.

STANDARD OF REVIEW

This appeal involves a question of law. Therefore, the standard of review is de novo. Execu-Tech Bus. Sys. v. New OJI Paper Co., 752 So. 2d 582 (2000).

ARGUMENT

> The court would have little difficulty in submitting the loss of the shoe, the horse, and probably the rider to a jury if caused by the sale of a defective nail or the failure to deliver the nail as agreed. The loss of the battle creates a doubtful question, but the loss of the kingdom is so remote as to bar its submission to the jury. ... [i]f the manufacturer of the nail becomes responsible for the loss of the kingdom, than we may not have any more nails.[2]

The Amici, which represent institutions of higher education in Florida and throughout the nation, respectfully suggest that the proverbial "nail that lost the kingdom" is at work in this case. A defective academic decision, as was proven below, may result in a student's loss of tuition, other out-of-pocket expenses, and perhaps even short-term living expenses in a proper case, but a "defective" academic judgment – like a defective nail – does not entitle the student to either the "battle" or the "kingdom." Instead, Amici respectfully submit that the decision below, which awards

---

[2] Halliburton Co. v. Eastern Cement Corp., 672 So. 2d 844, 847 (Fla. 4th DCA 1996) (citing Ohoud Establishment for Trade & Contracts v. Tri-State Contracting & Trading Corp., 523 F. Supp. 249, 255 (D.N.J. 1981)).

the "kingdom," should not stand.

I. THE NATURE OF IMPLIED-IN-FACT CONTRACTS FOR EDUCATION SERVICES INVOLVING ACADEMIC JUDGMENTS SUPPORTS A RESTRAINED APPLICATION OF REMEDIAL CONTRACT PRINCIPLES.

One size does not fit all, particularly in assessing and compartmentalizing the relationships involving students and educational institutions. In particular, "contractual" relationships between students and educational institutions are unique and do not fit neatly into any contract law doctrine. These relationships are personal and service-oriented and have few of the indicia of strictly commercial contracts.

A. A Common Law Tradition of Restraint Limits Courts In Matters Involving Academic Decisions By Private Colleges and Universities.

In the education context, the application of contract principles and remedies is underdeveloped in the law and requires careful analysis and circumspection.[3] Although some courts have likened the provision of educational services at private institutions of higher education to the provision of other commercially available service, the

[3] The Catalog in the Courtroom: From Shield to Sword, 12 J.C. & U. L. 201, 224 (1985) (hereinafter "The Catalog in the Courtroom") ("Perhaps because relatively few student plaintiffs have established liability for breach of the catalog contract, the common law concerning damages is somewhat undeveloped in comparison with other kinds of contract breach cases.").

better-reasonsed common law tradition has taken a restrained approach in light of the unique substantive and remedial limitations that apply in the academic context.[4]

Contracts involving non-academic matters differ significantly from contracts involving academic matters. Contractual disputes involving non-academic matters, such as a school's refund policy or the provision of room and board, typically fall within the realm of standard commercial disputes. In general, courts impose standard contract duties and remedies in these contexts, primarily because these transactions are better understood in terms of contractual exchanges of monies for ascertainable and anticipated goods and services.[5]

In contrast, the common law has been very hesitant to enmesh courts in disputes over academic judgments, such as a student's grade or other matters of academic importance.[6] As one commentator has noted:

---

[4] *See generally* Laura Krugman Ray, Toward Contract Rights For College Students, 10 J. OF LAW & EDUC. 163 (1981) (discussing the evolution of the application of contract principles in the context of private and public institutions).

[5] *See generally* E. Edmund Reutter, Jr., The Law of Public Education, 441-46 (4th ed. 1994) (discussing recovery under various contract theories including express, implied, and quasi-contract).

[6] *See, e.g,* Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) (no hearing required for medical student dismissed in last year for academic matters

> Courts have been very reluctant to interfere in the affairs of private educational institutions based in part upon a sense of their limited expertise and in part upon a respect for institutional autonomy. Courts have expressed the opinion that they are ill equipped to review a dismissal based on academic failure, since the evaluation of the student's academic performance involves the expert and subjective evaluation of cumulative information. Moreover, courts have adopted the view that private colleges and universities should be permitted to be self-governing, to the extent it is possible.[7]

Over time the common law has evolved into somewhat of a patchwork quilt, with the only dominating pattern or thread being judicial restraint in disputes involving the academic judgment of college and university officials and professors.

