

IN THE SUPREME COURT
STATE OF FLORIDA

SOUTHEASTERN UNIVERSITY OF THEHC Case No.: SC01-969
HEALTH SCIENCES, INC., d/b/a DCA Case No.: 3D98-2674
COLLEGE OF OSTEOPATHIC MEDICINE,

Petitioner/Defendant,

vs.

KEITH M. SHARICK,

Respondent/Plaintiff.

BRIEF ON THE MERITS BY PETITIONER,
SOUTHEASTERN UNIVERSITY OF THE HEALTH SCIENCES, INC.,

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STATEMENT OF THE CASE AND FACTS

It is unfortunately necessary to describe what occurred before the circuit court as the background for the multiple opinions and rulings issued by the Third District Court of Appeal on August 2, 2000, April 4, 2001 and April 18, 2001. This Court has tentatively accepted jurisdiction to review these opinions

¹ based on direct conflict. The supplemental record before this Court will be designated as (R. ___) and the transcript of the testimony before the trial court will be designated (T. ___). Southeastern University of the Health Sciences, Inc., d/b/a College of Osteopathic Medicine will be designated herein as "SEU" or "the University".

Before his graduation, SEU dismissed Keith M. Sharick ("Sharick") from its Osteopathic medicine program. A jury would eventually find this dismissal was arbitrary, capricious and without a rational basis. The April 4, 2001, dissenting opinion from the Third District described this dismissal:

Specifically, the record indicates that Sharick was dismissed because he: (1) 'was apparently unable to identify very fundamental signs and symptoms of diabetes mellitus'; (2) 'failed to examine the abdomen and suprapubic area of a woman complaining of lower abdominal pain and presenting with symptoms of a urinary tract infection'; (3) 'raised the skirt of a female patient without informing her that [he was] going to do so'; and (4) 'consistently failed to review charts properly prior to interacting with these patients.'

As a result of his dismissal, on August 17, 1993, Sharick filed a two-count complaint against SEU. (R. 1). SEU moved to dismiss this complaint and the motion was granted in part and denied in part. (R. 30). The count which survived the motion was Sharick's claim for outrageous conduct causing severe emotional distress. After numerous depositions and discovery, SEU filed a Motion for Summary Judgment

¹ The opinions are designated herein as the Panel Opinion, the Concurring Opinion and the Dissenting Opinion. They are reported at Sharick v. Southeastern University, 780 So. 2d 136 (Fla. 3d DCA 2000), and Sharick v. Southeastern University, 780 So. 2d 142 (Fla. 3d DCA 2001).

arguing that the University's conduct did not rise to the level of outrageousness which would allow Sharick to go forward on these claims. (R. 151). During the hearing on this motion, the court accepted Sharick's oral motion to further amend his complaint.

On February 18, 1997, Sharick filed his Third Amended Complaint again attempting to allege intentional infliction of emotional distress, along with claims for defamation, breach of oral contract, breach of implied-in-fact contract, and breach of implied in law contract. (R. 324). SEU followed with a further Motion to Dismiss arguing that Sharick had again failed to properly establish the required elements of his claims.

On July 3, 1997, the court entered an order dismissing several of the counts with prejudice and granted Sharick leave to amend the only remaining issue before the court which was count IV for breach of an implied-in-fact contract. (R. 353).

Sharick then filed his Fourth Amended Complaint on July 14, 1997. (R. 355). He sought recovery for tuition losses, medical expenses, reinstatement as a student via specific performance, and past and future lost wages and/or profits. SEU again moved to dismiss. (R. 391). SEU contended that the damages should be stricken because they were not allowable under a breach of implied contract theory since they were not within the contemplation of both parties at the time of the commencement of the contract when Sharick entered the University as a student. Sharick, of his own accord, amended his complaint again and filed his Fifth Amended Complaint on September 25, 1997. Again, Sharick sought the same damages as in his Fourth Amended Complaint. (R. 391).

On October 28, 1997, Judge Fredricka Smith granted in part an SEU Motion to Strike and in her order stated that Sharick would not be entitled to damages for future lost wages and/or profits. (R. 401). This order also struck the claim for specific performance (reinstatement). As a result of this order and the prior order on July 3, 1997, the only count remaining against SEU was for breach of an implied-in-fact contract and the trial court further ruled in the order that the only money damages which Sharick could recover on that claim was reimbursement for tuition expenses paid to SEU, plus interest. (R. 401).

Trial commenced under the evidentiary restrictions of the pretrial orders. (R. 782-787). Sharick proffered certain evidence concerning his alleged damages. The jury was furnished a verdict form which contained only two issues and did not mention an implied contract in any fashion. (R. 791). The jury found, in answer to the two questions, that SEU had arbitrarily and capriciously dismissed Sharick and that Sharick was entitled to reimbursement of a portion of the tuition he had paid to SEU. (R. 791). A Final Judgment of over \$81,000 in favor of Sharick was entered and Sharick accepted full payment of the judgment. (R. 840). Sharick also filed his appeal to the Third District on October 15, 1998. (R. 837). The appeal sought only additional money damages and did not question the ruling from the same order foreclosing readmission of Sharick as a student.

By the Panel Opinion of August 2, 2000, three judges of the Third District Court of Appeal reviewed the entire trial and reversed the circuit court's pretrial rulings without recognizing they had been pretrial rulings. The court reversed and remanded the case for a new trial but restricted that trial to money damages only. The opinion held an implied-in-fact contract had been proven and that Sharick was entitled to recover for all of his future lost earnings, profits and lost earning capacity as a physician.

SEU filed various motions including a Motion for En Banc Reconsideration based on exceptional importance, a Motion for Certification of Conflict and a Motion For Certification as to Great Public Importance. By order of November 14, 2000, the case was scheduled for oral argument on rehearing en banc before 10 judges and the parties were allowed to file supplemental briefs. The briefs were filed simultaneously along with an amicus brief by the University of Miami, the Independent Colleges and Universities of Florida and the American Council on Education. These amici have also appeared in this Court and the amicus brief is here adopted and incorporated by reference by SEU.

