IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC01-969

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

Petitioner,

-vs-

KEITH M. SHARICK,

Respondent.

AMICUS BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS ON BEHALF OF THE RESPONDENT

CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
and
KATHRYN B. JOHNSTON, P.A.
1962 26th Avenue
Vero Beach, FL 32960
Attorneys for Amicus Curiae Academy of Florida Trial Lawyers

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii-iii

STATEMENT OF INTEREST OF AMICUS 1-2

SUMMARY OF ARGUMENT 3-4

ARGUMENT 5-14

I. FLORIDA LAW ALREADY HOLDS STUDENTS TO A HIGHER BURDEN OF PROOF WHEN THEY CLAIM BREACH OF A CONTRACT FOR EDUCATION 5-7

II. IT IS BAD POLICY TO RESTRICT THE NATURE OF DAMAGES AVAILABLE AFTER THE STUDENT HAS PROVED THE SCHOOL'S WRONGDOING 7-13

III. DEFENDANT ARGUES THAT PLAINTIFF'S REMEDY SHOULD BE LIMITED TO RESCISSION, AN EQUITABLE REMEDY THAT HAS NO PLACE UNDER THE FACTS OF THIS CASE 13-14

CONCLUSION 15

CERTIFICATE OF TYPE SIZE AND STYLE 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

PAGE

U.S. SUPREME COURT CASES:

Board of Curators, Univ. of Mo. v. Horowitz,
435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) 6

STATE COURT CASES:

Allstate Ins. Co. v. Boecher,
733 So.2d 993 (Fla. 1999) 12

Dosdourian v. Carston,
624 So.2d 241 (Fla. 1993) 12

Hanna v. Martin,
49 So.2d 585 (Fla. 1951) 5, 7, 12

Mazzoni Farms v. E.I. DuPont De Nemours,
761 So.2d 306 (Fla. 2000) 13

Rood Co. v. Board of Public Instruction,
102 So.2d 139 (Fla. 1958) 13

Sharick v. Southeastern Univ. of the Health Sciences, Inc.,
780 So.2d 136 (Fla. 3rd DCA 2001) 5, 6, 10

Sharick v. Southeastern Univ. of the Health Sciences, Inc.,
780 So.2d 142 (Fla. 3rd DCA 2001) 6, 9

OTHER AUTHORITIES:

Robert P. Faulkner, JUDICIAL DEFERENCE TO UNIVERSITY DECISIONS NOT TO GRANT DEGREES, CERTIFICATES, AND CREDIT-THE FIDUCIARY ALTERNATIVE, 40 SYRACUSE L.REV. 837 (1989) 6

Brian Jackson, THE LINGERING LEGACY OF IN LOCO PARENTIS: AN HISTORICAL SURVEY AND PROPOSAL FOR REFORM, 44 VAND. L.REV. 1135 (1991) 6

STATEMENT OF INTEREST OF AMICUS

The Academy of Florida Trial Lawyers (AFTL) is a large voluntary statewide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law. The members of the AFTL are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The AFTL has been involved as amicus curiae in hundreds of cases in the Florida appellate courts and this Court. The lawyer members of the AFTL care deeply about the integrity of the legal system and, towards this end, have established an amicus committee for the purpose of considering requests by trial lawyers for amicus assistance. While not every request for amicus assistance is granted by the AFTL, the committee considered the issues presented in the case sub judice to be of importance, especially because the specific issues have never before been considered by this Court, and voted to seek leave of this Court to appear as amicus.

This is an important case about remedies, a concept fundamental to the protection of individual rights and liberties. If adequate remedies are denied, justice is denied. In this case, the trial court's ruling on the issue of damages so greatly restricted the respondent/plaintiff's remedy as to make it virtually meaningless. The decision of the District Court of Appeal recognized the injustice created by the trial

court's ruling on damages, but at the same time recognized that some protection must be afforded because of the special circumstances surrounding contracts for education services. The appellate decision achieved the proper balance between the need to protect colleges and universities from potential claims from all expelled or dismissed students, and the need to remedy the wrong committed when an educational facility arbitrarily and capriciously breaches the contract for education.

