NO. SC87565

IN THE MISSOURI SUPREME COURT

LEONARD J. VERNI,
Appellant-Respondent

vs.

CLEVELAND CHIROPRACTIC COLLEGE,
Respondent;

ALEKSANDR MAKAROV,
Respondent-Appellant

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit, 00CV210044C
Honorable Preston K. Dean, II

APPELLANT LEONARD J. VERNI'S SUBSTITUTE RESPONSIVE BRIEF TO SUBSTITUTE BRIEF OF RESPONDENT CLEVELAND CHIROPRACTIC COLLEGE AND RESPONDENT-APPELLANT ALEKSANDR MAKAROV

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JURISDICTIONAL STATEMENT

The present action arises out of the academic affairs of Appellant-Respondent Verni

(hereinafter referred to as "Leonard Verni", "Lee Verni", "Verni" or "plaintiff") while attending the Cleveland Chiropractic College (hereinafter "College"). (L.F. pp 1-67). While attending the College, plaintiff was enrolled in a dermatology class taught by Dr. Aleksandr Makarov. (Tr. p. 21). Plaintiff was reported to the College by an anonymous student for being in possession of the dermatology exam prior to its administration. (Tr. p. 390). The College instituted an investigation of the incident which ultimately resulted in plaintiff's dismissal from the College. (Tr. pp. 74-75, 396). After exhausting the appeal procedures of the College, plaintiff filed the present action against the College and Dr. Makarov. (L.F. pp. 1-67).

This matter was tried to a Jackson County jury. (L.F. pp. 102-104). At the trial the case was submitted to the jury under four separate theories; three against the College, and one against Dr. Makarov. (L.F. pp. 79-96, 102-104). The jury returned a verdict against the College on plaintiff's fraudulent misrepresentation claim awarding plaintiff damages in the amount of $20,000. (L.F. pp. 99, 103). Additionally, the jury returned a verdict against Dr. Makarov on a breach of contract claim awarding plaintiff damages in the amount of $10,000. (L.F. pp. 100, 103-104). The trial court set aside the verdict against the College on the fraudulent misrepresentation claim. (L.F. pp. 136-138).

Plaintiff appealed from the Judgment of the trial court asserting error relating to the amount of the Judgment in his favor on the breach of contract claim as well as the trial court's ruling on the fraudulent misrepresentation claim. (L.F. pp. 140-141). Dr. Makarov filed a cross-appeal asserting error with regard to the jury's verdict on the breach of contract

claim. (L.F. pp. 150-152). After the Missouri Court of Appeals, Western District, issued its opinion, this Court granted transfer pursuant to Rule 83.04 upon application of Respondents Cleveland Chiropractic College and Dr. Aleksandr Makarov. This appeal was within the jurisdiction of this Court pursuant to the Missouri Constitution, Article V, Section 3 and due to this Court's decision to compel transfer of this appeal from the Missouri Court of Appeals, Western District.

SUPPLEMENTAL STATEMENT OF FACTS

As an aid to the Court and for the purpose of presenting this Court with a comprehensive factual background for this appeal, the Appellant-Respondent Leonard Verni provides this statement of facts as a supplement to the statement of facts advanced in his prior briefs. For the sake of brevity and simplicity, Respondent-Appellant Cleveland Chiropractic College is occasionally referred to in this brief as either "the College" or as "Defendant College" and Respondent-Appellant Aleksandr Makarov is occasionally referred to hereinafter as "Dr. Makarov" or "Defendant Makarov".

This case arose from a disciplinary proceeding against Lee Verni while he was a student of chiropractic medicine at Cleveland Chiropratic College, a private chiropractic college with a campus in Kansas City, Missouri. (L.F. p.1, 69) The College also has and had a campus located in Los Angeles, California. (Tr. p. 1098). Lee Verni, although born in the former Ukraine region of the former Soviet Union, moved to the United States with his family when he was only six years old. (Tr. p. 6). After graduating from High School, Verni served a tour of duty in the United States Navy until 1991. (Tr. p. 7). He then attended undergraduate college, and thereafter, he enrolled at Defendant College, Cleveland Chiropractic College, beginning with the Fall trimester of 1995. (Tr. p. 18). Verni successfully completed nine trimesters of study at Defendant College, and was in his tenth trimester in February, 1998. Verni was scheduled to finalize his chiropractic studies and obtain his degree in December, 2000. (Tr. pp. 18-19).