Prior to the August 2, 2000, decision, no Florida court had ever held that a university student who failed to graduate and obtain a degree was entitled to recover from a university for all of his or her lost earnings and lost earning capacity and profits during the remainder of that student's working life.

² This dramatic and draconian ruling on damages for a "lost career" was based entirely on the implied contract of uncertain terms which the Third District Court of Appeal found to have existed.

Sharick was of course the appellant before the District Court of Appeal despite having prevailed in the trial court. The Sharick appeal was actually directed to the trial court's pretrial denial of his request for loss of future earnings and earning capacity as an element of damages in his suit for breach of implied contract. The contract was, of course, unwritten but has been found by the District Court of Appeal to have existed as an "implied-in-fact contract." The only issues tried before this jury were: (1) whether the decision by SEU to dismiss Sharick was arbitrary, capricious and lacking a rational basis; and (2) the amount of tuition Sharick was entitled to recover. (R. 791). The jury was specifically instructed: "In determining the total amount of damages, you may only award damages for tuition expenses." (R. 791). The jury could only award these damages in the event they found the University had acted arbitrarily and capriciously.

Although the jury concluded Sharick had been dismissed arbitrarily and capriciously, it is important to recognize what issues were tried and what issues were not tried before this jury. Because of the trial court's restrictive pretrial rulings, this jury never determined the existence or the terms of any implied-in-fact contract except to the extent of an implicit contract to reimburse tuition if Sharick was wrongfully dismissed. This jury did not find bad faith or malice and never determined any issues concerning any other aspect of this implied-in-fact contract. The jury did not determine or hear the issues concerning mitigation of damages by Sharick nor did the jury even hear evidence concerning Sharick reapplying for admission to SEU or seeking admission to some other university with an osteopathic program. The jury never determined Sharick could not be admitted to another osteopathic school. (See. R. 782-7, Motion in Limine to Prevent Evidence Regarding Causes of Action Dismissed with Prejudice.)

Despite the fact that much of the trial testimony was simply proffered by Sharick out of the hearing

² The absence of any such decision was conceded in the Sharick briefs before the District Court. See Sharick Initial Brief of 3/24/99, p.10 and Sharick Supplemental Brief of 12/29/00, p.3 concerning "lost career" damages.

of the jury, the Third District Court of Appeal chose to rely in part upon that proffered evidence. This evidence enabled the court to reach its conclusions, as a matter of law, concerning the existence of the implied-in-fact contract for a degree followed by a professional career as a physician.

The jury awarded \$45,000.00 as a partial award of the tuition and interest and costs brought the final judgment to the total amount of \$81,850.94. SEU paid this amount to Sharick and he accepted the benefits of the judgment but still appealed.

After the Third District issued its Panel Opinion of August 2, 2000, the court further considered the case in an en banc oral argument before 10 judges. The court then left the three judge Panel Opinion in place but issued two further opinions and a further order on motions. Sharick, 780 So. 2d 136 and 142. These included a Concurring Opinion by a single judge and a Dissenting Opinion by four judges. A majority of the court (6 judges) denied the Motion for Rehearing En Banc without comment. Despite the issuance of the new opinions, the court had not ruled on the motion to certify conflict and the University brought this to the court's attention. Thereafter, on April 18, 2001, a conclusory order signed off on by only three judges was issued denying the motions for certification.

³ Thus, the dissenting judges were not given the opportunity to rule upon the motion for certification of a conflict in decisions. The four dissenting judges almost certainly would have agreed that the Panel Opinion was in conflict with the existing law on certainty of future damages since they expressed this view in their dissent. These four judges were not shown as voting on the motion for certification of conflict.

STANDARD OF REVIEW

The Petitioner SEU has sought review before this Court based upon conflict and jurisdiction has been tentatively accepted. The pure legal issues within the Panel Opinion are to be reviewed de novo.

³ April 18, 2001 thus became the "rendition" date of the decision.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal erroneously found the existence of an "implied-in-fact" contract for a degree in a suit against a private university by a student who was expelled before his graduation. The jury found the University acted arbitrarily in dismissing the student. The District Court found the former student entitled to a degree from the University and a career in medicine. The Panel Opinion imposed this unprecedented remedy of implied contract damages for all future earnings and earning capacity during the working life of the student. In imposing this unprecedented remedy based upon an academic decision by the University, the Third District has placed itself in conflict with the body of law governing the decisions of universities as to academic matters and the law of contracts requiring that all damages for future earnings be reasonably certain and not speculative or remote. The Panel Opinion recognizes that the court was very close to "modifying...this rule" on certainty of future damages. Sharick at 140.

Universities provide students with educational services which generally result in a degree. Universities do not, however, impliedly or expressly, guarantee their students a degree and most certainly do not guarantee them future financial success in whatever profession or job they might choose after leaving the university. Although the University does not agree that its conduct should result in liability, at most the remedy should be limited to tuition expenses and other pecuniary losses within the reasonable contemplation of both parties at the time any implied contract came into existence.

Florida law on contracts and future damages was violated herein because the plaintiff has nothing more than an unenforceable expectation and because the future earnings in question are too speculative and uncertain to support an award of damages. If the University did not meet an implied contractual obligation to this student, then the student has already obtained his appropriate remedy. Damages for tuition reimbursement have already been imposed and the plaintiff has already been paid these damages of over \$81,000. The rulings of the circuit court should be affirmed and the plaintiff should be left with the verdict he has already secured and accepted.