This Court long ago recognized that the relationship between a student and a private college or university is contractual in nature. John B. Stetson Univ. v. Hunt, 102 So. 637 (Fla. 1924). The Stetson case, however, when taken in context and read

---

because "the educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, 'one in which the teacher must occupy many roles – educator, advisor, friend, and, at times, parent-substitute.'") (citation omitted); Dina Lallo, Student Challenges to Grades and Academic Dismissals: Are They Losing Battles?, 18 J.C. & U.L. 577, 577 (1992) ("In suits involving academic dismissals, courts are reluctant to review the dismissal and afford students protection. … [c]ourts fear that judicial intervention will jeopardize professional autonomy and scholarly integrity.") (hereinafter Student Challenges).

[7] Claudia G. Catalano, Annotation, Liability of Private School or Educational Institution for Breach of Contract Arising from Expulsion or Suspension of Student, A.L.R. 5th 1, § 2(a) (1997).

carefully, supports the exercise of judicial restraint in this case. The issue in Stetson was the validity of a **tort** verdict against the university for expelling a student "maliciously, wantonly and without cause in bad faith." Id. at 639.

The Court reversed, finding that universities are permitted to adopt reasonable regulations governing student conduct, which are by their nature "contractual." Further, the Court held that courts may not afford relief unless a university enforces its regulations "arbitrarily and for fraudulent purposes." In assessing the university's conduct, "every presumption must be indulged in favor of the school authorities to the extent that they acted in good faith ... and no recovery can be had for error of judgment, but may be had for error grounded on malice." Id. at 641. The Court reversed because the record did not establish malicious conduct by the university and its officials.

Thus, the Stetson case does not stand for the proposition that courts may impose broad remedial measures on a private college or university for breach of an implied contractual obligation. Rather, the Court in Stetson accorded substantial deference to private institutions to control student conduct via contract. The Court did not purport to permit courts to imply broad responsibilities and remedies *against* universities for alleged breaches of implied-in-fact agreements.

To the same effect is University of Miami v. Militana, 184 So. 2d 701, 704 (Fla.

3d DCA), cert. den. 192 So. 2d 488 (Fla. 1966), which is also broadly cited for the general proposition that student-university relations are governed by contract. That decision, however, is much like the Stetson case in its deference to academic judgments involving student performance standards set forth in bulletins and catalogues. In the University of Miami case, a medical student was dismissed for academic failure. He sued and claimed that the university's actions were arbitrary, capricious, and without just cause. The trial court ruled for the student and issued a writ ordering that the university promote the student.

The Third District Court of Appeal reversed, relying on the university's written guidelines for promotion of medical students. 184 So. 2d at 703-04. In holding that academic promotion is a discretionary matter that bars mandamus relief, the court emphasized the deference and discretion afforded to private institutions, as reflected in the Stetson opinion itself. Id. Moreover, the Court noted that this deference "is not against public policy because many years of experience have demonstrated the ability of the private colleges and universities of this Country to carry out their assumed task of educating their students." Id. (citing Robinson v. Univ. of Miami, 100 So. 2d 442 (Fla. 3d DCA), cert. den., 104 So. 2d 595 (Fla. 1958)).

The opinion below relied on both the Stetson and University of Miami decisions, but did not closely consider the context of those decisions, which favored the private

institutions involved. Amici do not quibble with the liability standard by which academic decisions are judged (i.e., arbitrary and capricious standard). The point to be made, however, is that a doctrine of restraint guides courts, which historically have not applied contract principles to academic institutions in a way that expands liability or that imputes broad remedies.

B. Commercial Contract Doctrines Should Not Be Applied Indiscriminately To Disputes Involving Academic Judgments.

Much like the common law doctrine of judicial restraint that affords considerable deference to colleges and universities in matters involving disputes over academic judgments, courts also have been hesitant to apply rote commercial contract doctrines to academic matters.[8] As one commentator stated, an "action for breach of an educational contract does not parallel a typical action for breach of a commercial contract in every respect. After all, a private school offering programs that culminate in a diploma or professional degree is not like a used car business."[9]

---

[8] Student Challenges, supra note 6, at 584, 585 (Courts are "most reluctant to interfere in academic decisions and matters of subjective interpretation. … By rejecting a rigid application of contract principles to the student-university relationship, courts may defer to academic discretion, giving universities wide latitude in decisions involving academic judgments.").