In the Spring of 1999, Verni's academic career and professional future was changed forever. This change in his life began when Lee Verni enrolled in the dermatology class

taught by Dr. Aleksandr Makarov. (Tr. p. 19, 20). The very first exam in that course was scheduled by Dr. Makarov for February 11, 1999 (Tr. p. 21) and Verni took that exam on that date. However, the day just before that scheduled dermatology exam, a student who initially failed to identify himself, and was thereby initially anonymous to all, contacted Dr. Ruth Sandefur, the Academic Dean of the College, by telephone and advised Dr. Sandefur that Lee Verni was selling copies of the dermatology test that Dr.Makarov was going to give to his class the following day. (Tr. p. 388-391). The "anonymous" student then mailed to Dr. Sandefur a purported copy of the exam that Verni was allegedly selling. Upon receipt of that purported exam copy from the "anonymous" student, Dean Sandefur completed and filed an incident report regarding the alleged misconduct. (Tr. pp. 395-396). The College then initiated an investigation, which was conducted by Mr. Aaron Lorenzen, a member of the College's staff. (Tr. p. 766). Based on this investigation made by Mr. Lorenzen, which did not include interviewing the reporting witness (Tr. p.799-800), Cindy Miller, the Registrar and Director of Student Services, made a finding that " . . . . the evidence . . . does support the charge of misconduct . . . as described in the Fall 1998 Cleveland Chiropractic College Handbook . . . " by "Buying, selling, or otherwise obtaining, possessing, or using any copy of any material intended to be used as an instrument of academic evaluation in advance of its initial administration". (Tr. p. 76, L.F. pp. 60-61). At the same time, Cindy Miller, Registrar and Director of Student Services, notified Lee Verni, on March 23, 1999, that he was dismissed from the College because of this alleged violation and she advised him of his right to appeal that decision, directing him to the College Student Handbook for guidance and

the procedure in conducting his appeal. (Ex. 2, Tr pp. 76-76).

Thereafter, Lee Verni, following the direction and advice of Cindy Miller, immediately filed a written Notice of Appeal with the College on March 23, 1999 (Tr. p. 80). The Student Handbook in effect at the time Verni filed his Notice of Appeal with the College stated that appeals of disciplinary action against a student were to be governed by certain rules, among which were that a student had a right to see and/or hear all evidence against him; that only one witness at a time was to be present in the hearing room during the giving of testimony; and, if necessary to avoid disruptions in the hearing, an appealing student could be excluded from part of the testimony against him, and in such an event, the committee would summarize for the student the testimony that was given in the student's absence from the hearing room. (Tr. 80).

The College's Appeals Board, was comprised of the appeal chairperson, two faculty members and a student of the College. The College Appeals Board held a hearing on plaintiff's appeal on April 5, 1999. (Tr. p. 104). At the hearing, the College Appeals Board was presented with the testimony of Cindy Miller, Aaron Loenzen and Dr. Makarov. (Tr. p. 105-106). Dr. Ruth Sandefur, the person who initiated the investigation by filing an incident report, and ostensibly the only person who knew the name of the "anonymous" student, and the only person who had spoken to the "anonymous" student before the appeal hearing (Tr. pp. 389-391) was not called to testify by the College's Appeal Board (Tr. p. 957). Furthermore, the "anonymous" reporting student, who was known to the College, was not identified to Lee Verni, and was not called as a witness by the College. Although the

allegations and charges allegedly made by that "anonymous" student which initiated the College's disciplinary actions were contained in the original incident report filed by Dr. Sandefur, and neither Dr. Sandefur, nor this student were called by the Appeals Board to testify. (Tr. p. 957). Only a month later, in May of 1999, Dr. Sandefur again spoke with the "anonymous" student witness and that witness, Leland Weathers, told Dr. Sandefur that he believed that Dr. Makarov had used Verni's work to prepare Dr Makarov's own test. (Tr. p. 470-473). The College's Appeals Board upheld the College's decision to dismiss Lee Verni from the College. (Tr. pp. 109-110).

Eventually Lee Verni was able to enroll in another chiropractic college, Texas Chiropractic College, located in a suburb of Houston, Texas. (Tr. p. 172). Verni had to move his family to that part of Texas in order to complete his chiropractic education at this Texas college. However, in enrolling at Texas Chiropractic College, not all of the academic course credits that Verni had earned at defendant College were accepted by his new college and it took Lee Verni five (5) additional trimesters to obtain his degree even though it would only have required two (2) more trimesters to obtain that degree at Defendant College had he not been dismissed from the Defendant College. (Tr. p. 171-172).

