IN THE SUPREME COURT
STATE OF FLORIDA

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

Petitioner/Defendant,

SC Case No.: SC01-969
DCA Case No.:3D98-2674

vs.

KEITH M. SHARICK,

Respondent/Plaintiff.
_____\

RESPONDENT'S BRIEF ON THE MERITS BY KEITH M. SHARICK

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

Page

OTHER STATUTES

STATEMENT OF CASE AND FACTS

This case arose from the expulsion of Keith Sharick (hereinafter referred to as Sharick) by Southeastern School of Osteopathic Medicine (hereinafter referred to as Southeastern). Southeastern concluded that Sharick failed the only remaining course he needed to graduate, the rural rotation at Okeechobee. In fact, Sharick never failed the rotation which the school claimed was the reason for his dismissal.

By the exercise of sheer capriciousness and raw power, Southeastern arranged with its physician in charge of that rotation, Dr. Ham Ying, to fail Keith Sharick based on a review of Keith that lasted less than one hour and consisted of two patients who, Dr. Ham Ying admitted at trial, Sharick handled properly. (T.363-373,559-610). The examination at trial of Dr. Dana Richard, the other physician at the Okeechobee rural location, and the one with whom Sharick had spent virtually all his time, revealed that Dr. Richard himself was highly displeased with the treatment visited on Sharick.(T.658-703)

After being advised that he had failed the rotation, Keith Sharick was afforded to two Kangaroo courts,("Appeals") one with Dr. Matthew Terry, the Dean and another with Dr. Arnold Melnick, the Vice President of the school. The tapes and transcripts are attached in the record as Appendices to the Initial Brief of

Sharick before the Third District Court of Appeals and speak for themselves.(Appendix Exhibits 1,2)

At the end of the Melnick interview, Sharick was ignominiously thrown off the premises, Dr. Melnick told Sharick he would be arrested if he returned.

Based on the foregoing conduct, Sharick filed a number of Complaints against Southeastern (R.1-29,219-229,324-337,355-370,391-400). In those Complaints, Keith Sharick alleged intentional infliction of emotional distress, implied or expressed contractual breaches, defamation, reinstatement and punitive damages. Yet, by the time of trial on 8-18-98 the only theory that was permitted was breach of contract. Said breach had to be proven to also be arbitrary, capricious and without any discernable reason.

Prior to trial, on 6-1-98 (R.769-772) Keith Sharick moved to include loss of wage earning capacity in the damages. The Motion was denied.

At Motion in Limine, 8-14-98 (R.782-787), Keith Sharick reiterated his request that loss of future earning capacity be considered as part of the damages in the case. The trial court denied that Motion.

On 8-20-98 the jury found that Southeastern had acted arbitrarily, capriciously and without the slightest discernable cause when it dismissed Sharick.

Yet, it could only award him the damages that the court had allowed which was a refund of his tuition.(8-20-98)(R.788,791).

Sharick filed a Motion for New Trial on Damages only which was denied.(9-11-98)(R.818-827) The appeal to the Third District followed as a result of which Sharick prevailed. Southeastern's Motion for en banc review was denied. Southeastern then moved for review in this Court which was granted.

INTENTIONS AND EXPECTATIONS OF THE PARTIES AT THE TIME OF THE ENROLLMENT OF KEITH SHARICK

The Student Handbook for 1992-93 governed the period when Keith Sharick was a student (Appendix Exhibit No.3 Trial Exhibit No.9) stated in the Preface:

> "The objective of the university is to offer the finest professional health care science, training and education to his students with the purpose of developing competent family physicians, pharmacists and optometric physicians who can serve in all areas of our region. Toward that end, this handbook will offer a description of university facilities, financial affairs, academic affairs, policies and procedures, student services, student activities and on-campus university services."

The Handbook proceeds to identify Southeastern endorsed organizations whose goal is to produce Osteopaths.

UNDERGRADUATE CHAPTER OF AMERICAN COLLEGE OF GENERAL PRACTITIONERS AND OSTEOPATHIC MEDICINE AND SURGERY

(Appendix Exhibit No. 3 Trial Exhibit No.9)

The undergraduate chapter of the AGCP has been organized for all students in the college. Its objective is to advance study of general practice in the field of osteopathic medicine and surgery.

The organization works toward the preservation of the concept of General Practice and the continued existence of the role of the General Practitioner in the total picture of osteopathic medicine services in the community. The chapter recognizes the fact that the general practitioner is the backbone of modern medical practice.