Thus, the issues in this case are of great public importance, bearing on the issue of availability and nature of damages available to victims of wrongdoing. The members of the AFTL respectfully assert that their input may be of assistance to the Court in resolving the issues raised in this case.

SUMMARY OF THE ARGUMENT

This is an important case about remedies. While there are sound public policy reasons to limit the circumstances in which dismissed students can challenge their dismissal via judicial review, there is no sound public policy served by denying a wrongfully dismissed student fair and just compensation for the injuries and losses caused by a school's wrongful conduct, once such conduct is proved. Virtually all of the defendant college's argument is aimed at the sufficiency of the plaintiff/respondent's proof on the issue of damages. It is the defendant/appellant's contention that the student's proof on the issue of damages - specifically, on the issue of lost future earnings - was entirely speculative and therefore such damages should be denied, as a matter of law.

However, the trial court's ruling prohibited the student- plaintiff from alleging, let alone attempting to prove, his lost future earnings. What is speculative at this point, therefore, is what the student-plaintiff would have been able to prove had he been allowed the opportunity to present his evidence at trial. The District Court of Appeal's rulings reversed the trial court's pretrial ruling, and allow the student-plaintiff an opportunity to present his evidence on the issue of damages. That is all. The rulings do not constitute a determination that the student is entitled to receive a damages award for lost future earnings, as defendant/appellant contends. The

defendant/appellant remains capable of challenging the sufficiency of the plaintiff's proof of damages throughout the retrial. In sum, the appellate decision achieved the proper balance between the need to protect colleges and universities from potential claims from all expelled or dismissed students, and the need to remedy the wrong committed when an educational facility arbitrarily and capriciously breaches the contract for education.

ARGUMENT

The right to recover damages is central to our justice system, and this Court has previously recognized:

> The fundamental principle of the law of damages is that the person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's act which give rise to the action. ***In other words, the damages awarded should be equal to and precisely commensurate with the injury sustained.***

Hanna v. Martin, 49 So.2d 585, 587 (Fla. 1951) (further citation omitted) (emphasis supplied).

I. FLORIDA LAW ALREADY HOLD STUDENTS TO A HIGHER BURDEN OF PROOF WHEN THEY CLAIM BREACH OF A CONTRACT FOR EDUCATION.

The briefs of the parties and the decision below respect the traditional deference afforded colleges and universities in determining which students should graduate. Sharick v. Southeastern Univ. of the Health Sciences, Inc., 780 So.2d 136, 138 (Fla. 3rd DCA 2001).[1] In fact, the District Court of Appeal *began* its analysis "by

[1]Even amici for defendant/appellant "do not quibble with the liability standard by which academic decisions are judged, (i.e., arbitrary and capricious standard)." Amicus Brief of University of Miami, The Independent Colleges and Universities of Florida, and the American Council on Education, p. 11.

acknowledging that . . . courts have historically distinguished between the judicial fact finding process and academic judgment regarding the performance of students . . . ." Id. There are numerous law school reviews devoted to the subject of judicial review of academic expulsion or dismissal, including those cited by the District Court of Appeal: Robert P. Faulkner, JUDICIAL DEFERENCE TO UNIVERSITY DECISIONS NOT TO GRANT DEGREES, CERTIFICATES, AND CREDIT-THE FIDUCIARY ALTERNATIVE, 40 SYRACUSE L.REV. 837, 839-40 (1989); Brian Jackson, THE LINGERING LEGACY OF IN LOCO PARENTIS: AN HISTORICAL SURVEY AND PROPOSAL FOR REFORM, 44 VAND. L.REV. 1135, 1148 (1991). Sharick v. Southeastern Univ. of the Health Sciences, Inc., 780 So.2d 142, 142-43 (Fla. 3rd DCA 2001) (On Motion for Rehearing En Banc) (Ramirez, J., concurring). There is sound reasoning for the traditional deference: the decision to dismiss a student requires expert evaluation and "is not readily adapted" to judicial determination. See Sharick, 780 So.2d at 138 (citing Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 88-92, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978)). However, to deprive students of *all* access to judicial review of expulsion or dismissal is clearly unjust; there must be some mechanism available to provide a remedy when the circumstances of expulsion or dismissal are sufficiently egregious.