[9] Claudia G. Catalano, Annotation, Liability of Private School or Educational Institution for Breach of Contract Arising from Provision of Deficient Educational Instruction, 46 A.L.R. 5th 581, 581 (1997) (hereinafter "Deficient Educational Instruction").

For instance, in the widely-cited decision, Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir.), cert. den., 423 U. S. 898 (1975) the Tenth Circuit held that the trial court erred by strictly applying commercial contract doctrines to the student-university relationship. 514 F. 2d at 626. The graduate student, who had been expelled, sued for breach of contract. The trial court entered an $88,283 judgment on a jury verdict in the student's favor.

In reversing the judgment, the Tenth Circuit held that the trial court erred in its "rigid application" of the commercial contract doctrine that the student had pursued:

> It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. There are other areas of the law which are also used by courts and writers to provide elements of such a framework.

Id. at 626. In rejecting a one-dimensional contractual approach, the court stated that the "***student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category***." Id. (emphasis added).

In support of the highlighted language, the Tenth Circuit noted that some courts, including those in Florida, had applied contract theories, but that none of these courts

had adopted the commercial contract doctrine in whole. The Tenth Circuit concluded that the trial court had gone too far in extending contract remedies for an academic dismissal. The court held that:

> ***The complete adoption of commercial contract doctrine by the trial court as to this disciplinary matter resulted in its conclusion that since the University had breached the "contract" by its dismissal of plaintiff, he was entitled to damages based on what he would have earned had he received his doctorate***. This was some sort of substantial performance remedy. It assumed that plaintiff was excused from, or would have completed, his academic requirements. This was an unwarranted assumption by the court under the facts, but was necessary to support the damage theory it had adopted.

Id. (emphasis added). The important point is the highlighted language's focus on the unwarranted application of commercial contract doctrine under the circumstances, particularly the award of damages for a purported lost degree.

Rejecting the rote application of commercial contract principles makes good sense in light of the unique relationship between students and institutions of higher education. This principle extends not only to a heightened standard of liability under a contract theory, but to a restrained application of contract-based remedies as well. Student relationships with colleges or universities based on "implied-in-fact" contracts do not support broad contractual remedies for money damages, particularly those that the parties did not and would not have contemplated. As a federal district court explained in A. v. C. College, 863 F. Supp. 156 (S.D.N.Y. 1994):

> Equitable relief provides greater realistic protection to those potentially subject to discipline. If lawsuits with monetary objectives are encouraged, they might disrupt the functioning of academic institutions and intimidate academic decision makers seeking to perform their duties.

Id. at 158.

II. DAMAGES FOR BREACH OF IMPLIED CONTRACTS BETWEEN STUDENTS AND ACADEMIC INSTITUTIONS ARE LIMITED BY A NUMBER OF LEGAL PRINCIPLES.

The opinion below errs by extending a potentially broad measure of damages for the breach of an implied-in-fact agreement. The court imposes far greater remedial relief than is warranted.

A. The Opinion Intermingles Tort And Contract Concepts Thereby Wrongly Extending "Tort" Damages To The Implied-In-Fact Relationship At Issue.

The purpose of an award of damages in a breach of contract action is to restore the injured party to the condition he or she would have occupied if the contract had been performed. Koplowitz v. Girard, 658 So. 2d 1183 (Fla. 4th DCA 1995). Contract damages cannot give a party more than it bargained for nor place the party in a position better than contract performance would have produced. Campbell v. Rawls, 381 So. 2d 744 (Fla. 1st DCA 1980). In this regard, courts "must preserve well-defined conceptual and practical distinctions between the body of law relating to contract damages and tort damages, so that contracting parties may rely confidently

on their allocation of risk without fear that their counterparts will seek to recoup contract damages through tort actions." Jones v. Childers, 18 F.3d 899, 904 (11th Cir. 1994) (applying Florida law).

