

## WHAT CAN BE LEARNED FROM *SHARICK V. SOUTHEASTERN UNIVERSITY*?

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*"Lessons learned are like bridges burned,  
you only need to cross them but once."*<sup>1</sup>

A recent decision from a Florida appellate court is an education law professor's dream. This still-pending<sup>2</sup> case touches on many issues of the day affecting colleges, universities and their students in disciplinary matters: due process, implied contracts, remedies, and the role of the judiciary in academic judgments. It is also (perhaps unknowingly) on the cusp of a judicial trend that views institutions of higher learning as not significantly different from other commercial ventures that serve a consumer dominated society. This paper, however briefly, presents one person's view<sup>3</sup> of the case and the "lessons learned" so far.

### A. Overview of Sharick v. Southeastern University.

A lawsuit's "facts" have a Rashoman-like quality because observers see things in such dissimilar ways. Those who actually lived the "facts" firsthand (such as the litigants and witnesses) often see black and white, their lawyers usually see gray, and courts and commentators see colorful collages of a now-disputed historical event. It's as though each is looking at the same light through panes of differently colored glass. So it is with Sharick v. Southeastern University of the Health Sciences.

It is tempting to present each version of the "facts" as viewed by the litigants or their evidence. Each paints vivid portraits, one of capricious academic judgment, another of student failure. Rather, the "facts" as the Florida appellate court found them are as follows:

Keith M. Sharick, a fourth-year medical student, was dismissed from the College of Osteopathic Medicine (Southeastern), when he was given a failing grade in the final course he required for graduation, a rural rotation in general medicine at the Clewiston Community Health Center. Following several unsuccessful appeals within the university's review process, Sharick filed a complaint, which was

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<sup>1</sup> Dan Fogelberg, *Lessons Learned* on NETHER LANDS (Full Moon/Epic Records 1977).

<sup>2</sup> The Florida Supreme Court accepted jurisdiction on November 30, 2001. 26 Fla. L. Weekly i (Dec. 14, 2001) (no oral argument).

<sup>3</sup> A view that was influenced by the author's preparation of an amicus brief in the Sharick case on behalf of various higher education interests.

amended several times, alleging multiple tort and contract claims against Southeastern. The only claim that ultimately went before the jury was breach of implied-in-fact contract. The trial court disallowed Sharick's claims for specific performance and past and future lost earning capacity and only permitted the jury to consider damages with respect to tuition expenses. The jury found for Sharick, concluding that Southeastern's decision to dismiss him was arbitrary, capricious, and/or lacking any discernable rational basis, and awarded a partial reimbursement of the tuition paid to Southeastern. Sharick now appeals, claiming that the trial court erred in denying him the right to plead and prove loss of future earning capacity. We reverse.

Sharick v. Southeastern Univ. of the Health Sciences, 780 So. 2d 136, 137-38 (Fla. 3<sup>rd</sup> DCA 2000). A fact of note is that a *jury* found that the university breached an *implied-in-fact* contract. The implied contract was based, in part, on "Southeastern's publications at the time of Sharick's enrollment" at the University. Id. at 139. The court stated:

The preface to the student handbook reflects that the "objective of the University is to offer ... health care science training and education to its students with the purpose of developing competent physicians ... who can serve in all areas of our region." The handbook proceeds to identify Southeastern endorsed organizations whose goal is to produce osteopathic physicians. The course of study is outlined as a "four year curriculum *leading to the DO degree*." (emphasis added). As such, the receipt of a DO degree upon the successful completion of Sharick's studies was reasonably within the contemplation of the parties at the time Sharick and Southeastern entered into their implied-in-fact contract.

Id. (emphasis in original). In other words, the appellate court upheld the jury's conclusion that an implied contract to award a DO degree had been entered by the parties. Because the University did not appeal the jury's finding of arbitrary conduct, the "sole issue presently before the court is the appropriate measure of damages for Sharick's wrongful dismissal less than two months prior to when he expected to graduate and obtain his degree as a doctor of osteopathic medicine (DO)." Id. at 138-39.<sup>4</sup>

Given its limited appellate review, the court found that the trial court erred by precluding Sharick from attempting to prove future lost earnings arising from a D.O. degree.