> Accordingly, [it is now established that] judicial review of a private educational institution's determination of academic performance in this context is limited to whether the challenged determination was arbitrary and capricious,

> irrational, made in bad faith, or in violation of constitution or statute.

Id.

While this rule prohibits judicial review in the vast majority of cases involving student dismissal or expulsion based on the school's exercise of discretion, it permits judicial review where the determination is caused by abuse of that discretion. In the instant case, the case was tried to a jury on this issue, and a verdict in favor of the student, the plaintiff/respondent Sharick, was rendered. In answer to a special verdict question, the jury specifically found that Sharick's dismissal from the defendant/appellant's osteopathic college was arbitrary, capricious and lacking any discernable rational basis. This finding has not been challenged via any appeal by the defendant/appellant.

II. IT IS BAD POLICY TO RESTRICT THE NATURE OF DAMAGES AVAILABLE AFTER THE STUDENT HAS PROVED THE SCHOOL'S WRONGDOING.

Due to pre-trial rulings, the plaintiff/respondent was prohibited from pleading, arguing, and attempting to obtain "fair and just compensation commensurate with the loss[es he] sustained in consequence of the defendant's act" of wrongdoing. Hanna v. Martin, 49 So.2d at 587. Specifically, despite Sharick's proffers that his damages included loss of future earnings, the trial court precluded Sharick from pleading or

obtaining any relief *other than a refund of his tuition*. The trial court concluded that, as a matter of law, such damages were "too speculative", and therefore the jury was instructed over Sharick's objection that it could award damages consisting of only a tuition refund. At trial, Sharick was prevented from even introducing evidence proving his other losses, including loss of future wages. The appeal in this case was taken by the plaintiff/respondent, Sharick, solely on the issue of the trial court's rulings prohibiting him from pleading, and attempting to prove at trial, loss of future earnings. On appeal, the District Court of Appeal for the Third District ruled, as aforesaid, that Sharick had a special burden of proof because he alleged breach of contract for education services, to wit, he could make no recovery at all unless he first proved that the college's breach of the contract to educate was committed arbitrarily, capriciously, and without discernable reason. Having sustained this special burden, however, he was then entitled to seek the damages ordinarily available in breach of contract actions, including such losses as could be reasonably anticipated at the time the contract was made. The District Court of Appeal stated:

> One of the vestiges of our past judicial deference is the current requirement that a student seeking redress for the denial of a degree or academic credit cannot prevail against a learning institution unless the school's behavior was arbitrary and capricious. Commentators uniformly agree that this is an extremely high burden.
>
> * * *

> Apparently the Intervenor would have the courts allow these institutions to act arbitrarily and capriciously with the assurance that at most they would simply have to refund part of the tuition, which is all that Sharick received in this case, despite the fact that he dedicated several years of his life in pursuit of a degree. Sharick v. Southeastern Univ. of the Health Sciences, Inc., 780 So.2d 142, 142-43 (Fla. 3rd DCA 2001) (On Motion for Rehearing En Banc) (Ramirez, J., concurring) (citations omitted).

The trial court's interpretation of the law of damages - eviscerating the plaintiff/respondent's *opportunity* to seek and prove damages commensurate with the injury sustained - was improper. Equally improper, however, is the characterization of the District Court of Appeal's rulings by the defendant/appellant. While the defendant/appellant repeatedly characterizes the appellate rulings as determining Sharick's *entitlement* to lost future earnings, this characterization is untrue and misleading. There is a great distinction in our system between being given the *opportunity* to plead and prove damages and being awarded such damages. This distinction is disregarded by the defendant/appellant's argument. For example, in its opening brief, the defendant/appellant states that the decision of the District Court of Appeals "*entitle[s Sharick] to recover damages* representing his loss of future earnings or earning capacity as an osteopathic physician for the rest of his working life. The opinion also holds *Sharick is entitled* to the profits he would have made as

a physician. Thus [sic] the opinion holds the University promised both a degree and a career as a physician." Defendant/Appellant's Brief at 13-14 (emphasis supplied). Nowhere in the appellate rulings is there any determination that Sharick *is entitled* to receive damages (other than those already awarded).[2] To the contrary, the rulings of the District Court of Appeals hold only that:

> 1. The record establishes that "but for Sharick's dismissal from the university, he would have obtained his DO degree some two months thereafter";
>
> 2. "As the fact of Sharick's damage as the result of Southeastern's breach *can be* proved with certainty, we reverse and remand for a new trial on damages";
>
> 3. "Upon retrial, Sharick must be afforded the opportunity to plead and prove damages in the form of loss of earning capacity that would reasonable have resulted had he received his DO degree."
>
> Sharick, 780 So.2d at 140 (emphasis supplied).

The rulings under review, rather than establishing Sharick's *entitlement* to damages including loss of earnings, establish only that he has the *opportunity* to plead the alleged loss, and attempt to prove it. This is a far cry from a judicial determination that Sharick *is entitled* to receive damages that he alleges. Virtually every argument that defendant/appellant asserts with respect to the speculative nature of these losses

---

[2]As aforesaid, there has been no cross-appeal and Sharick's receipt of the tuition refund has not been challenged on appeal.

can be presented at the re-trial and is properly considered at that stage of the proceeding. In opening statement, defendant would be entitled to state its position that plaintiff will be unable to meet his burden of proof with respect to damages. At the close of the plaintiff's case, the defendant can move for a directed verdict as to those damages that it alleges have not been proven *prima facie.* Defendant can properly request, and receive, jury instructions setting forth the plaintiff's burden of proving his alleged damages. At the time of closing argument, defendant can remind the jury of its contention that plaintiff's alleged loss of earnings has not been established with the certainty required by law.[3] In the event that the jury returns a verdict awarding plaintiff lost future earnings, defendant then has the opportunity to request judgment notwithstanding the verdict, and/or that the verdict be set aside. If, at that time, there remains a verdict awarding plaintiff damages for loss future earnings to which the defendant objects, defendant has the right to appeal the verdict and obtain further review. It is bad policy to restrict a party's opportunity to prove damages. Such a policy certainly runs afoul of the rule that victims of wrongdoing "shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's act . . . ." Hanna v. Martin, 49 So.2d at 587.

[3]See, e.g., Defendant/Appellant's Opening Brief at 17 ("Sharick did not graduate but now wants to be paid for the rest of his working life as though he were a licensed physician").

While there are legitimate policy reasons to limit school's exposure to damages for the dismissal or expulsion of students, these policy concerns are properly addressed by limiting the school's *liability* for its decision-making. Such liability is already limited via the current rule that a dismissed student must prove that his dismissal was arbitrary, capricious, done in bad faith, or without discernable rational basis. This burden is admittedly high and not challenged or contested by parties or amici in this proceeding. As the lack of reported decisions suggest, it is a rare circumstance. However, once having met this difficult burden of proving the egregious nature of a school's wrongdoing, there is no legitimate public policy reason to further restrict a student's remedy. To the contrary, public policy is well-served by a rule that requires payment of fair and just compensation, commensurate with the loss sustained. As has been noted by this Court in the past, one of the most fundamental tenets of our system of justice is that a jury trial is to be a search for truth and justice. This Court has noted that it has not shrunk from condemning any practice that "undermines the integrity of the jury system which exists to *fairly* resolve actual disputes between our citizens." Dosdourian v. Carston, 624 So.2d 241, 243 (Fla. 1993). This Court has further explained that only when all of the relevant facts are before the judge and jury can the "search for truth and justice" be accomplished. Allstate Ins. Co. v. Boecher, 733 So.2d 993, 995 (Fla. 1999). By denying the student

in this case the opportunity to present all of the relevant facts concerning his damages to a jury, the trial court erred. It is respectfully submitted on this basis that the opinion and rulings of the District Court of Appeal should be affirmed.

III. DEFENDANT ARGUES THAT PLAINTIFF'S REMEDY SHOULD BE LIMITED TO RESCISSION, AN EQUITABLE REMEDY THAT HAS NO PLACE HERE.