The court below improperly blurred the distinction between contract damages and tort damages by relying on principles and case law that are inappropriate in the instant situation. The court held that "[i]n valuing the loss of this degree *within the context of an arbitrary, capricious or bad faith deprivation of such*, we conclude that it is appropriate to consider the possibility of lost future earnings." 780 So. 2d at 139-40. Thus, because the plaintiff had met the higher arbitrary and capricious standard applicable in breach of contact cases involving academic judgments, the court mistakenly felt free to extend the full measure of tort damages even though this was a breach of contract case.

Florida law, however, does not support this type of extension of tort law, particularly to actions based on implied-in-fact contract. The reason is much the same as that for why punitive damages are impermissible in contract actions: contract losses are limited to only those pecuniary losses actually sustained and contemplated by the parties regardless of whether the breaching party acted innocently, arbitrarily, or even

flagrantly.[10] For an implied-in-fact contract, the measure of damages is the reasonable value of goods or services rendered or promised.[11] If goods or services are not provided under such a contract, even if done so in an arbitrary or capricious way, a court may impose only a contract remedy; it may not resort to extra-contractual remedies or damages simply because the breach was "arbitrary" or "capricious."[12]

The opinion also wanders into uncharted waters by relying heavily on one of the most unique cases in Florida jurisprudence that involved cutting-edge spoliation law issues. In Miller v. Allstate Insurance Company, 573 So. 2d 24 (Fla. 3d DCA 1990), the Court was presented with an unusual breach of contract action against an insurance company. The plaintiff alleged that the insurer breached its promise to return a

---

[10] *See* Lake Placid Holding Co. v. Paparone, 508 So. 2d 372 (Fla. 2d DCA) (punitive damages for breach of a contract impermissible absent independent, actionable tort, such that even "a 'flagrant breach of contract' will not support punitive damages.") (citations omitted), rev. den., 515 So. 2d 230 (Fla. 1987). *See also* American Int'l Land Corp. v. Hanna, 323 So. 2d 567, 569 (Fla. 1975) ("The general rule is that a breach of contract cannot be converted into a tort merely by allegations of malice."); Electronic Sec. Sys. Corp. v. Southern Bell Tel. & Tel. Co., 482 So. 2d 518, 519 (3d DCA 1986) (same).

[11] *See* Quayside Assoc., Ltd. v. Triefler, 506 So. 2d 6 (Fla. 3d DCA 1987); Dean v. Blank, 267 So. 2d 670 (Fla. 4th DCA 1972).

[12] Henry Morrison Flagler Museum v. Lee, 268 So. 2d 434, 437 (Fla. 4th DCA 1972); Associated Heavy Equip. Schools, Inc. v. Masiello, 219 So. 2d 465, 467 (Fla. 3d DCA 1969).

wrecked automobile that the plaintiff needed as evidence in a products liability action against the manufacturer.

The facts in Miller were unique and far afield from those at bar. The contractual nature of the claim in Miller was based on representations made to the plaintiff's father, an attorney, who contacted the insurer and informed its agent that he "wanted to retain possession of the automobile in order to have it examined by an expert for defects." Id. at 25. The father was told that the insurer "wanted temporary possession of the car because they also planned to have an expert examine it for defects as they anticipated that the passenger injured in the accident would file a claim against [the insurer]." Id.

> ***Eventually the parties reached an agreement whereby [the plaintiff] relinquished possession of the car to [the insurer] to prepare for its defense to a claim by the passenger. In exchange, [the insurer] promised to preserve the car and to make it available for inspection by [the plaintiff's] experts. The existence of the oral agreement is not disputed.*** Before any expert examination was performed, however, [the insurer], in breach of the agreement, sold the car to a salvage yard where it was disassembled and disposed of. [The plaintiff] sued [the insurer] alleging that, as a result of [the insurer's] breach of the agreement to preserve the wrecked automobile for expert inspection, she was denied the opportunity to maintain a products liability action against the manufacturer.

Id. at 25-26 (emphasis added). On these facts, the Court permitted a contract-based

spoliation claim to proceed, and enunciated – for the first time – that the uncertainty of spoliation damages would not defeat such a claim.

The Miller case, however, is so factually and legally dissimilar as to be a particularly poor foundation for extending such broad damages by analogy to the student-university context under an implied-in-fact contract theory. First, in Miller the parties actually discussed and agreed upon preservation of the evidence. As such, an implied-in-fact agreement was not at issue; instead, the parties did not dispute that an oral agreement existed, as the highlighted language above demonstrates.