This unprecedented decision against the University will do substantial harm to all private universities and to the overall educational system of this state. Any failing student will be encouraged to sue his or her

university. Juries will become the final decision maker as to every failed student. Indeed, even a student who graduates with a degree will have similar claims for a lifetime of earnings if such students are unable to find a lucrative position based upon their degree. The Third District decision violates the general and consistent law imposing judicial restraint as the guiding principle concerning academic decisions by universities. Public policy requires a reversal of this decision.

The implied-in-fact contract which the Third District Court of Appeal has held to have been proven was never tried before this jury. The jury did not find and was not asked to find any of the terms, conditions or the remedies within this implied-in-fact contract. The Third District Court of Appeal has imposed its own version of a contract and remedies without recognizing the limited nature of the trial which occurred based upon the trial court's pretrial rulings.

In the alternative, although the University argues for an affirmance, if there is to be a reversal and a further trial, then that trial should concern all issues. The terms of the implied contract and the remedies under that implied contract must be found by the same jury which will determine damages. The remedy must be limited to what these parties would have contracted for had they entered into an express contract. This requirement of Florida law or damages within the contemplation of the parties has been disregarded. The reinstatement of the plaintiff as a student at this University or some other university should also be left open as an issue in any further trial ordered by this Court.

ISSUES ON REVIEW

- I. THE DECISION OF THE DISTRICT COURT CONFLICTS WITH FLORIDA CASE LAW REQUIRING DAMAGES FOR FUTURE EARNINGS TO BE PROVEN WITH REASONABLE CERTAINTY IN AN IMPLIED CONTRACT ACTION — SPECULATIVE AND REMOTE FUTURE LOSSES MAY NOT BE AWARDED

- II. THE THIRD DISTRICT DECISION VIOLATES THE COMMON LAW DOCTRINE OF RESTRAINT AS TO EDUCATIONAL DECISIONS BY PRIVATE UNIVERSITIES AND FURTHER VIOLATES OVERALL PUBLIC POLICY AS TO UNIVERSITIES

- III. THE IMPLIED-IN-FACT CONTRACT FOUND BY THE DISTRICT COURT WAS NEVER TRIED BEFORE THIS JURY

- IV. IN THE EVENT OF A REVERSAL AND REMAND, THE NEW TRIAL SHOULD CONCERN ALL ISSUES INCLUDING REINSTATEMENT OF SHARICK, THE TERMS OF THE IMPLIED CONTRACT, LIABILITY AND DAMAGES

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT CONFLICTS WITH FLORIDA CASE LAW REQUIRING DAMAGES FOR FUTURE EARNINGS TO BE PROVEN WITH REASONABLE CERTAINTY IN AN IMPLIED CONTRACT ACTION — SPECULATIVE AND REMOTE FUTURE LOSSES MAY NOT BE AWARDED

Petitioner, SEU is a private university offering a curriculum in osteopathic medicine. Respondent Sharick was a student who failed to receive a degree and sued the University. The University seeks review of the Panel Opinion of the Third District Court of Appeal issued August 2, 2000, and rendered April 18, 2001. This opinion was initially issued and after an en banc oral argument before 10 judges, the en banc motion was denied by the vote of 6 judges and further opinions were issued. There are thus three opinions from the District Court now before this Court. Conspicuously absent is any explanation for the denial of the en banc rehearing motion.

The Panel Opinion

The Panel Opinion holds that Sharick, as an osteopathic medical student, had an implied-in-fact contract for a degree and that this implied contract was breached by the University's failure to award the degree based on an arbitrary and capricious decision by the faculty. The former student was held entitled 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 the opinion holds the University promised both a degree and a career as a physician. The remand is for a trial solely on damages for the breach of the implied-in-fact contract which the appellate court

has found to have existed as a matter of law.

The Panel Opinion concluded:

Upon retrial, Sharick must be afforded the opportunity to plead and prove damages in the form of the loss of earning capacity that would reasonably have resulted had he received his DO degree.

The court based its overall ruling on the conclusion that an "implied-in-fact contract" for a degree existed because the word "degree" appeared in the preface to a student handbook. (Sharick p. 139). The jury was not asked to determine whether an implied-in-fact contract existed nor what the terms of such a contract might have been. As the verdict shows, the jury determined only that (1) the dismissal of Sharick was arbitrary and capricious; and (2) that Sharick was entitled to \$45,000.00 as damages for the tuition money he had expended. (R. 791).

The court expressly held that the student's implied contract claim for the loss of a medical career was already proven and that the damages were not too uncertain or speculative for recovery. Sharick at 140. In avoiding the rule on certainty of damages, the opinion relies primarily on the "modifying" affect of Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. 3d DCA 1990). Miller is a unique case on proof of damages in a spoliation of evidence suit. The Panel Opinion also applies pure commercial contract law on "lost prospective profits" as the "yardstick" for Sharick's profits in his new business as a physician. Sharick at 141.

The Dissenting Opinion

The four dissenting judges concluded that whether Sharick would ever have been able to practice as an osteopathic physician was "beyond reasonable conjecture." Sharick at 145. The dissent relies upon Slaughter v. Brigham Young University, 514 F.2d 622, 626-627 (10th Cir. 1975) in concluding that Sharick should not be excused from completing all of his professional degree requirements. The dissent faults the Panel Opinion's analogy to prospective business profits and concludes that Florida law requiring that future damages in an implied contract situation be reasonably certain, constituted a complete bar to Sharick's claim for future lost earnings and a lost career. Sharick at 146.

Five out of the 10 participating judges stated that the readmission of Sharick as a student should be seriously considered. The Dissenting Opinion stated readmission was the only "appropriate remedy" and the specially concurring judge found it would be the "best solution in this case." Sharick at 146, note 3 and note 5. However, the initial 3-judge Panel Opinion noted Sharick had lost on this issue as a matter of law in the trial court's early rulings and that neither Sharick or the University had appealed the issue. Thus 5 judges did not rule on the reinstatement issue and 5 other judges found reinstatement to be the "appropriate remedy" or the "best solution." Sharick was criticized in the dissent for appealing only as to damages and not appealing as to reinstatement.