The Florida Society of the AGCP is the state division of the national organization and maintains a direct liaison with the chapter. While the overall objectives are similar, this group addresses and responds to those issues and problems unique to the osteopathic general practitioner in Florida.

UNDERGRADUATE FLORIDA OSTEOPATHIC MEDICAL ASSOCIATION

The Undergraduate Florida Osteopathic Medical Association, FOMA, is a student division of the state osteopathic association. It is open to all osteopathic students and deals with those medical and political issues unique to the State of Florida.

The Catalogue for the School demonstrates again and again that the School's purpose is to educate and train osteopaths.

SOUTHEASTERN UNIVERSITY OF THE HEALTH SCIENCES CATALOGUE - 1991-1993
(Appendix Exhibit No.4 Trial Exhibit No.7)

> Our mission is to train health professionals who will make an impact and fulfil a unique need in society with our commitment to the under served, and to geriatric minority and rural health care we are reaching patients who have fallen through the cracks of the traditional medical system."

HISTORY

> The Southeastern University of the Health Sciences was born out of the commitment and determination of a core group of osteopathic physicians to further the profession and perpetuate the tradition of service unique to the practice of osteopathic medicine."

AN OSTEOPATHIC PHYSICIAN

> Because osteopathic physicians provide something more, not something else, communities are experiencing a period of phenomenal need for osteopathic services. A study of osteopathic education foundered by the Kellogg Foundation called Osteopathic Medicine, the fastest growing health care profession.(italics added). Southeastern views with pride the role it is playing in the ongoing development of osteopathic medicine.

COURSE OF STUDY

> Southeastern's four year curriculum leading to the DO degree has for its goal the preparation of the student for the general practice of osteopathic medicine. A qualified faculty of certified and board eligible physicians, competent PhD's and supportive staff will carry out the program's objectives.

There is no question that Keith Sharick had the grades to graduate. Attached is a letter, not three months before his dismissal, from Dean Terry to that very end.(Appendix Ex. No.5, Trial Exhibit No. 31) Further, Keith Sharick admitted into evidence a contract for a one year post graduate internship after which he would be able to practice.(Appendix Ex, No. 6, Trial Exhibit 36). Dr. Neer, one of Southeastern's administrators involved in this case testified that he practiced since 1954 upon finishing a one year postgraduate internship.(T.67) Southeastern requires that all graduates have the ability to treat patients upon graduation. Dr. Neer further stated that he did not know of any students who could finish at another school after being dismissed for academic reasons.(T.81) He agreed that at graduation any graduate could be a medical examiner.(R.191) Sharick proffered the report of his psychiatrist Dr. Ronald Friedman to establish that since the incident Keith has suffered a profound depression. (Appendix Exhibit No.7)

Sharick further proffered the economic report of his expert economist Dr. George Reavey (Appendix Exhibit No.8) which indicated that as a family practitioner osteopathic physician Keith Sharick had a loss of earning capacity of $1,411,959.

SUMMARY OF ARGUMENT

SECOM argues three points.

First, Secom cites one of the Third District judges who voted with the minority to grant en banc review to prove that there were "reasons for the dismissal" of Sharick. This issue was extensively litigated before the jury by both parties. The jury found not only that there were inadequate reasons to dismiss Sharick but that there was no reason to dismiss him.

Seacom had the opportunity to appeal that verdict to the Third District but failed to do so. It strains credulity for Seacom to now cite to a decision of no precedential value whatsoever so that this court might by suggestion review the jury verdict which SECOM saw fit not to appeal.

Second, Seacom argues that the verdict did not mention an implied in fact contract. However Seacom has conceded that the only cause of action that was tried in this case was breach of an implied in fact contract. When jury instructions were submitted Sharick did submit a jury instruction mentioning the contractual basis (Exhibit 1) the court chose to use Seacom's instruction,(Exhibit 2) but as a factual matter the record in this case is replete with the references to the Student Handbook

for 1992 and 1993 (Plaintiff's Exhibit 3- Trial Exhibit 9- this brief pgs. 3-6) and the Student Catalog for 1991 and 1993 (Plaintiff's Exhibit 4 - Trial Exhibit 7- this brief pags 3-6) which laid out the basis of the relative obligations of the students and the University.