Second, and more importantly, prior to forming their agreement the parties in Miller actually discussed the prospective products liability claims in which the evidence was to be used. Unlike the instant case, where the student and university never discussed (let alone agreed upon) a potential claim for lost future earnings capacity, the parties in Miller both understood at the time of their agreement that they intended the evidence to be used by both in future litigation. Thus, the specific agreement formed in Miller was based on a fully informed discussion of the risks that both parties understood, which was not the case below.

Third, the unique "all or nothing" nature of a contract-based spoliation claim makes the damages discussion in Miller inapplicable. A spoliator should not be permitted to take advantage of the uncertainty of damages it has created by destroying

the needed evidence. The court below extended the principle of Miller when it stated that: "[I]f the jury finds that it is no longer possible for Sharick to obtain a DO degree, then Southeastern would be foreclosed from complaining of the resulting uncertainty in proof of damage caused by its wrongful actions." 780 So. 2d at 140. In so doing, the court overlooked the fact that the spoliation of evidence constituting the breach of contract in Miller actually caused the uncertainty of damages. In the instant case, Southeastern's breach may have prevented Sharick from obtaining a degree, but the uncertainty over what he could accomplish with his degree was always present. The District Court of Appeal has improperly applied traditional tort remedies to an action for breach of an implied contract.

B. The Measure Of Damages Does Not Include The Value Of A "Lost" Degree.

The opinion below also errs in holding that the student is entitled to pursue as damages the future value of his "lost" degree. The court held that such damages "can be proved with certainty." 780 So. 2d at 140. This approach, however, is flawed for the fundamental reason that the student was entitled only to a degree, not the speculative future value of a job or career for which the degree may have been required or desirable.

Students expect to be awarded degrees upon the successful completion of all

academic requirements. When a college or university acts in a way that breaches the academic contract, the student has a reasonable expectation to be awarded that which will enable him to achieve the degree or its equivalent. It is legal error, however, to permit him to pursue the value of lost future earnings from the degree not yet attained.

The value of lost future earnings for a degree not yet received is far too conjectural. A graduate hopes to pass state boards, anticipates being offered employment in a profession, desires a substantial and certain income, wishes for a marketplace with abundant and stable jobs, and aspires for a financially and professionally rewarding career. This pyramid of speculation is too shaky a foundation on which to base lost future earnings, particularly where an institution has neither bargained for nor agreed to such a risk. While colleges and universities share each graduate's hope to be economically and professionally successful, such success is not an enforceable part of the academic contract.

Florida courts have consistently held that lost income or profits are recoverable only if the loss is proven with a reasonable degree of certainty. *E.g.* Douglass Fertilizers & Chem., Inc. v. McClung Landscaping, Inc., 459 So. 2d 335 (Fla. 5th DCA 1984). The cases cited by the court below involving loss of prospective business profits cannot be analogized to the instant case. R. A. Jones & Sons v. Holman, 470 So. 2d 60 (Fla. 3d DCA 1985), rev. dism., 482 So. 2d 348 (Fla. 1986),

was a breach of warranty action in which there was evidence that the plaintiff had lost sales of equipment to specific customers because of faulty engines supplied by the defendant. In W.W. Gay Mechanical Contractors, Inc. v. Wharfside Two, Ltd., 545 So. 2d 1348 (Fla. 1989), a mechanical contractor was engaged to construct the water system for a hotel under construction. Before and after the hotel opened, an unpleasant odor emanated from the water system. The court held that proffered testimony concerning the hotel's loss of revenue because of the foul-smelling water was sufficiently definite to be admitted as proof of damages. The damages in both of those cases were directly related to specific, ascertainable business losses and cannot be compared with the speculative damages Sharick seeks to recover.

C. The Remedy for Breach of an Implied-in-Fact Contract Must be Limited to What the Defaulting Party Could Have Reasonably Contemplated When the Contract was Made.