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<sup>4</sup> The court noted that the "alternative remedies of specific performance and mandamus are unavailable to compel the granting of a degree where an educational institution had exercised its discretion in refusing to confer such." Id. at 139 n.1 (*citing Militana v. University of Miami*, 236 So. 2d 162, 164 (Fla. 3d DCA 1970) and Robinson v. University of Miami, 100 So. 2d 42, 44-45 (Fla. 3d DCA 1958)).

In valuing the loss of this degree within the context of an arbitrary, capricious or bad faith deprivation of such, we conclude that it is appropriate to consider the possibility of lost future earnings. We agree with Sharick that the value of a professional degree, particularly to a prospective physician who has successfully completed the overwhelming majority of the academic and clinical requirements, significantly exceeds the tuition cost expended.

Id. at 139-40. The court also rejected the University's argument that "recovery of anything beyond tuition reimbursement when a school dismisses a student from classes is precluded because any other damages would be too remote, contingent, conjectural and speculative and could not be established within a reasonable degree of certainty." Id. at 140.<sup>5</sup>

In summary, the court concluded that Sharick had proven that "but for [his] dismissal from the university, he would have obtained his DO degree some two months thereafter." Id. Because the "fact of Sharick's damage as the result of Southeastern's breach of contract *can be proved with certainty*," the appellate court reversed and remanded for a new trial on damages, allowing Sharick to seek damages "in the form of *the loss of earning capacity that would reasonably have resulted had he received his DO degree*." Id. (emphasis added).

The three judge panel's decision set off a firestorm in the academic world because of its broad language about implied contracts for the awarding of degrees and the court's willingness to open up academic judgment cases to broad measures of damages including the future value of a "lost degree." As a result, the appellate court (en banc) reviewed briefs and heard arguments in the case. The net result, however, was the affirmance of the original decision via a denial of the motion for en banc rehearing. 780 So. 2d 142 (3d DCA 2001).

In an unusual move, five of the ten judges expressed their views separately, one writing to concur in support of Sharick, four dissenting in support of the University's view. The concurring judge plowed over icons that universities have held dear for decades. He first discarded any notion that in loco parentis had a role to play, finding it out of favor. Id. at 142 (citation omitted). Next, he said "[o]ne of the *vestiges of our past judicial deference* is the

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<sup>5</sup> The court relied upon a "spoliation" case that set forth various damage axioms that can apply when the certainty of damages is unclear. Id. at 140 (*citing Miller v. Allstate Ins. Co.*, 573 So. 2d 24 (Fla. 3d DCA 1990)) (e.g., "Mere difficulty in ascertaining the amount of damage is not fatal" and "Mathematical precision in fixing the exact amount is not required").

current requirement that a student seeking redress for the denial of a degree or academic credit cannot prevail against a learning institution unless the school's behavior was arbitrary and capricious." Id. (emphasis added).

Then, in a fearful passage, the judge stated that the "best analogy to Sharick's situation can be found in *cases where new businesses assert lost profits as consequential damages* for breach of contract." Id. at 144 (emphasis added). The primary highlight is on "lost profits" in the context of a "student v. university" case, a relatively unique concept. He also relied on law review articles ("which are the product of the same university system being sued here") that were "critical of the courts, not for their liberality, but for their reluctance to protect students." Id. at 145. He noted one professor's commentary that "higher education has become increasingly commercial, using various marketing tools to entice students to their schools" such that "[t]he deeply rooted hostility toward student claims and judicial deference to university conduct toward students becomes increasingly less defensible as bottom-line, commercial concerns motivate university actions and students seek a more consumer friendly product." Id. (quoting Hazel Glenn Beh *Student Versus University: The University's Implied Obligation of Good Faith and Fair Dealing*, 59 Md. Rev. 183 (2000)). In conclusion, he caustically noted that the "panel opinion is on solid ground" and will only require "that schools not act in an arbitrary and capricious manner, hardly an insurmountable responsibility." Id.<sup>6</sup>