All this was litigated at the trial court level before a jury and not appealed by Seacom. Furthermore, the case law, as will be seen, is unequivocal in these college expulsion cases that the cause of action is for breach of implied in fact contract and when the Florida case law, albeit sparse, is reviewed, this will be obvious to the court.

Third, Seacom argues that the jury did not hear whether Sharick could mitigate his damages nor did they hear whether he could be admitted to another school. As to the latter point, the school administrator Dr. Neer testified that Keith could not be admitted to another school. Both these matters were issues of defense to be adduced by Seacom. It is highly inappropriate for Seacom to rehash these factual issues or tactical stratagems in this forum when Seacom should have brought forth these matters at trial or on plenary appeal.

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS CASE BECAUSE THERE IS NO EXPRESS AND DIRECT CONFLICT OF DECISIONS

Article V, Section 3(b)(3) of the Florida Constitution enables this court to review a decision of the District Court of Appeal that expressly and directly conflicts with the decision of another District Court of Appeal or of this court on the same question of law. Article V, Section 3(b)(3) Florida Constitution 1980; Florida Rules of Appellate Procedure 9.030(a)(2)(iv). It has long been recognized that there is a difference between whether this court has jurisdiction in a case and whether this Court will exercise that jurisdiction.

Based upon the 1980 revisions to the Constitution, this court's jurisdiction is focused upon the power to resolve decisional conflicts in the body of the law.

This court has discretionary jurisdiction only if the decision of the District Court expressly conflicts with the decision of the Supreme Court or another District Court of Appeal. It is not enough to show that the District Court decision is effectively in conflict with other appellate decisions. The term expressly requires

written representation of expression of the legal grounds according to the decision under review. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). The District Court in conflict must at least address the legal principles applied as a basis for the decision. Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981). This court must look to the opinion of the District Court to determine whether the decision is in conflict and the opinion must be a majority opinion on the point of law that is the subject of the alleged conflict. Kennedy v. Kennedy, 641 So. 2d 408 (Fla. 1994).

Particularly applicable to this case, discretionary jurisdiction cannot be based on a conflict existing in a plurality opinion on an en banc hearing or rehearing because the opinion is not the decision of the court. Intra-district conflicts are now addressed by the rehearing en banc procedure.

In this case the Third District Court of Appeals citing 17 Florida Juris 2d Damages, Section 18, followed Hadley v. Baxendale, 9 Exch. 341. Thus the law of damages in this case harkens all the way back to early principles of English jurisprudence. That principle is universally accepted.

In this case there was a contract, the contract was understood to mean that for the payment of tuition and the attainment of the required academic and professional

standards the graduate would be able to practice as an osteopathic physician. In fact, the very Student Handbook and Student Catalog that the University provided plaintiff Sharick in this case, unequivocally indicated that if he completed the course work he would be prepared to practice as an osteopathic physician. Thus the standard of damages was set.

But more important, there is no other case by any other District Court of Appeal or this court which has held to the contrary. This is because none of the other higher education cases in Florida, Stetson University v. Hunt, 102 So. 637 (Fla. 1924); Robinson v. University of Miami, 100 So. 2d 442 (Fla. 3d DCA 1958), and University of Miami v. Militana, 184 So. 2d 704 (Fla. 3d DCA 1966) ever reached the issue of damages. Their decisions with regard to their students were upheld by application of the strict protections provided to institutions of higher learning in the opinions of the appellate courts.

The Sharick case was the first case in which the student successfully challenged the University's exercise of power and thus the first case to confront the issue of damages.

There is no jurisdiction because there has not been another case in this area of the law where affirmative relief was determined to be appropriate which could form the basis of a conflict with Sharick.

The only opinions which literally conflicted in this case were the opinions of minority of Judges voting for a rehearing en banc. This type of intra district conflict in the context of a denied motion for rehearing cannot be the basis of a conflict jurisdiction. The same reasoning would apply to a minority opinion of a three judge panel. Even though that opinion would conflict with the majority, it would not be considered as a basis for conflict jurisdiction because only majority decisions are considered on the point of law that is the subject of the alleged conflict. Kennedy v. Kennedy, 641 So. 2d 408 (Fla 1994)

In this case, it is the initial decision of the Third District that stands as the decision of the court and thus there is no conflict jurisdiction. To find conflict jurisdiction in minority en banc decisions would mean that every en banc decision of any kind in every District Court in the State of Florida could result in Supreme Court review based upon conflict. Sharick would submit that this was not the intention of the Constitutional drafters.

