IN THE SUPREME COURT
STATE OF FLORIDA

SOUTHEASTERN UNIVERSITY OF THESC 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.
_________________________________/

REPLY BRIEF ON THE MERITS BY PETITIONER,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND FACTS 1

ISSUES ON REVIEW 5

ARGUMENT 6

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 6

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 10

III.THE IMPLIED-IN-FACT CONTRACT FOUND BY THE DISTRICT COURT WAS NEVER TRIED BEFORE THIS JURY. 11

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 12

CONCLUSION 14

CERTIFICATE OF SERVICE 14

CERTIFICATE OF TYPE SIZE AND STYLE 14

TABLE OF AUTHORITIES

CASES

Brock v. Gale,
14 Fla. 523 (Fla. 1874) 6

Bromer v. Florida Power & Light Co.,
45 So. 2d 648 (Fla. 1944) 7, 8

Douglass Fertilizers and Chemical, Inc. v. McClung Landscaping, Inc.,
459 So. 2d 335 (Fla. 5th DCA 1984) 6

Kennedy v. Kennedy,
461 So. 2d 408 (Fla. 1994) 7

Miller v. Allstate Insurance Co.,
573 So. 2d 24 (Fla. 3d DCA 1990) 8, 9

Slaughter v. Brigham Young University,
514 F.2d 622 (10th Cir.) 11

STATEMENT OF THE CASE AND FACTS

In an attempt to dodge the question of what issues were actually tried and decided by the jury in this case, plaintiff Sharick presents an emotional factual statement casting the University in the worst possible light. Plaintiff criticizes the University's reference to the dissenting opinion which recited some of the actual reasons for Sharick's dismissal. These reasons were quoted on the first page of the Petitioner's brief on the merits. These reasons came from Sharick's own exhibit #12 which was a letter of February 22, 1993 by Dr. Ham-Yng, M.D., of the Florida Community Medical Center. Dr. Ham-Yng sent this letter complaining about Sharick's conduct to Dr. Howard Nerr of University. Sharick exhibited serious deficiencies during his rotation at the medical center operated by Dr. Ham-Yng. The letter of February 22, 1993 ended with the doctor Ham-Yng's comment: "He [Sharick] will not be allowed to see patients in any of my facilities regardless of what action you [the University] deems appropriate." This was the rural rotation course which Sharick failed and the reason he failed to graduate.

The opposing factual statement makes reference to "kangaroo courts" which is counsel's own term. A reference is also made to certain tapes but these tapes are not before this Court and there is no Appendix to the Sharick brief before this Court.

The opposing statement of the facts relies upon evidence proffered during the trial out of the hearing of the jury.

(Sharick Br. 6, 7). The University again points out that it had no responsibility to cross-examine or present evidence in response to proffered evidence from the plaintiff. There were simply no issues tried as to the terms or remedies available under the supposed implied-in-fact contract other than tuition reimbursement. Proffered evidence from a psychiatrist concerning Sharick's depression and proffered evidence from an economist as to the millions of dollars that Sharick might have earned as a doctor had been excluded based on two pretrial orders. (R. 353, 401). Evidence regarding most all of Sharick's theories was excluded at trial and from any consideration by the jury. The two pretrial rulings occurred well before the trial and even the Sharick brief makes this clear at p. 2 where Sharick complains of these pretrial rulings citing (R. 769-772 and 782-787).

The Sharick brief relies several times on (T. 81) which purportedly shows that Sharick would never have been able to get into another osteopathic school. At (T. 81), the witness was asked if Sharick could get in another school and answered:

> A. Okay. What osteopathic school? I don't know. He'd have to –– the student would have to make the application and find out. I have no way. This is a very unusual situation. It's rare.

Whether Sharick could enter another university was simply not an issue in the case as tried. Again, we ask the Court to simply look to the instructions and the verdict form which asked only two questions: (1) whether Sharick's dismissal was arbitrary and

capricious, and (2) if so, whether he was entitled to recover tuition reimbursement.

The jury answered "yes" to the first question but awarded only a portion ($45,000) of the claimed tuition amount. (R. 791). The University paid this amount plus interest and Sharick accepted the payment and the University did not appeal. Despite his acceptance of the payment, Sharick did appeal. At most, this jury found an implied contract to refund a portion of the tuition Sharick had paid.

We again point out that the terms and remedies of the supposed implied-in-fact contract were never the subject of this trial and were certainly not submitted to or decided by this jury. However, the Third District Court of Appeal, in its panel opinion, has reversed the trial court and remanded solely for a trial on damages for future loss wages, lost earning capacity, and profits growing out of Sharick's professional life as a doctor. The Third District directly found liability for breech of implied contract and most certainly did not leave open the question as to whether the University could be found not liable for damages. The District Court of Appeal determined liability for a lost career as a matter of law. In doing so, the court detailed what it saw as the terms and remedies contained in the implied contract. The court found "lost prospective profits" as the "yardstick" for Sharick's profits in his new business venture. Sharick at 141.