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<sup>6</sup> In passing, the concurring judge took a potshot at the amici who filed a brief in support of a more limited measure of damages. He stated:

The Intervenor [i.e., the amici] argues that we should not indiscriminately apply contract doctrines to disputes involving academic judgments, even after its initial acknowledgement that "the Florida Supreme Court long ago recognized that the relationship between a student and a private college or university is contractual in nature." Apparently the Intervenor would have the courts allow these institutions to act arbitrarily and capriciously with the assurance that at most they would simply have to refund part of the tuition, which is all that Sharick received in this case, despite the fact that he dedicated several years of his life in pursuit of a degree.

Id. at 143. The amici, however, only argued that Sharick should be made whole by compensating him for what it would take to acquire the degree sought, but that he should not get future income and profits that might flow from the degree itself, an inherently speculative endeavor.

The dissenting judges claimed that "Sharick essentially seeks a lifetime's worth of income for a potential career in an unknown field from a degree not yet obtained." Id. at 145. They found it "inconceivable" than any expert could divine whether Sharick would successfully complete the preconditions for employment as an O.D. including passing state board examinations, completion of internship or residency programs, and "then meeting all licensing requirements of the state O.D. board." Id. They found the application of "lost profits" analysis misplaced and noted that the jury should consider Sharick's "inappropriate conduct that led to dismissal" in considering damages. Id. at 146.<sup>7</sup> They concluded that it is "wholly speculative whether Sharick would ever practice as a D.O., much less become successful and earn substantial income." Id. For this reason, the "majority opinion requires the jury to utilize a divining rod of conjecture which simply cannot find water." Id.

B. "Lessons Learned" from *Sharick*

Before addressing five possible lessons from the Sharick decision, here is some of the conventional (and astute) wisdom on matters involving student discipline at the end of the 20<sup>th</sup> Century.

College and university officials sometimes are faced with the prospect of having to discipline or dismiss a student for either misconduct or poor academic performance. At other times, they have to deal with a disgruntled student angry about a grade. Both situations are potentially costly and can have devastating effects on the lives and reputations of the people and universities involved. Fortunately, by preparing and adhering to set policies and procedures, colleges and universities can equip themselves with the tools and resources to minimize the potential side-effects of their academic and disciplinary decisions.<sup>8</sup>

The operative phrase in this paragraph is that good policies and procedures "*minimize* the potential side-effects" of decisions on academic discipline. The emphasis on minimize is meant to highlight that even the finest procedural safeguards -- set forth in impressive student

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<sup>7</sup> The dissenters noted that the basis for dismissal was that Sharick was unable to identify certain fundamental signs/ symptoms of diabetes, failed to conduct a proper physical examination, had "raised the skirt of a female patient without informing her" and "consistently failed to review charts properly prior to interacting with" patients.

<sup>8</sup> Carol J. Perkins, *Sylvester v. Texas Southern University: An Exception To The Rule of Judicial Deference To Academic Decisions*, 25 J.C. & U.L. 399, 399 (Fall 1998).

handbooks and policy statements<sup>9</sup> -- cannot prevent the filing of a lawsuit, a potentially ugly side-effect of every disciplinary proceeding. Now, to the lesson plan.

***Lesson #1: Avoid courts, which increasingly are inhospitable to traditional notions of academic deference.***

Southeastern contends that Sharick contracted with it solely to provide an education in exchange for payment of tuition. We disagree.<sup>10</sup>

One apparent lesson is the unwillingness of many courts to defer to the traditional concept that academic judgments are accorded substantial if not overriding consideration in student disputes. An academic (mis)judgment was made that Sharick was not entitled to the last few credits he needed to graduate. The court dismissed the argument that Sharick was entitled only to complete his education, not a degree and its benefits. The court recognized that it could not order the University to grant Sharick a degree and, perhaps partially for that reason, decided

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<sup>9</sup> The concept that student handbooks establish the legitimate and legally enforceable expectations of students has garnered increased attention. As two commentators have indicated:

At one time, student handbooks were thought to be nothing more than an outlet for schools to express their policies and expectations. However, at some point in the not so distant past, these innocent expressions of policy became something more, giving students and parents legal rights. Today, school districts and their attorneys must carefully craft student handbooks to clearly state the "law" of the school and to provide both students and parents with ample due process. Equally as important, school administrators and employees must take great care in following these policies, as any variation may lead to a costly and time-consuming lawsuit.