Sharick at 146, note 5.

The Concurring Opinion

Despite its adoption of reinstatement as the "best solution", the Concurring Opinion finds that Sharick is entitled to "recover traditional breach of contract damages" and that the "best analogy" to Sharick's situation are the cases concerning new businesses and lost profits. Thus, this opinion would treat Sharick as any other person with a commercial contract. Sharick at 142-5.

The Briefs

The briefs by both parties before the District Court agreed and conceded that prior to the August 2, 2000, decision, no Florida court or any other court had ever held that a university student was entitled to be paid by the University for a "lost career" for all of his or her lost earnings during the remainder of the student's working life.

Conflict Between Sharick and Existing Law on Certainty of Future Damages in a University Context

Actual case law in this area is minimal, but professors and lawyers have written extensively on the subject. Both sides can rely upon quotations by commentators they feel to be particularly apt. The University suggests the following:

[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."

Claudia G. Catalano, Annotation, Liability of Private School or Educational Institution for Breach of Contract Arising From the Provision Of Deficient Educational Instruction, 46 ALR 5th 581 (1997). The purchaser of a used car may tell the seller of his need for a reliable car to use in a new business but if the car breaks down the seller is not legally liable for all of the future profits the buyer hoped to make in the new business. Also see: Robert L. Cherry, Jr. and John P. Geary, The College Catalog As A Contract, 21 J.L. & Educ. 1, 29 (1992) (court "decisions indicate that contract theory is applied selectively and courts are hesitant to overrule academic judgments."); David Devenport, The Catalog in the Courtroom: From Shield to Sword, 12 J.C. & U.L. 201 (1985) (noting that because "courts rarely address the specific and obvious question of which contract standards apply and which do not...the law in this area" is a "patchwork' of holdings").

Sharick did not graduate but now wants to be paid for the rest of his working life as though he were a licensed physician. Sharick never had more than an unenforceable expectation of a degree and the substantial earnings of a doctor. There is no binding contractual obligation which can be enforced against the University in the form of a money award. Sharick can not identify any terms or conditions in SEU's publications which specifically create a binding promise to confer a degree, let alone a promise that a graduated student would have a working

lifetime after that degree. The Panel Opinion relies on the handbook's statement: "leading to the DO degree" but this was nothing more than the expression of an intent.

4

In Abrams v. Illinois College of Podiatric Medicine, 395 N.E. 2d 1061 (Ill. App. 1979), an academically dismissed student sued a private medical college claiming breach of contract on several grounds including reliance upon particular provisions of the student handbook. The appellate court in Abrams stated that the provision in the student handbook:

[W]as not an offer or a promise by the college which created a power or acceptance in the plaintiff. The provision was more in the nature of an unenforceable expression of intention, hope or desire...We find that this provision in the student handbook was an expression by the college of an unenforceable expectation which plaintiff did not have the power to transform into a binding contractual obligation. (emphasis supplied).

Abrams, 395 N.E. 2d at 1064, 1065. Thus, here Sharick had no more than an "unenforceable expectation."

Even with a degree, Sharick would still have to pass his professional examinations, complete an internship and residency program, meet all licensure requirements of state medical boards including background checks and then ultimately demonstrate the overall competency necessary to obtain employment as a doctor and then begin making income. Sharick might choose to work in a low paying position treating the poor or he might choose to work in a metropolitan area treating the rich. He might

⁴ The SEU handbook outlines graduation requirements as follows:

Students are not awarded their degrees upon the completion of any prescribed number of courses or upon passing a prescribed number of examinations. Degrees are awarded when the faculty believes the students have obtained sufficient maturity of thought and proficiency. If a student fails to graduate, he/she does not fail in any one subject but is judged by the faculty to be unqualified for the practice of the health profession as a whole. (R. 438-439).

have high overhead expenses or low overhead expenses. The University would have no control over any of these events. Such damages are too speculative, too remote and too uncertain under the law of Florida and most other jurisdictions to be recoverable in an implied contract situation. The District Court's Panel Opinion conflicts with the cases from this Court and the other district courts requiring certainty of such future damages.

One case of striking similarity on certainty of future lost income damages has been on the books since 1874. Brock v. Gale, 14 Fla. 523 (Fla. 1874) involved a dentist who took passage on a steamship on the St. John's River. He checked his valise containing his dental tools which he asserted were ornamented with gold and jewels. The valise containing the dental instruments was lost by the steamship operator. The dentist sued for (1) the value of the instruments and (2) for money damages for what he would have earned as a dentist for the six month period during which he was deprived of the use of the instruments. In 1874, this Court cited Hadley v. Baxendale, 9 Exch. 341 and ruled that such future lost earnings were too speculative and uncertain and too remote from the original contract to be recoverable.

Obviously Brock v. Gale is antique and a curious bit of history, but it was cited and relied upon with approval in Douglass Fertilizers and Chemical, Inc. v. McClung Landscaping, Inc., 459 So. 2d 335, 336 (Fla. 5th DCA 1984). There the Fifth District stated:

In the case of Brock v. Gale, 1874, 14 Fla. 523, Defendants loss of Plaintiff's dental tools justified recovery of their market value but not loss of the dentist's profit or income from not being able to practice his profession until the tools were replaced, the latter being too remote.

As in Brock, here Sharick's "lost career" was too remote and speculative. The Douglass Fertilizers case has become one of the most often cited and relied upon Florida cases requiring certainty of proof on future lost profits or income. Future lost earnings and profits must be proven with a reasonable degree of certainty and further are recoverable only when they "were reasonably within the contemplation of the defaulting party at the time the contract was entered into." Douglass Fertilizers at p. 336. The Douglass case involved a claim for lost profits based on a loss of future business dependent upon future shipments of sod. The court held the jury award of such future profits was too remote and too speculative. Douglass

Fertilizers has been cited at least 11 times and is the controlling law in the state on certainty of future income damages. See e.g., Ethan Allen, Inc. v. Georgetown Manner, Inc., 647 So. 2d 812 (Fla. 1994), (damages disallowed for interference with a relationship based on speculation regarding future sales to past customers).