Under Florida law, an implied-in-fact contract requires the assent of the parties.[13] As such, a court may impose only those risks and responsibilities to which the parties, by their words and conduct, reasonably could be said to have assented. For this reason, the appropriate measure of damages in this action must be limited to

[13] *See, e.g.,* Tipper v. Great Lakes Chem. Co., 281 So. 2d 10, 13 (Fla. 1973); Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., 695 So. 2d 383, 385 (Fla. 4th DCA 1997) (en banc); Policastro v. Myers, 420 So. 2d 324, 326 (Fla. 4th DCA 1982).

those to which the parties agreed or reasonably would have agreed at the time they entered their agreement.

As this Court indicated long ago, the concept of an implied contract is limited in a number of significant ways. First, a plaintiff shoulders a heavy burden to show that the "effect" of an implied agreement was to impose a broad duty or remedy because to "hold otherwise would be to encourage loose dealings and place a premium upon carelessness." Bromer v. Florida Power & Light Co., 45 So. 2d 658, 660 (Fla. 1949). In other words, an implied contractual obligation will extend

only so far as to represent the intent of the parties under the circumstances, and no further.

Second, and perhaps most importantly, a court must not imply terms that the parties would not have agreed upon. For instance, in Bromer, a customer sued a power company for damages resulting from an alleged breach of an implied contract to furnish electrical current. In rejecting the broad duty and remedy sought, this Court made emphatically clear that an implied obligation would not be imposed unless a court reasonably could presume that the affected party, the power company, "would have entered into an express contract" under the circumstances:

> This Court should determine and give to the alleged implied contract 'the effect which the parties, as fair and reasonable men, presumably would have agreed upon if, having in mind the possibility of the situation which has arisen, they had contracted expressly in reference thereto.'

Id. (citation omitted).

Of note, the Court determined that the relief sought under the implied contract (i.e., the continuous provision of electricity under all circumstances) was highly dubious and would not be implied in so casual a manner. The Court stated:

> To presume that the [power company] would have entered into such an express contract or that it impliedly did assume such risk is a 'postulate so egregiously erroneous' as to tax the credulity of the most naive of modern business men.

Id. at 661. Likewise, in the instant case, it would be "egregiously erroneous" to

presume that a school or university would have agreed to "assume such risk" of broad liability for a dismissed student's future earnings and profits, albeit so speculative in nature. The parties here did not agree upon the remedy that the court below imposed on the student-university relationship, and, indeed, no private educational institution would agree to such a remedy. The portions of Southeastern University's handbook upon which the lower court relied provide no support for the conclusion that the University would have agreed by contract to pay for a student's lost future earnings potential. Sharick, 780 So. 2d at 139. Instead, the quoted language is, at best, hortatory in nature and merely supports the unremarkable conclusion that students expect degrees when they meet applicable graduation requirements.[14]

Nonetheless, the opinion below unjustifiably transforms this isolated, generally descriptive language in the University's handbook into a boilerplate entitlement not only to a degree, but also to revenues and profits from the degree due to loss of earning capacity. It is one thing to infer an agreement that a university will award a degree to a student who successfully completes applicable requirements; it is an entirely different thing to infer that a university would have agreed to pay a student for

---

[14] The Catalog in the Courtroom, supra note 3 at 213 (courts are "careful in interpreting the documents to distinguish between portions of the catalog that are contractual and those that are not. Certain material in a catalog has been held to be merely a statement of intention or hope, and is not interpreted to be a legal promise.")

potentially immense and speculative future losses arising from not receiving the degree. Like almost every existing student-university relationship, the implied "contract" below promised an education. It did not guarantee anything more. For these reasons, it is improper to bind a college or university to remedies that it did not contemplate and to which it would not have assented.

Even in cases involving breaches of express contracts, Florida courts hold that damages for lost profits are limited to those reasonably within the contemplation of the defaulting party at the time the parties entered into the contract. Frenz Enterprises, Inc. v. Port Everglades, 746 So. 2d 498 (Fla. 4th DCA 1999); Lucas Truck Service v. Hargrove, 443 So. 2d 260 (Fla. 1st DCA 1984). Assuming that an implied contract arose between the parties when Sharick enrolled in school, Southeastern certainly could have contemplated that it would have to return his tuition if he were wrongfully dismissed. Perhaps Southeastern may have contemplated being ordered to award him a degree. However, it is inconceivable that Southeastern could have contemplated that it would have to support him for the rest of his working life.