Wm. Bradley Colwell & Brian D. Schwartz, *Student Handbooks: A Significant Legal Tool For The 21st Century*, 154 WEST ED. L. REP. 409, 409 (Aug. 16, 2001); *see also* Ralph D. Mawdsley, *Litigation Involving Higher Education Employee and Student Handbooks*, 109 ED. LAW REP. 1031, 1049 (1996) ("Although handbooks are generally repositories of information concerning rights and responsibilities, the concept of handbooks as part of a contract with commitments and expectations on both sides does not necessarily seem to have universal acceptance."); Robert L. Cherry, Jr. & John P. Geary, *The College Catalog as a Contract*, 21 J.L. & EDUC. 1 (1992) (noting that "contract theory is applied selectively" to catalogs, which may have both contractual and non-contractual components); David Davenport, *The Catalog in the Courtroom: From Shield to Sword?*, 12 J.C. & U.L. 201 (1985) (noting changing legal treatment of catalogs, which serve many non-contractual purposes such as an institution's promotional and aspirational goals).

<sup>10</sup> 780 So. 2d at 139.

to give him the right to seek the next best thing (future losses from a career yet to be established). Of course, the court's hostility in Sharick was influenced, in part, because the breach at issue was adjudged to be "arbitrary", "capricious" or "lacking any discernable rational basis" making it an uphill battle to argue for a more limited remedy. The point, however, is that the court, in the original panel opinion and in the separate concurrence, displayed little empathy for the concept that academic misjudgments (even gross misjudgments) should not open the floodgates to the hope of big jury awards for "lost careers." Educational institutions must win these battles on the "front-end" (i.e., by showing reasonable, rational grounds for their judgments) and not rely on the backstop historically provided by judicial deference to academic decisions.

***Lesson #2: In loco parentis is dead; instead, commercialism and formalism in student-university/college relations rule the day.***

The relationship between the parties in this case was essentially a contract between the party who paid a fee for services, the student, and the provider of those services, the private university.<sup>11</sup>

A corollary to Lesson #1 is that the "education industry" is viewed increasingly no differently in the courts from other business such that the fiction of in loco parentis is a dead letter. The concurring judge in Sharick noted that the "judiciary has traditionally deferred to colleges and universities concerning decisions to deny degrees, certificates or academic credit."<sup>12</sup> Nonetheless, this view is "disfavored because it no longer represents contemporary values."<sup>13</sup> Interestingly, the concurring judge invoked the language of Justice Oliver Wendall Holmes that "If a contract is broken the measure of damages generally is the same, whatever the cause of the breach." Id. (citing Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 40 (1903)). In other words, Holmes's amoral bad man theory applies in the dens of commerce as well as the academic towers.

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<sup>11</sup> Id.

<sup>12</sup> Id. at 142.

<sup>13</sup> Id. (citing Robert P. Faulkner, *Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit-the Fiduciary Alternative*, 40 SYRACUSE L. REV. 837 (1989) and Brian Jackson, *The Lingering Legacy of in Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135 (1991)).

***Lesson #3: Academic institutions are subject to potentially expansive remedies for implied breach of contract including future profits from a "lost career."***

The court would have little difficulty in submitting the loss of the shoe, the horse, and probably the rider to a jury if caused by the sale of a defective nail or the failure to deliver the nail as agreed. The loss of the battle creates a doubtful question, but the loss of the kingdom is so remote as to bar its submission to the jury. ... [i]f the manufacturer of the nail becomes responsible for the loss of the kingdom, than we may not have any more nails.<sup>14</sup>

An obvious moral of the Sharick story is the potential for an implied breach of contract case to lead to the "loss of the kingdom." Academic misjudgments, particularly those made in the latter terms of students' studies nearing graduation, can be costly. Institutions cannot view these situations as merely "defective nails" that led to the "loss of the shoe" because students (and their legal counsel) will view them as keys to the kingdom's crown jewels. For this reason, the following two correlative lessons follow.