By trying to restrict the student to recovering only the tuition paid, the Defendant is essentially trying to limit the remedy available to rescission, i.e., to be released from its contractual obligation by returning the consideration paid under the contract. Apparently, the Defendant believes that justice would be served here simply by reestablishing the status quo prior to the parties' contract. However, a party seeking to avoid its contractual obligations by rescission must have clean hands and must also be able to reestablish the status quo. Rood Co. v. Board of Public Instruction, 102 So.2d 139 (Fla. 1958), Mazzoni Farms v. E.I. DuPont De Nemours, 761 So.2d 306, 313 (Fla. 2000). Neither of those elements exist here.

Clearly, the Defendant does not have clean hands since it has been found to have acted arbitrarily, capriciously, and without any discernable rational basis. That, in itself, should bar limiting the remedy to that of rescission. However, it is also obvious that the Defendant cannot reestablish the status quo since, as noted by the

Third District, the student dedicated several years of his life in pursuit of a degree and thus cannot be returned to the status quo. As a result, damages are the only appropriate remedy, and there is no equitable basis for limiting those damages to the return of the consideration paid by the student.

Viewed in a broader prospective, the effect of accepting the Defendant's argument here would not simply limit a student's damages, but would effectively eliminate the ability of a student to bring such an action. As the damages award in this case shows, the limitation sought by the Defendant would make it economically impossible for a student to be able to pursue such a suit. Obviously, students rarely have substantial funds or earning capacity, especially when they have been expelled from an institution, and if the damage award were to be limited solely to tuition, the ability to obtain counsel on a contingency basis would be problematic because of the cap on damages. It appears that is the result that the Defendant and its amici seek, which is another significant policy reason for rejecting their argument.

CONCLUSION

Since the plaintiff/respondent successfully proved that the defendant/appellant osteopathic college had arbitrarily, capriciously and without any discernable reason dismissed him just prior to his completion of his four-year course of studies, he should have then be permitted to allege and prove his damages, including his loss of future earnings. The defendant/appellant's argument that such damages should be prohibited at the pleading stage is misplaced. While defendant/appellant is certainly entitled to contest the sufficiency of the plaintiff/respondent's proof of damages, a pretrial ruling is the wrong place and time to do it. The District Court's rulings, which merely affirm the plaintiff/respondent's right to plead and attempt to prove his damages should be affirmed.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was furnished to RICHARD A. BARNETT, ESQ., 121 South 61st Terrace, Suite A, Hollywood, Florida 33023; DONALD TOBKIN, ESQ., P. O. Box 220990, Hollywood, Florida 33022; JOHN BERANEK, ESQ., Ausley & McMullen, P. O. Box 391, Tallahassee, Florida 32302; and MARK A. HENDRICKS, ESQ., Panza, Maurer, Maynard & Neel, P.A., NationsBank Building, Third Floor, 3600 North Federal Highway, Fort Lauderdale, Florida 33308, on March 11, 2002.

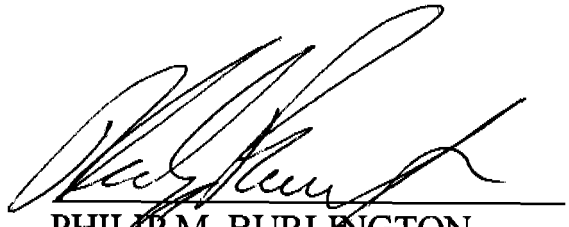
Philip M Burlington
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A, Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401-2320
and
KATHRYN JOHNSTON, P.A.
1962 26th Avenue
Vero Beach, FL 32960
Tel. (561) 567-5641/567-6298 (fax)
Attorneys for Amicus Curiae, AFTL

By: _____
PHILIP M. BURLINGTON
Florida Bar No. 285862

By: _____
KATHRYN B. JOHNSTON
Florida Bar No. 0113050

CERTIFICATE OF TYPE SIZE AND STYLE

Appellants hereby certify that the type size and style of the Amicus Brief of The Academy of Florida Trial Lawyers is Times New Roman 14pt.



PHILIP M. BURLINGTON
Florida Bar No. 285862