In State ex rel. Peters v. Hendry, 31 So. 2d 254 (Fla. 1947), a drag line was to be furnished to prepare proper drainage on cattle grazing lands. The plaintiff eventually sued for loss of profit arising from the depreciated value of cattle which became sick and debilitated due to a breach of warranty concerning the drag line. Again this Court held that such damages were too remote. This Court stated:

To warrant the recovery of substantial damages, the losses complained of must have actually and proximately resulted from the breach of the contract; they must be of such a nature that they should reasonably have been contemplated by the parties as a probable result of a breach of the contract; and the amount of the losses must be capable of reasonably certain ascertainment and not remote, conjectural, contingent or speculative.

The four dissenting judges in the en banc proceeding in this Sharick case clearly stated their view:

Sharick is not entitled to recover, as damages, lost future income that he might have earned as a DO in an undetermined field only after he might possibly have passed his boards and potentially received a DO license. It is wholly speculative whether Sharick would ever practice as a DO, much less become successful and earn substantial income. The majority opinion requires the jury to utilize a divining rod..."

These cases requiring reasonable certainty of future lost income or profits also require that such damages be within the contemplation of the parties when they made their implied contract. Here the Panel Opinion by the Third District, although not based on any issue actually before the jury, was that an implied-in-fact contract existed as a matter of law and that the University agreed to be financially responsible for Sharick's lost medical career. The University would never have contracted to pay a failing student for the loss of his or her desired career throughout his or her working life. It is, quite frankly, ludicrous to suggest that any university would agree to such liability and this Court has held as much in Bromer v. Florida Power and Light Co., 45 So. 2d 648 (Fla. 1944), stating at p. 660:

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 referenced thereto.'

Bromer goes on to reject as "egregiously erroneous" an argued for implied contract that Florida Power and Light Co. would have agreed to continuously provide electricity under all circumstances. Similarly, no university would agree beforehand with prospective students to pay them all what they could have earned had each of them received their desire degree and gone on to be successful in his or her chosen field.

The Panel Opinion imposes draconian contract damages which are tantamount to tort damages and will do great harm to the private university system in this state. It will further dramatically change the relationship between universities and all of their students who might graduate with a degree but still be unable to find a job. This may well be the most dangerous part of the decision. The student who obtains a degree and is unsuccessful in finding the right job can now sue his or her university contending that there was an implied promise by the university that a job would be available for a graduate with a degree. A jury will decide whether such an implied-in-fact contract existed and will then decide how much money the unsuccessful student would have made as a doctor, lawyer, accountant or any number of other professions. This is precisely what Sharick is suing for in this case and implicit within the Third District's Panel Opinion is the conclusion that there was also an implied contract that Sharick would have a job in the medical profession.

The opinion is also internally inconsistent in several respects in stating that the implied contract claim has already been proven despite the fact that it was never tried and on the other hand, that Sharick should be allowed to plead and prove his claims. In any event, we know for certain that under the Panel Opinion the only further trial to occur will be on damages alone and that liability for loss of future earnings, earning capacity and profits has already been decided. The decision erroneously fails to follow the time-honored principle that such future damages must be reasonably certain and not speculative.

"Modification" of the Law on
Certainty of Damages

The Panel Opinion recognizes the "requirement for certainty of damages in a contract action" but resorts to the "modifying doctrines to this rule" found in Miller v. Allstate Insurance Company, 573 So. 2d 24 (Fla. 3d DCA 1990). Miller is a unique spoliation of evidence breach of contract case against an insurance company. It was based on the company's breach of its express promise to retain a wrecked automobile and return it to its policy-holder so that person could have it examined by an expert and used as evidence in another lawsuit. The Miller case has absolutely nothing to do with the present case and Miller does not and could not modify the law of certainty of damages in an implied contract situation. In Miller there was an explicit oral agreement, the terms of which were completely undisputed. There is simply no analogy to the student-university implied-in-fact contract theory put forth by the Panel Opinion herein.

Miller must be limited to its facts. A contracting party who destroys evidence cannot take advantage of the uncertainty of damages created by the spoliation of the evidence which the party contractually agreed to preserve. Indeed, here the District Court has over-extended Miller because here the University's breach (if there was one) prevented Sharick from obtaining a degree but it certainly did not create the uncertainty as to what Sharick would have done with that degree.

The actual terms of this implied contract have never been tried. The District Court simply took certain proffered

evidence and its own view of the evidence to conclude that such a contract existed. The panel relied upon R.A. Jones & Sons v. Holman, 470 So. 2d 60 (Fla. 3d DCA 1985) and W.W. Gay Mech. Contr. v. Wharfside Two, 545 So. 2d 1348 (Fla. 1989), but these cases also do not abrogate the rule requiring certainty of damages. Holman concerned lost sales of equipment to specific customers because of faulty engines and Wharfside Two concerned a hotel's revenue losses because of an unpleasant odor from a water system which directly related to specific business losses. In the Sharick situation, the business losses are entirely speculative and nothing more than guess work. Similarly, the District Court's reliance on lost prospective profits does not constitute an appropriate "yardstick."

Instead of attempting to "modify" the doctrine of certainty of damages by overextending its own Miller decision, the Third District should simply have complied with the existing law affirming the circuit court's ruling striking the prayer for future loss of earning capacity and profits. This Court should now so order.