Instead, it is respectfully submitted that a student is entitled to no more than a reasonable remedy to which the parties assented (or reasonably would have assented) that rectifies the breach of contract at issue. A clear line of demarcation is necessary: permissible damages are those that, if awarded, would enable the student to rectify the

breach by obtaining the "benefit of the bargain," which is the ability to seek reinstatement, restitution, or a damage award that permits the pursuit of the course or degree sought (or its equivalent) within reasonable time and financial limits. On the other side of this line are impermissible "damages" such as lost future earning capacity, lost future profits, and the like.

This assessment, which will vary with the specific facts of each situation, will leave courts with effective remedial powers, but will also require a guarded, incremental approach. For instance, reinstatement may very well be an appropriate remedy.[15] If reinstatement or completion of a program is not feasible, a refund of past tuition paid should be considered. Next, an award of monies necessary to obtain an equivalent course or degree might be appropriate.[16] The student might seek entitlement to damages measured by the cost of obtaining the degree elsewhere. But, the student may not seek or receive damages that might conceivably flow from not having the degree.

---

[15] Indeed, in the en banc rehearing opinions, the four dissenting judges and concurring Judge Ramirez asserted that the proper remedy in this case was specific performance. Sharick v. Southeastern Univ. of Health, 780 So. 2d 142 (Fla. 3d DCA 2001). Thus, half of the judges participating in the decision favored reinstatement.

[16] It may be that a student justifiably dismissed from medical school would have difficulty obtaining admission to another school. However, the suggestion that one judicially determined to have been wrongly dismissed could not get admitted to another school illustrates the speculative nature of Sharick's claim.

In summary, no student is entitled to damages for future earnings or profits that might arise from the degree itself, which is not yet conferred. The student is entitled only to the "benefit of the bargain," which includes reinstatement, restitution, or – in a proper case – monetary relief that will enable him to pursue the course or degree sought (or its equivalent). In no event, however, may a student seek damages for future revenues or lost profits that might flow from not having the course or degree in the first instance.

III. RISK MANAGEMENT AND PUBLIC POLICY CONCERNS COUNSEL AGAINST BROAD MEASURES OF DAMAGES.

Basic principles of risk management and public policy also counsel against the broad damages that the opinion below would permit. By its terms, the opinion is not limited to academic dismissals at professional schools. Its reasoning extends to a multitude of academic and disciplinary decisions that educational institutions must make every day. Undergraduate students denied an "A" in an important course could argue that their resulting lower grade point average denied them admittance to a favored graduate or professional school. Under the opinion's reasoning they would be entitled to a damages award if they could convince a jury that the lower grade was "arbitrary." Students suspended or dismissed for academic reasons could make the same argument about harm to their career from purportedly "capricious" decisions by

colleges and universities.

Private colleges and universities simply cannot be expected to shoulder the unreasonable degree of risk that arises from the potentially enormous awards that can flow from the District Court's sweeping imposition of damages. In addition, public policy should foster legal principles that do not create incentives for litigation by students or disincentive to exercise judgments by academicians or administrators.

A. Principles Of Risk Management Caution Against Sweeping Damage Awards.

The risk management aspects of this case are important to the education community. Institutions attempt to protect themselves from litigation risks in different ways, one of which is to implement risk avoidance programs. Another is to obtain insurance to cover potential risks. Florida-based institutions generally do both. Here, the decision below has two negative effects as to both methods of risk avoidance.

First, the decision seriously hinders the exercise of academic judgment in evaluating or disciplining students. Even if properly counseled on their responsibility to avoid "arbitrary or capricious" judgments, academicians necessarily will be overly sensitive and cautious and thereby err to an even greater degree in their decisions in grading and penalizing students for substandard performances or conduct. This effect will – at least on the margin – force such judgments to be based less on academic merit and more so on their usefulness in avoiding litigation by disgruntled students. In

making such judgments, academicians should not face the specter of lawsuits by students seeking the value of their "lost" careers. The decision below improperly suspends a Sword of Damocles over academic decisions affecting students.