At the last two pages of the trial transcript, after the

verdict had been returned, the plaintiff moved to amend all pleadings to conform to the proof and this motion was denied. The Third District Court of Appeal overlooked this ruling and wrote the panel opinion as though all of these issues had been fully tried and defended against.

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

Respondent argues an absence of conflict asserting that there is no Florida case involving a university which reaches an opposite result. In doing so the respondent disregards all of the conflict cases cited and argued by the University in its two briefs before the Court. There is abundant Florida law holding that damages for future lost earnings must be reasonably certain and that in implied contracts, all damages must be within the contemplation of the parties based on an implied contract which the parties would have agreed to had they reached an express contract.

Sharick's brief does not mention Brock v. Gale, 14 Fla. 523 (Fla. 1874), as cited and relied upon in Douglass Fertilizers and Chemical, Inc. v. McClung Landscaping, Inc., 459 So. 2d 335 (Fla. 5th DCA 1984). Indeed, Gale dealt with the future earnings of a dentist rather than the future earnings of an osteopath and Gale, as reaffirmed in Douglass Fertilizers, held that such "profit or income" is too remote and too uncertain for recovery under Florida's implied contract law. Clearly, the same principles of law should apply to both dentists and osteopaths.

Citing Kennedy v. Kennedy, 461 So. 2d 408 (Fla. 1994), Sharick argues that the University is attempting to show a conflict between the several opinions issued by the various judges within the Third District Court of Appeal. This is simply incorrect as indicated by the Jurisdictional Brief before this Court. There is no attempt whatsoever to demonstrate a conflict between the majority opinion and the dissenting opinion within the Third District Court of Appeal. Obviously these two opinions are in direct conflict but this conflict does not create jurisdiction. The conflict exists with the other district courts. The Kennedy decision is relevant only insofar as it makes clear that this Court will closely analyze all of the opinions issues by a district court of appeal when proceeding en banc. In the present Sharick case, an analysis of the three opinions issued by the Third District Court of Appeal fully demonstrates the direct conflict with case law outside the district.

The case law requiring reasonable certainty of future lost income or profits also requires that such damages be within the contemplation of the parties when they make their implied contract. Here the Third District Court of Appeal has held 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. In Bromer v. Florida Power & Light Co., 45 So. 2d 648 (Fla. 1944) at p. 660, this Court held that future damages under an implied-in-fact contract must be

within the contemplation of the parties and that a court is limited to giving effect to what "the parties...presumably would have agreed upon" as "fair and reasonable men." The Third District did not recognize this directly applicable principle of law despite the fact that it was argued to the court. Again, there was no trial and no evidence on whether the University would have agreed with any student to pay for a lost career even for a wrongful and arbitrary termination.

The panel opinion by the Third District at Sharick 140, "acknowledged the requirement for certainty of damages in a contract action" but then resorted to the "modifying doctrines to this rule" found in the Third District's own decision of Miller v. Allstate Insurance Co., 573 So. 2d 24 (Fla. 3d DCA 1990). The Sharick brief at p. 18 argues that "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." The Third District overstepped its authority in applying "modifying doctrines" as to certainty of damages in an implied contract situation as enunciated by this Court in Bromer and as stated by the other district courts in all other implied contract cases. Miller has no application.

Indeed, the University had already pointed out the highly distinguishing aspects of the Miller decision which is a unique spoiliation of evidence breach of contract case against an insurance company. In Miller there was an explicit written contract and this case did not change the law on certainty of

damages in implied contract cases. The Third District was in direct error in holding that Miller modified the law on certainty of damages in the present implied contract case.

The Third District's panel opinion concluded with the following statement:

> 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.

[1]

Leaving the plaintiff's pleadings open to amendment is inconsistent with most of the other rulings. The court had already expressly held that the student's implied contract claim for the loss of a medical career was proven and that the damages arising from this claim were not too uncertain or speculative for recovery. (Sharick at 140). Under the panel opinion, the only further trial to occur will be on damages alone — liability for loss of future earnings, earning capacity and profits have already been decided. There will be no further trial on liability under the panel opinion. The new trial is limited to damages and the court has already held that liability has been established.

Again, it is as though the University has lost an implied contract case that was never actually tried. Clearly, the only implied-in-fact contract claim presented to this jury was a contract for tuition reimbursement. Sharick correctly argues he was prohibited by the trial court from trying any other claims. Now the District Court has ruled on these other claims as though the University had been given the chance to defend them.