**II. THE THIRD DISTRICT DECISION VIOLATES
THE COMMON LAW DOCTRINE OF RESTRAINT
AS TO EDUCATIONAL DECISIONS BY PRIVATE
UNIVERSITIES AND FURTHER VIOLATES
OVERALL PUBLIC POLICY AS TO
UNIVERSITIES**

The common law draws important distinctions between contracts and relationships between students and universities as to academic and non-academic matters. As to academic matters,

universities are granted great deference by the courts; "the educational process is not by nature adverse." Board of Curators, Univ. of Mo. V. Horowitz, 435 U.S. 78, 90 (1978). Courts are reluctant to interfere in the educational decisions of universities. Horowitz, 435 U.S. at 88. There is only one consistent and dominant pattern in the decisions and that is the principle of judicial restraint in disputes involving academic judgments.

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 involved 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.

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Although the law in this area has often been referred to as a "patchwork quilt," the single and only guiding principle is that of judicial restraint.

One of the earliest Florida cases is John B. Stetson University v. Hunt, 102 So. 637 (Fla. 1924), which involved a tort verdict against the university for expelling a student. Stetson University was found to have acted maliciously and wantonly concerning conduct by male students in the girl's dormitories. In reversing the tort ruling, the Florida Supreme Court held that the student/university relationship was contractual in nature and found that universities were permitted to enact rules governing student conduct. The Court limited recoveries except for situations in which the university enforced its rules "arbitrarily and for fraudulent purposes." The early Stetson case does not hold that courts can impose broad measures

⁵ Claudia G. Catalano, Annotation, Liability of Private School or Educational Institution for Breach of Contract Arising From Expulsion or Suspension of Student. 45 ALR 5th 1 § 2(a) (1997).

imposing damages against private universities for breach of an implied contractual obligation. Stetson cannot be seen as authorizing courts to impose broad responsibilities and remedies against universities. Judicial restraint is the principle governing a court's imposition of both responsibilities and remedies.

In University of Miami v. Militana, 184 So.2d 701 (Fla. 3d DCA 1966), there was also a decision giving great deference to academic judgments involving student performance standards as set out in university bulletins or catalogs. In Militana, the court reversed the judgment in favor of a dismissed medical student. The court held that mandamus was inappropriate and that the judgment in favor the student was improper. Both Stetson and Militana uphold the doctrine of restraint in imposing obligations, duties and remedies against universities. Courts have no power to impose terms of an implied contract outside of the parties' mutual expectations and further have no right to impose remedies beyond those expectations.

An essential corollary to the rule of restraint is the further conclusion that pure commercial contract doctrine should not be broadly applied to universities concerning academic decisions and judgments and the remedies available against universities.

Slaughter v. Brigham Young University, *supra*, reversed a judgment on a jury verdict in favor of an expelled graduate student. The Tenth Circuit Court of Appeals held that the trial court erroneously engaged in the "rigid application" of commercial contract rules of law. The court held that "some elements of the law of contracts" should be applied but that this did not mean that contract law should "be rigidly applied in all aspects." The Slaughter court concluded that the "student/university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category." Thus, the federal court directly held that pure "commercial contract doctrine" should not be applied.

Here, the Third District Panel Opinion purports to apply pure commercial contract law on damages. The court has gone so far as to directly base its decision on spoliation of evidence case law and the law governing damages to new business ventures. In short, the Third District sees this case as involving Sharick's entitlement to "traditional breach of contract damages." Sharick at 143. The Third District has disavowed any restraint whatsoever in imposing extreme remedies and damages. The court has gone

overboard in imposing damages which are very close to being punitive in nature.

Contrary to its notion of a pure contract approach, the District Court Panel Opinion actually ventures into damages for tortious conduct. Imposition of damages for the lifetime loss of earning capacity is purely a tort concept. Florida Power and Light Co. v. Brinson, 67 So. 2d 407 (Fla. 1953), (where plaintiff was injured and "little better than a vegetable" and better off dead) and Florida Greyhound Lines v. Jones, 60 So. 2d 396 (Fla. 1952), (a 40 year old decision where a married woman's "worth as a housewife" would be "nil", she was still entitled to recover loss of her earning capacity "as an injury to her personal rights.").

The Third District's opinion displays its antagonism for the University and comes very close to imposing a penalty against the University. Although damages for breach of contract should restore the injured party to the condition he would have been in had the contract been performed, a party is still bound by the benefit of the bargain and he should never be placed in a position where he receives more than he would have received had the contract been properly performed. Campbell v. Rawls, 381 So. 2d 744, 746 (Fla. 1st DCA 1980). This is limited to what both parties thought the contract meant. Tort damages simply cannot be obtained in the guise of a breach of contract action and that is precisely what the Third District has imposed here. The District Court holds Sharick can recover the future value of his "lost" degree and that these damages "can be proved with certainty." Sharick would be in a position of recovering everything he would have earned as a physician without practicing as a physician or ever meeting the essential prerequisites he must meet to obtain his license to practice. This is truly the "golden ring" which every college student would yearn for.

There can be no question that the Third District blurred the binding distinctions between contract and tort. The opinion goes so far as to state:

In valuing the loss of this degree within the context of an arbitrary, capricious or bad faith deprivation of such, we concluded that it is appropriate to consider the possibility of lost future earnings.

This is a tort analysis based upon the heightened burden of proof of arbitrary and capricious conduct. We

note however that there was absolutely no determination by this jury of "bad faith" on the part of the University. The Panel Opinion wrongly adds this concept to the damage equation. In University of Miami v. Militana, *supra*, the Third District held that the term "arbitrary" was not synonymous with "bad faith" in a suit against the University of Miami. There can be no question; here the District Court's Panel Opinion concluded that because the jury found arbitrary and capricious conduct, lost future income became a proper element of damages. We note that the plaintiff's supplemental brief before the Third District Court of Appeal actually argued for tort remedies and damages. The court was obviously influenced by this improper argument. This ruling is similar to imposing punitive damages which of course would be totally prohibited by Florida law.