II. EVEN IF THIS COURT TAKES JURISDICTION THE OPINION OF THE THIRD DISTRICT COURT OF APPEALS IN THIS CASE IS CORRECT.

The Third District's opinion was grounded in the Florida jurisprudence of Stetson v. Hunt, 102 So. 637, 640 (1924) and University of Miami v. Militana, 184 So. 2d 701, 704 (Fla. 3d DCA 1966). These cases held that the terms and conditions for graduation are those offered by the publications of the college at the time of enrollment

> "as such they have some of the characteristics of a contract between the parties and are sometimes subject to civil remedies in courts of law".

It was based upon these decisions that the implied in fact contract became the basis of the relationship between the University and the student.

In this case, the Student Handbook as cited by the Third District in Sharick v. Southeastern University of the Health Sciences Inc., 780 So.2d 186 (Fla. 3rd DCA 2000) stated that the objective of the University was to offer healthcare science training, etc. for the purpose of developing competent physicians who can serve in all areas of our region.(italics added) The Handbook proceeds to identify Southeastern

endorsed organizations whose goal is to produce osteopathic physicians. This was the evidence in this case.

The Militana case stated that a mere mistake by the University was not enough but rather it must be shown that the action in the matter complained of was wanton, willful or malicious. Militana, 236 So. 2d at 164. This was why in Militana, a medical student who barely passed from his first year in school, was on probation almost every year thereafter and finally was dismissed obtained no recovery because he was either correctly expelled or if incorrectly expelled not treated arbitrarily or capriciously.

Seacom argues that it has the benefit of the high standard that protects universities from interference with its academic decisions. This is the doctrine of restraint that applies in making liability determinations in the context of these cases. This has nothing to do with the award of damages in such a case. The University is being protected in the first instance by this extremely high standard of care that has to be violated in order for an implied in fact contract to be breached.

Because Seacom never appealed the jury verdict it asks this Court that if there is to be a remand to have all matters tried again so that it's failure to appeal would be rectified by the order of this tribunal. Even universities don't merit that much

protection from their own mistakes.

The critical finding by the Sharick court was that the record in the case established that but for Sharick's dismissal from the University he would have obtained his DO degree. The Third District recognized that the record established a basis for the income loss for a normal osteopathic physician. These figures are readily available, they were proffered to the trial Court as the basis on which a forensic economist would testify. (Plaintiffs Exhibit Five- Trial Exhibit - Plf.. Proffered Evidence - 93-15077 CA-32 Preliminary Economic Report).

This is not to say, as the Third District noted in Sharick, that there are not other issues that can and should be litigated upon retrial. It is up to the jury to determine the quality of the resulting impairment to show its effect on earning capacity based on reasonable inference.

This Court must only determine whether the threshold legal test for certainty for has been met. Whether the various prerequisites to practice were reasonably

certain to have been met. i.e. Part II of the Medical Boards, internship, licensure and any practice vicissitudes are matters for the trial court on remand.

The tort law corollary to the contract law rule on certainty is the finding of reasonable foreseeability of damage as a whole, the proximate cause issue, which is determined by the trial court as a matter of law.

The certainty finding required in a contract case for the award of future wage loss or lost earnings is such certainty as satisfies the mind of a prudent, impartial person

Here, it was in the contemplation of the parties that the consideration to Sharick was that in exchange for tuition, matriculation and compliance with all reasonable rules, Sharick would be educated, trained and qualified to be an osteopathic physician.

On remand, both parties will be free to present evidence as to what impact Sharick's academic and clinical performance may have had upon his ultimate success as an osteopathic physician. In other words, the Third District decision did not reach the conclusion that Sharick merely needed to introduce the economic conclusions of his forensic economist and the jury would be obliged to award it. Every variable that would impact upon his ability to earn more or less would be subject to litigation.
If the trial court concludes that the evidence is uncertain as to any or all of the particulars then the court can direct a verdict or accept the verdict and enter a

judgement notwithstanding the verdict and the parties could then appeal with the fullest possible record.

The Sharick court, supra p. 138 fn. 1 also recognized the obvious fact that no court could force the University to reinstate Keith Sharick and referred to the Milatana decision at 236 So. 2d 164, and Robinson v. University of Miami, 100 So. 2d 442, 444-45 (Fla. 3rd DCA 1958) where the alternative remedy of specific performance by mandamus was held unavailable to compel the granting of a degree where an educational institution has exercised its discretion in refusing to confer such.