***Lesson #4: Alternative dispute resolution should be considered to preclude judicial resolutions of such matters.***

Don't forget what your failures have taught you or else you'll learn them all over again.<sup>15</sup>

Given the potential uncertainty of juries and judges in litigation, institutions should -- if they have not already done so -- consider instituting other mandatory means of resolving Sharick-like disputes. These methods are well known in the commercial world and are reflected in standard "ADR" clauses in most business contracts. They include mediation and arbitration, which need not be discussed at length here. The virtues and vices of both are known generally.<sup>16</sup>

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<sup>14</sup> Halliburton Co. v. Eastern Cement Corp., 672 So. 2d 844, 847 (Fla. 4<sup>th</sup> DCA 1996) (citing Ohoud Establishment for Trade & Contracts v. Tri-State Contracting & Trading Corp., 523 F. Supp. 249, 255 (D.N.J. 1981)).

<sup>15</sup> Dan Fogelberg, *Loose Ends* on NETHER LANDS (Full Moon/Epic Records 1977).

<sup>16</sup> See, e.g., Raymond Ehrlich, *Mediation is a less trying way to resolve some legal disputes*, JACKSONVILLE BUS. J. (Dec. 3, 1999) (<http://jacksonville.bcentral.com/jacksonville/stories/1999-12/06/smallb3.html>) (commentary of former Florida Supreme Court Justice and certified mediator that "Folks who want to wrestle in the mud of litigation are bound to get splattered a bit. Mediation is the way to an honorable truce that spares the parties a roll in the sty.").

In light of Sharick, it may be a useful exercise to add mandatory ADR clauses to student handbooks or other contractual means by which universities and colleges define their relationships with their students. Which leads to the last lesson (for now).

***Lesson #5: Limitation of liability or remedies clauses should be considered to limit the financial exposure of colleges and universities.***

And we plead and we pray for a glimmer of day, as the night  
folds its wings and descends... exposing the loose ends.<sup>17</sup>

The "prayer" for relief in the student's complaint seeks enormous sums of money for compensatory damages; the student's discovery (depositions, requests for production, interrogatories, etc.) will seek the "loose ends" that oftentimes are better left unexposed. Why not consider what commercial businesses do, which is to require consumers (here, the students) to agree to a limitation of liability for contract claims and limit the scope of relief to only a refund of tuition, a credit for future courses, or the like? So long as limitations are reasonable, they will likely be upheld judicially.<sup>18</sup> Limiting students to recovery of what would be necessary to obtain a degree, rather than exposing an institution to the value of students' "lost careers", makes good sense from a loss prevention perspective. Plus, imagine a class action seeking damages for the economic value of the entire student body's future earnings!

**CONCLUSION**

Perhaps the lessons learned from Sharick have a Rashoman-like quality of their own: universities and colleges feeling exposed and indignant; Sharick and student rights advocates feeling vindicated and righteous. Whichever viewpoint has current ascendancy (which could change in Florida in 2002 due to the state supreme court's acceptance of review in Sharick), everyone involved in student academic decisions needs to continually self-assess and take steps to avoid a no-win result like that in Sharick.

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<sup>17</sup> Dan Fogelberg, *Loose Ends* on NETHER LANDS (Full Moon/Epic Records 1977).

<sup>18</sup> Steven B. Lesser, *How to Draft Exculpatory Clauses That Limit or Extinguish Liability*, 75 FLA. B.J. 10 (Nov. 2001) ("Exculpatory clauses extinguish or limit liability of a potentially culpable party through the use of disclaimer, assumption of risk and indemnification clauses as well as releases of liability.")