When a party breaches a contract, even intentionally, damages are still limited to pecuniary losses actually suffered and then only where those damages were contemplated by the parties to the contract. Punitive damages in a breach of contract case are absolutely prohibited. See: John Brown Automation, Inc. v. Nobles, 537 So. 2d 614 (Fla. 2d DCA 1989) and Lake Placid Holding Co. v. Paperone, 508 So. 2d 372 (Fla. 2d DCA 1987), rev. denied 517 So. 2d 230 (Fla. 1987).

Public Policy and Risk Management Considerations

Private universities are an overwhelmingly important part of the entire educational system of this state and country. They may be operated to some degree as a business but the courts have recognized their "eleemosynary characteristics." University of Miami v. Militana, 184 So.2d 701, 704 (Fla. 3d DCA 1966).

Universities are important to the entire academic structure and, most important of all, to the students themselves. Students function on limited money in obtaining their education. It is patently obvious that this decision will have a dramatic

effect on the cost of education in all private universities. The cost of a college education will be substantially increased and this may well be the poorest of public policy steps toward eventual tort liability against universities. This Panel Opinion will encourage unsuccessful students to sue in an attempt to catch the gold ring without having to go to work.

Universities engage in risk management efforts and often do so through the purchase of liability insurance. If there is no coverage, then the university itself is of course responsible. No university and indeed no liability insurer would sign-on to guarantee a degree, a job, and the lifetime income which a disappointed student will be able to convince a jury would have resulted from that degree. We respectfully suggest that public policy considerations warrant this Court ordering a hasty retreat from the sweeping remedy imposed here.

**III. THE IMPLIED-IN-FACT CONTRACT
FOUND BY THE DISTRICT COURT WAS NEVER
TRIED BEFORE THIS JURY.**

As previously pointed out, the only issues tried before this jury were whether the University was arbitrary and capricious in its dismissal of Sharick and if so, the amount of tuition he was entitled to recover as damages. We invite this Court to look at the one-page verdict form dated August 20, 1998. (R. 791). The verdict form specifically instructed the jury: "In determining the total amount of damages, you may only award damages for tuition expenses." Whether this ruling was right or wrong, it

was the ruling of the trial court which occurred in the pretrial rulings on the pleadings. (R. 401-2).

The issue of whether there was an implied-in-fact contract that Sharick would obtain a degree and that Sharick would then have the ability to go out and become a productive osteopathic physician was never considered by this jury. Despite this, the University is in the anomalous position of having somehow lost this case on issues which were never actually tried.

The District Court's opinion even goes so far as to cite to various items of proffered testimony which the plaintiff put on. The plaintiff called an expert economist who proffered evidence as to how much money osteopathic physicians make from graduation from school until age 65. The court used this proffered testimony to conclude that the earnings of a physician would greatly exceed the cost of tuition. Sharick at 140, 141. Since is was only a proffer and since the jury did not even hear it, the University's counsel was in no position to cross-examine or contest the evidence. The evidence was inadmissible and the trial court had so ruled. Now, based upon purely proffered evidence, the District Court of Appeal has decided that Sharick has already proved his case.

Under Florida law, contracts implied-in-fact are to be inferred from the facts and circumstances of the entire course of conduct between the parties. Bromer v. Florida Power & Light Co., 45 So. 2d 658 (Fla. 1944) and Eskra v. Provident Life & Accident Ins. Co., 125 F.3d 1406 (11th Cir. 1997). Here, the

University was never given the opportunity to present evidence to challenge the Third District's apparent assumption that the University's publications create a right in Sharick to obtain a degree. The District Court sat as a seventh juror and decided a question on an issue of fact which the jury was never asked to determine.

If there is an implied contract in this case, it was to be based upon the entire course of conduct beginning with when Sharick became a student at the University. According to Bromer, a plaintiff shoulders a heavy burden in proving an implied contract particularly in seeking to impose a broad duty or remedy. Bromer at 660. No implied contract can be found unless the court can find that the parties would actually have entered into an express contract to some effect. Again, Bromer at 660 requires the court to determine the terms of the contract which "the parties, as fair and reasonable men, presumably would have agreed upon...[if] they had contracted expressly in reference thereto."

Because of the trial court's rulings on the legal issues before trial, the overall implied contract which the District Court found to exist was simply not the subject of a trial before this jury. It is as though the Third District has now granted a summary judgment finding an implied contract based upon the allegations of the complaint and certain proffered evidence not before the jury. This is a totally erroneous procedure having no basis in Florida law.

In conclusion under this point, the implied contract issues were never tried and the Third District Court of Appeal erred in not recognizing this fact. This was the subject of extensive argument in the University's supplemental brief of January 2, 2001. Although the Court invited these supplemental briefs, this issue was not addressed.

**IV. IN THE EVENT OF A REVERSAL AND REMAND,
THE NEW TRIAL SHOULD CONCERN ALL
ISSUES INCLUDING REINSTATEMENT OF
SHARICK, THE TERMS OF THE IMPLIED
CONTRACT, LIABILITY AND DAMAGES**

Although SEU respectfully urges that the trial court should be affirmed and the opinion withdrawn, in an abundance of caution, we must also note what we believe are serious errors in the opinion regarding the ordered new trial. If left unaltered, the opinion will be used by Sharick as a blank check to be filled in by a new jury with the total earnings of a doctor for a lifetime of medical practice. Because the actual terms of the supposed implied contract were not actually tried below and because the issues of liability and damages were so intertwined, any new trial should address all issues and not be limited solely to damages.

What the District Court actually reversed were the trial court's initial rulings as a matter of law that no valid claims for loss of earnings or earning capacity had been stated. However, instead of simply reversing those legal rulings, the panel has gone much further, issuing an opinion on the apparent assumption that all conceivable issues were tried before this

jury.