Second, the breadth of damages that the decision below countenances creates a new and substantial likelihood that insurance premiums will necessarily reflect the significantly greater potential for large money judgments against educators based on faulty academic decisions. The availability and affordability of insurance policies – or the viability of self-insured institutions – will be impacted negatively. Notably, insurers could view a breach of contract based on "arbitrary, capricious or irrational" conduct as being akin to an intentional tort and thereby make insurance coverage for these situations unavailable.

B. Public Policy Favors An Approach That Does Not Create Incentives For Litigation and Preserves Academic Judgments Without Draconian Results.

In addition, public policy disfavors the type of overbroad liability and damages that the District Court's decision in this case would impose. In this regard, one commentator has noted that "for reasons of public policy, courts have been reluctant to permit contract suits based on a school's failure to provide a 'quality' education."[17]

---

[17] Deficient Educational Instruction, supra, note 9 at 581 (discussing cases).

The notion that an academic misjudgment, even if severe, may result in a massive and punitive award to a student under a breach of implied-in-fact contract is contrary to the historical deference to colleges and universities and the need for institutional autonomy.

In fact, in its 1924 Stetson decision this Court acknowledged that the judicial intrusion into the affairs of a private university may open the floodgates to unwarranted litigation. In rejecting the imposition of burdensome obligations on academic institutions and officers, the Court stated:

> It would very materially impair the discipline and usefulness of an institution of learning and would lead to vexatious litigation to hold that whenever a teacher sends a child home, as a punishment for insubordinate conduct, the child or the parent may treat it as an expulsion and sue the teacher or other governing authority.

102 So. at 641. While the instant case goes beyond sending a child home for discipline, a very real risk exists that ever greater and more vexatious litigation will result from the lure of large damage awards. As the United States Supreme Court has explained, a "school is an academic institution, not a courtroom or administrative hearing room." Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 88 (1978).

In addition, a moral hazard exists where universities become insurers of their students' economic and professional futures. Under a regime of expansive liability and damages, students will have less incentive to perform in the classroom and will be

more likely to sue over academic disagreements due to the greater potential for large jury awards. Conversely, colleges and universities will exercise less discretion against academically marginal students for fear of litigation and its high costs, or indeed may be even less willing to admit them in the first place. As some commentators note that although "litigation, while costly in time and money, should not deter critical evaluation of academic performance … some faculty and administrators are reluctant to evaluate students candidly and to promptly dismiss those who fail to meet academic standards."[18] One of these commentators notes his experience that "faculty reluctance to evaluate students in a clinical setting is one of the most frequently expressed concerns of academicians."[19] Both commentators believe that "more litigation arises, and creates the bulk of appellate case law, as a result of medical school dismissals because financial investment and potential loss are greater; therefore, if the suit is successful, the cost of litigation may be considered worthwhile."[20] In other words, as

---

[18] Steven D. Milam & Rebecca D. Marshall, Impact of *Regents of University of Michigan v. Ewing* On Academic Dismissals From Graduate and Professional Schools, 13 J.C. & U.L. 335, 335 (1987).

[19] Id. at 335 n.2.

[20] Id. at 335 n.4.

the financial incentive to litigate increases, so does the likelihood of litigation against an academic institution. For all these public policy reasons, a more restrained approach to the measure of damages should be adopted in cases based on implied-in-fact contracts between students and universities involving academic judgments.

CONCLUSION

Based upon the foregoing, the Amici respectfully suggests that this Court should quash the opinion below and affirm the trial court or order such other limited remedy appropriate under the circumstances.

Respectfully submitted,

HOLLAND & KNIGHT LLP

_____

Stephen H. Grimes (FBN 032005)
Susan L. Kelsey (FBN 772097)
Post Office Drawer 810
Tallahassee, Florida 32302
(850) 224-7000

Counsel for Amici

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States Mail to: Richard A. Barnett, 121 South 61st Terrace, Suite A, Hollywood, Florida 33023; Donald Tobkin, P. O. Box 220990, Hollywood, Florida 33022; John Beranek, Ausley & McMullen, P. O. Box 391, Tallahassee, Florida 32302; and Mark A. Hendricks, Panza, Maurer, Maynard & Neel, P.A., NationsBank Building, Third Floor, 3600 North Federal Highway, Fort Lauderdale, Florida 33308, this _____ day of January, 2002.

_____
Attorney

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using the Times New Roman 14-point font, which is proportionately spaced.

_____
Attorney