. Seacom makes much of the fact that the Miller V. Allstae Insurance Co., 573 So.2d 24 (FL 3d DCA 1990) case does not to apply in this situation. They argue that Miller concerned an express contract whereas here there is an implied in fact contract. Sharick would argue this is a distinction without a difference. Once a contract is found to exist, then the applicability of the rules regarding damages should logically not be any different than the rules cited in Miller. Seacom states that in Miller, which concerned a ladder disposed of by the defendant, that the defendant can't take advantage of the uncertainty caused by their wrongful acts. At bar, Seacom can't take advantage of the uncertainty it caused by preventing Keith from attaining his DO degree thereby preventing him from taking his Part II of the national medical testing, entering his internship and fulfilling any licensure requirements. The fact that he was

prevented from achieving those goals and that now his accomplishment of them are uncertain is the fault of Seacom for wrongfully expelling him just as much as it was the fault of the party in Miller for destroying the evidence.

Seacom also tries to distinguish the WW Gay Mechanical Contractors, Inc. v. Wharfside At Two Ltd., 545 So. 2d 1348 (Fla. 1989). The losses in WW Gay were losses due to the fact that there was unpleasant odors in the hotel. As demonstrated by the proffered evidence, it is quite straightforward to calculate losses to a sole practitioner osteopathic physician. The numbers are readily available and the parameters are relatively few in contradistinction to a hotel with unpleasant odors. At first impression the following issues come to mind. Where are the foul odors? How many floors, rooms are involved. Does the unpleasant odor affect everyone? Can some people tolerate while others can't? It presents a much more problematic situation for determination of damages than this case. And yet this court felt that the damages were sufficiently certain..

The Third District in Sharick did not grant any future damages in its opinion. It only granted Sharick the opportunity to present to a jury his evidence as to what that amount ought to be with both parties entitled to use all relevant evidence to contest the amount of damages.

It has been suggested that the relationship between Sharick and Seacom is a

noncontractual agreement to provide future income and profits. This is an inaccurate characterization. What was held by the jury in the lower court and not appealed was that there was an implied in fact contract that was arbitrarily and capriciously breached by Seacom. The Third District held in Sharick that being prepared as a osteopathic physician was within the contemplation of the parties at the time the contract was commenced. Further, that Sharick was entitled to be placed in the position he would have been had the contract been performed. These are contractual principles. As a result Sharick has the right to litigate future wage loss based on the same being within the contemplation of the parties at the time

There is no question that as to the determination whether a student should be expelled or placed on probation or fail the year or anything of that nature, both from a standpoint of academics or conduct, the University has discretion. As a matter of fact both Stetson and Militana, are clear that the discretion is so broad that the University cannot be questioned unless their determination is arbitrary, capricious and without any basis in fact. There can be no greater extent of discretion allowed than to permit the University to impose any sanction so long as there is any basis in fact to do so.

However neither Stetson and Militana pertained to damages, but rather to evaluating students in different circumstances. In Stetson, the student was a young

lady who misbehaved at parties and was punished based on conduct. In Militana, it was a medical student who failing the courses. Both cases held that the university did not act arbitrarily, capriciously or without any basis in fact. So long as there was a basis in fact. Neither case reached the issue of damages.

That being said, on the issue of damages there is no indication, in either of those cases, that there would be some change from normal damage principles in the event that the universities had acted without any basis in fact. Therefore it is incorrect and over broad for Seacom to argue that there is a special doctrine of damages for universities that is different from the doctrine applicable to any other party.

The special doctrine for universities relates to liability not damages and concerns evaluating the universities determinations regarding students that are suspended, expelled et cetera However; once the university acts in violation of this most restrictive standard, there is nothing in the jurisprudence that then precludes wage loss as part of future damages, or that in order to prove wage loss one must prove it by a standard other than the reasonable man standard.

III. THE TRIAL COURT TRIED THE IMPLIED IN FACT CONTRACT AS THE THEORY OF RECOVERY

Seacom contends that there was no trial of the implied in fact contract, relying solely on the jury instruction which stated

> "did Seacom dismiss Sharick arbitrarily, capriciously and without any discernable reason".