If there is to be a new trial, there is no reason not to apply the general law of implied contracts to the case. Bromer v. Florida Power and Light Co., supra. Thus, any implied contract is not limited solely to the handbooks and written materials. Such a contract presents factual questions based on a full trial concerning the four years in question. Of particular importance will be what, if any, deal was struck or implied at the beginning of the term rather than at the end.

If the case is reversed, it will be necessary for a new jury to determine the terms and remedies of any implied-in-fact contract. Quite simply, the first jury was not asked or allowed to make any determination of these terms. Both the terms of the contract and the remedies for a breach should be decided.

A new jury may find a totally different set of facts. SEU respectfully suggests that, if this case is to be retried, then liability and damages are so inextricably intertwined that a complete new trial on all issues must occur. Casper v. Melville, 656 So. 2d 1354 (Fla. 4th DCA 1995) and Watson v. Builders Square, Inc., 563 So. 2d 721 (Fla. 4th DCA 1990). Indeed, the opinion gives Sharick the right to file new pleadings. Surely, SEU also has the right to file pleadings and raise new issues including the possible reinstatement of Sharick.

Here, the first jury only determined that there had been an

arbitrary and capricious dismissal of Sharick. (R. 791). The remainder of the verdict form instructed that the only damages available for such an act were tuition expenses. (R. 791). Thus, the only reasonable interpretation of this verdict was that of an implied contract to refund tuition if the University wrongfully dismissed Sharick. The issues on which the parties were allowed to present proof were restricted under the trial court's pretrial orders.

Sharick originally pled a cause of action for specific performance or reinstatement and same was dismissed in the same order which struck his claims for lost earnings. Sharick appealed the judgment in his favor but actually contested only the pretrial ruling on lost earnings and earning capacity and not the reinstatement issue in the same order. Now the District Court has reversed only a part of this pretrial order. The claim for specific performance providing for conditional readmission (including all pragmatic requirements) was never litigated or considered during trial as an available remedy by the circuit court or jury. The District Court should not have decided this issue as a matter of law. Whether Sharick could have reentered SEU or some other osteopathic university was not tried or submitted to this jury.

The Panel Opinion discusses mitigation of damages in some detail. Again, the opinion assumes too much. Mitigation of damages was never an issue tried or presented to the jury. Although the court's language on of how damages will eventually

be tried may be dicta, it will almost certainly be seen as binding by any trial judge who has been reversed. Thus, the Panel Opinion has ruled on issues which have yet to be pled or proven.

If future earnings based upon an implied contract had been an issue in the trial of this case, then the entire trial would have been a very different proceeding. If the University had known that it was subject to paying Sharick all of the earnings he would have made as an osteopath up to age 65, the case and the proof would have been presented very differently. The University may well have offered some form of relief in the nature of reinstatement. See Behrand v. State of Ohio, 379 S.E. 2d 617 (Ohio Ct. App. 1977) involving a claim for damages based on a loss of accreditation by an architectural school in which nontraditional remedies were considered.

The Panel Opinion states that the alternative remedy of specific performance was unavailable to compel the granting of a degree citing Robinson v. University of Miami, 100 So. 2d 442 (Fla. 3d DCA 1958). However, Robinson never ruled out specific performance to require reinstatement of an arbitrarily dismissed student and in fact left the matter to the sound discretion of the trial court. Also see: Slaughter v. Brigham Young Univ., supra, cited at Sharick 146 note 3 approving reinstatement as a remedy.

This jury was asked to decide simply whether Sharick was entitled to tuition reimbursement based upon actions the jury

chose to term as arbitrary and capricious solely in the context of the damages sought before this jury. If this jury had known that Sharick was actually seeking all the income he would have earned over the next 40 years in the form of a judgment without ever actually working as a doctor, then the jury might well have reached a totally different conclusion on the liability issue. Indeed the jury only awarded Sharick a partial \$45,000 refund on his total tuition claim. Again, we have already suggested that the issues of liability and damages herein are so inextricably intertwined that a total retrial is necessary. At most, this jury ruled there was merely an implied contract to refund some part of the tuition expenses if the University arbitrarily failed a student. Nothing more can be read into this verdict.

In the District Court, 10 judges considered this case and five of them expressed the view that reinstatement was the most appropriate remedy. Four of the judges concluded that Sharick should have appealed that reinstatement issue. Indeed, Sharick appealed and obtained a reversal of one sentence out of the trial judge's order but did not seek reversal of the other sentence concerning reinstatement. Now, the District Court has remanded for a new trial and foreclosed the issue of reinstatement from being considered. Thus five judges have found reinstatement to be the most reasonable alternative and the other five judges have not ruled directly on the subject. We suggest this was also error and to retry this case without the reinstatement issue would certainly be error.

As we have already urged, the relationship between a university and a student is a unique one and may well call for unique remedies rather than mere resort to extreme money damages. Lost future earning capacity, lost profits and the like are concepts born of tort remedies and should not be so easily transferred to this unique relationship of university and student. We thus suggest that in the event this case is to be remanded, the trial court should be given the opportunity to fashion a remedy under the traditional approach of the benefit of the bargain. That bargain must be no more than both parties would have agreed to when Sharick began as a student. If necessary, future tuition, expenses and other monetary adjustments may be necessary and reinstatement may also be appropriate.

CONCLUSION

The petitioner University contends this is an extremely important case to the universities of the state of Florida and to their students. The Third District's decision does violence to the law of certainty of damages in contracts and to the law urging restraint on judicial decisions concerning academic conduct by universities. The Third District should not have imposed tort remedies. This Court should consider the various alternatives. The trial judge could be affirmed and the \$81,000 judgment, which has already been paid, will end the controversy. If a new trial is to occur, then it should be on all issues pursuant to an opinion by this Court providing guidance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished by mail to the following this _____ day of January, 2002:

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