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[1] The court obviously misspoke and probably meant to say "loss of earning capacity" which would have resulted from his not receiving his DO degree.

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

Neither the Sharick brief nor Sharick's amicus make any attempt to deal with the arguments by the University and the amicus brief of the University of Miami, the Independent Colleges and Universities of Florida and the American Council on Education. Instead of applying the overall rule of restraint as to universities, the Third District Court of Appeal has adopted a pure commercial contract approach, very close to tort remedies. In accordance with Sharick's argument, the court has ruled that once a breach of implied contract is established, damages for all conceivable future losses and profits flow as a matter of course and that this case is no different than any other commercial contract case. The Third District overlooked the fact that this implied contract theory was not tried or determined by a jury or indeed by the trial court in any way whatsoever. The terms of this implied contract were not determined and the remedies under this implied contract were not tried or determined. If these had been issues then the University would have defended with evidence on what the University would or would not have agreed to with its incoming students. Based in large part on proffered evidence, the Third District has now already decided all of these issues.

The arguments from the petitioner/amicus brief have been totally disregarded. Of particular importance is Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir.) cert. den. 423 U.S. 898 (1975). We invite the Court's attention to the discussion of this widely cited decision at pages 12-14 of the University amicus brief. In short, Slaughter holds that the Federal district judge had gone too far in extending commercial contract remedies for an academic dismissal and the Tenth Circuit rejected the reasoning that since the university had breached a contract the plaintiff was entitled to damages based on what he would have earned had he received his doctorate. This Court should adopt the Slaughter v. Brigham Young University, supra, rationale.

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

We again invite the Court to review the clear verdict form which allowed the jury to determine whether Sharick's dismissal was arbitrary and capricious and in that event to award damages for loss of tuition alone. (R. 791). This jury did not hear the proffered testimony which the Third District's opinion relied upon. The District Court has really done nothing more than to reverse the two pretrial orders of the circuit judge where the damages and issues were restricted. The panel opinion addresses issues not properly before it and in any event, the dissenting opinion states the correct result in accordance with existing Florida law.

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

The issues of liability and damages as structured and discussed in the Third District's panel opinion are so intertwined that any new trial should concern all issues including liability, damages and other appropriate remedies including reinstatement.

Surprisingly, the Sharick brief and the Sharick amicus brief both support this alternative argument by the University for a new trial on all issues. Both briefs take a step back and retreat from the scope of the Third District's opinion. Now Sharick contends: "The Third District in Sharick did not grant any future damages in its opinion." (Sharick Br. p.19). The plaintiff's amicus contends: "The rulings do not constitute a determination that the student is entitled to receive a damages award for lost future earnings." (Amicus Br. p.3 and 11). Thus both briefs argue that the Third District really did not grant future damages. Amicus goes even further suggesting that:

> In the event that the jury returns a verdict awarding plaintiff lost future earnings, defendant then has the opportunity to request judgment notwithstanding the verdict, and/or that the verdict be set aside.

(Amicus Br. p.11). It sounds as though Sharick and his amicus are suggesting that the Third District actually ordered a new trial on both liability and damages.

Although the University would certainly have preferred this result, the Third District panel opinion ruled that liability had been established in this completed jury trial and that the new trial would concern solely damages. The panel opinion also forecloses reinstatement as a remedy.

When these contract damages are awarded by a new jury, the Third District's opinion will be an absolute bar to a motion for a defendant's judgment notwithstanding the verdict. These "step back" arguments are asserted by Sharick and Sharick's amicus because they both recognize that the Third District went much further than it should have.

In addition, if a new trial is to occur, then reinstatement of Sharick as a student at this or some other university should be considered as a possible remedy. Ten District judges considered the case. Five judges expressed the view that reinstatement was the most appropriate remedy. Sharick appealed the original pretrial order striking his future earnings claim. This same order struck him claim for reinstatement. The District Court reversed only the money damages part of the order and left the ruling against reinstatement in the same order in effect and binding in all further new trial proceedings. The District Court had the discretion to also reverse as to reinstatement as a possible form of remedy. If the University had known it could be financially responsible for Sharick's lost career it might well have considered readmission.

CONCLUSION

The panel opinion of the Third District should be reversed and the trial court's judgment reinstated. The panel opinion does violence to the law of certainty of damages in implied contracts and to the law urging restraint on judicial decisions concerning academic conduct by universities. The Third District erroneously imposed a pure commercial contract or tort remedy. In the alternative, if a new trial is to occur it should concern all issues, including liability, damages and possible reinstatement.

CERTIFICATE OF SERVICE

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

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

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