There are a number of problems with this assertion which appears repeatedly throughout SECOM's brief. First, this case was tried to the jury on one cause of action, and one cause of action only, and that cause of action was the only cause of action that the case law allows in these type of cases. The cause of action was a breach of an implied in fact contract, said contract being implied from the Student Handbook and other materials presented by the University to the student at the time of enrollment.

The record in this case is replete with the fact that the Student Handbook and Student Catalog stated as their goal the development of osteopathic physicians. See this brief pgs 3-6.

In fact, this is the only cause of action which the law allows in regard to dismissal by a university.

One of the other issues that Seacom repeated throughout its brief was its entitlement to extreme deference as to its decisions with regard to student dispositions. The case law is clear, coupled with the Student Handbook and Student Catalog as the basis for the implied in fact contract that it is not enough to prove that the University wrongfully expelled a student but it must also be proved that they did so arbitrarily, capriciously and with no discernable basis in fact.

This was the cause of action that was pled, this was the only cause of action that was available to plaintiff.and this was the cause of action that was proved to the jury. The transcript is replete with references to this standard of proof and the aevidence has pinpointed portions of the enrollment materials that established the contract.

Seacom, who failed to appeal the verdict against it, now asks this court for a new trial on all issues and suggests that Sharick should have appealed the denial of the reinstatement count by the court. First, Sharick has previously demonstrated that the case law teaches that reinstatement is unavailable, that one cannot force the University to reinstate someone as a student. Second, it is an accepted precept of injuctive law

that negative injuctions can be enforced but not positive injucntions. The coourts prevent can prevent violations but not mandate compliance.

IV. THE AFFIRMANCE OF THIS DECISION IS GOOD POLICY AND THE ALLEGED NEGATIVE CONSEQUENCES OF THIS DECISION ARE NOT VALID

The alleged unintended negative consequences of this case are argued to be an encouragement of unnecessary litigation, a discouragement of university discretion and an increase in insurance.

This case is an extremely limited factual situation where the student has completed all but one course over a four year period and has been failed on the the last course of the last semester of the last year. No one can be closer to graduating. These facts apply to a very few cases. Any other cases by definition are further removed from the facts of this case and would be all the more difficult to prove.

Any new cause of action is always criticized as causing unnecessary litigation. Yet time after time, the courts are easily able to sort out the wheat from the chaff and to impose the necessary penalties if warranted. What is ironic in this case is that this is not a new cause of action but has been present at least since the decision in Stetson.

It has not been abused presumably because so few students are sanctioned for no reason.

As to discouraging discretion, this case should discourage the discretion to act arbitrarily and capriciously by a misuse of power.

Actions taken by University based on facts with the goal of good graduates should not and are not discouraged under this standard. It is true that the University is accorded great respect in its decisions but it is not accorded the right to be a dictatorship making decisions based upon no facts whatsoever which is the standard one must prove to show that the University violated their contract with the student.

Finally, as far as insurance is concerned, the limited class of cases in which liability is found, and then, of those cases, the number in which damages would be awarded for future loss of career would minimize any insurance cost. Even this case, with egregious liability may result in a small award once tried on damages to the jury for reasons already discussed in the briefs.

The concern of the University is to be able to exercise its power to sanction students free from the prospect of paying damages for a "lost career". If such damages are allowed in any case, this will have a chilling affect on an important function of higher education, to cull out those who may ultimately be a threat to their own patients. Colleges will err on the side of allowing unqualified professional school

students to graduate in order to avoid the prospect of "lost career" damages.

The concern of the students is to forego years of their lives, other careers, pay or borrow tuition only to lose their career for no reason receiving only a tuition refund to repay their student loan for their trouble. This will have a chilling effect on the enrollment of prospectively excellent practitioners. Those who do will enroll will stifle academic curiosity and challenge based on the knowledge that they can be expelled for any reason at with a tuition refund only. The university will be able to expel qualified professional. school students for any reason knowing that a tuition refund is their maximum exposure. Further what lawyer would take the case of an impoverished student whose maximun contingency payment would be a percentage of the tuition refund.

Sharick submits that an award of damages beyond a tuition refund, regardless of the nature of the expulsion, can be adopted which takes into account the interests of both parties. The flexibility of the common law to process the continuum of cases of expulsion and apply the appropriate remedy provides the solution for this situation.

The university asks this Court for a damage cap limited to a refund of tuition. no matter how egregious their actions, how close the student is to graduation or that the expulsion prevents completion of any other program. The university seeks to avoid responsibility for not only its breach of contract but also its arbitrary, capricious and

baseless actions.

The university is concerned that a jury can be persuaded that an expulsion was arbitrary, capricious, with no discernible reason and that the student would otherwise graduate.

There are three mechanisms within the system that address such concern. First, the trial court can dismiss the action either through preliminary motions, motions during trial and motions post verdict. For example, in this case every other cause of action, besides the rule of liability upon which the verdict was based, was dismissed by the trial Judge on motion to dismiss or summary judgment. Second, juries should not be underestimated. In this case, the evidence was overwhelming that the school failed Sharick on his last class for no reason. Even Doctor Ham-Yang, who failed him, so admitted at trial.(T. 363-373,559-610) Third, the sufficiency of the evidence to support the verdict can be challenged on appeal. The University chose not to do so here.

If Sharick prevails here, he still must convince a jury that he should be compensated for the loss of his entire career. The jury could decide not provide that compensation, to provide it for a limited number of years and/or to offset against what Sharick can earn with his training. That verdict is subject to review as to sufficiency of the evidence and application of the proper legal rules.

The University would have this Court establish a unique judicial damage cap. Sharick submits that such a cap is a legislative rather than a judicial function which, if implemented, would have the effect of encouraging universities to exercise the power to arbitrarily and capriciously, expel or otherwise discipline professional students for no discernible reason whatsoever.

The interests of the parties can be accommodated most efficiently through the common law. At present, there has not been a reported case awarding the right to a jury trial on "lost career" damages as a remedy for unjustified expulsion. This could mean, among other outcomes, that universities prior to this case have never expelled a professional student without cause, or that the students have taken their tuition and left so the universities concluded they could expel their professional students without fear of paying "expectation" rather than "reliance" damages.

This case would carve out a narrow exception to the existing law.

First, there is an uncontested jury verdict that the university not only breached this contract but did so arbitrarily, capriciously and without any discernible reason. (R.788,791) This case is not only a contract case. The courts, recognizing and giving special protection to the actions of the university vis-a- vis students, also required that the university act arbitrarily, capriciously and with no basis in fact.

Second, Sharick was failed seeing his last patient in his last course of the entire

osteopathic physician program. There was no question as to this fact. It was established in the record and not appealed.

Third, Sharick could not finish elsewhere once he failed at Southeastern.(T.81)

Fourth, Sharick already had a contract for a one year post graduate internship after which he would be able to practice.(Appendix Ex. No. 6, Trial Exhibit. No. 36)

Fifth, one of the administrators at Southeastern, Dr. Neer, testified that he had practiced since 1954 upon finishing a one year post graduate internship and that students have the ability to practice upon graduation.(T.67)

Given these facts, Sharick was as close as one can be to graduating and practicing. Therefore this case presents facts of negligent expulsion of a student at the precipice of practice.

The interest of the university is preserved in that unless an administrator expels a student in his last class for no reason, not to mention the arguments already briefed, there is no basis for awarding "lost career" damages. The interest of the student is protected in that a student need not fear completing all but one class and then being denied his career for no reason.

> "This college cannot take the money of a student, allow him to remain and waste his time,(because it would be a waste of time if he cannot get a degree) and then arbitrarily refuse, when he has completed his term if study, to confer upon him that which they have promised, namely, the degree..."

People Israel. Cecil v. Bellevue Hosp. Med College, 14 N.Y.S. 490 (App.Div.1891) aff'd 28 N.E.253 (N.Y.1891); See also: Booker v.Grand Rapids Med.College, 120 N.W.589,591 (Mich.1909)

CONCLUSION

It is respectfully requested that this case be dismissed for lack of subject matter jurisdiction or in the alternative that the decision of the Third District Court of Appeals be affirmed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the foregoing document has been served by U.S. Mail on this 11th day of March 2002 to the following: John Beranek, Esq., P.O. Box 391, Tallahasee, FL. 32301, Thomas Panza and Mark Hendricks, Esqs., 3600 N. Federal Highway, 3rd Floor, Fort Lauderdale, FL 33308, Donald A. Tobkin Esq., P.O. Box 220990, Hollywood, FL 33022, Stephen H. Grimes and Susan L. Kelsey Esqs., P.O. Drawer 810, Tallahasee FL 32302, Kathryn B. Johnston Esq.,1962 26th Ave., Vero Beach, FL 32960.

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