After Plaintiff enroll in Texas Chiropractic College he eventually completed all his requirements at that Texas college and obtained his degree in Chiropractic Medicine on April, 12, 2002. (Tr. P. 173). Lee Verni was able to take his chiropractic boards in Louisiana, passed those exams the first time he took them (Tr. p.177), and was formally licensed to practice the profession of Chiropractic Medicine in Louisiana on February 11,

2003. (Tr. p. 184).

Lee Verni was therefore a duly licensed Chiropractor when the Jackson County Circuit Court trial of this cause has held in February, 2003.

POINTS RELIED ON

POINT I

(Response To Respondents-Appellants' Point I)

THE TRIAL COURT WAS CORRECT IN ENTERING JUDGMENT IN PLAINTIFF'S FAVOR AND IN DENYING DEFENDANT MAKAROV'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM ARISING FROM THE EMPLOYMENT CONTRACT BETWEEN DEFENDANT MAKAROV AND DEFENDANT COLLEGE, BECAUSE THE PLAINTIFF HAD STANDING TO BRING THAT ACTION IN THE TRIAL COURT SINCE HE WAS A MEMBER OF A CLASS OF INTENDED BENEFICIARIES UNDER THAT WRITTEN CONTRACT BETWEEN DEFENDANT MAKAROV AND DEFENDANT COLLEGE IN THAT THERE WAS SUBSTANTIAL COMPETENT EVIDENCE PRESENTED AT TRIAL THAT CHIROPRACTIC STUDENTS WERE THE INTENDED BENEFICIARIES OF THAT CONTRACT NOT ONLY THROUGH THE EXPRESS TERMS OF THAT EMPLOYMENT CONTRACT WHICH INCORPORATED THE FACULTY HANDBOOK BY REFERENCE, BUT ALSO THROUGH THE TESTIMONY OF DEFENDANT COLLEGE'S STAFF AND FACULTY WHICH CLEARLY DEMONSTRATED THAT THE STUDENTS OF DEFENDANT COLLEGE WERE THE INTENDED THIRD-PARTY BENEFICIARIES OF MAKAROV'S EMPLOYMENT CONTRACT WITH THE COLLEGE.

Andes v. Albano, 853 S.W.2d 936 (Mo. banc 1983).

James v. Poppa, 85 S.W.3d 8, 9 (Mo. banc 2002).

Volume Services, Inc. v. C.F. Murphy & Asociates, Inc., 656 S.W.2d 785 (Mo. App. 1983).

The American Heritage College Dictionary, Third Edition (1993).

POINT II

(Response to Respondent-Appellants' Point II)

THE TRIAL COURT WAS CORRECT IN DENYING DEFENDANT MAKAROV'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON A THEORY CLAIMED BY DEFENDANT UNDER THE HOLDING OF JOHNSON v. MCDONNELL DOUGLAS CORP., 745 S.W.2d 661 (Mo. banc 1988):

A. BECAUSE A PARTY MAY NOT OBTAIN AN ORDER OF JUDGMENT NOTWITHSTANDING THE VERDICT UNLESS THAT PARTY HAS FIRST PRESERVED ITS ARGUMENT OR ALLEGED ERROR AND ASSERTED THE SPECIFIC GROUNDS THEREFORE IN ITS MOTION FOR A DIRECTED VERDICT, IN THAT DEFENDANT MAKAROV FAILED TO PRESERVE ITS CLAIMED ARGUMENT PURSUANT TO JOHNSON v. MCDONNELL DOUGLAS CORP., Id., IN THAT DEFENDANT MAKAROV'S MOTION FOR A DIRECTED VERDICT AND DID NOT SPECIFICALLY CLAIM THAT AN EMPLOYEE HANDBOOK CANNOT BE PART OF A VALID EMPLOYMENT CONTRACT, NOR DID DEFENDANT MAKAROV CITE JOHNSON, Id., OR ANY SIMILAR AUTHORITY IN HIS MOTIONS FOR DIRECTED VERDICT OR FOR JUDGMENT NOV, THAT ISSUE WAS NOT PRESERVED ON APPEAL.

B. BECAUSE THE INCORPORATION OF OTHER DOCUMENTS INTO CONTRACTS IS WELL RECOGNIZED LAW IN MISSOURI, AND, IN THAT, DEFENDANT MAKAROV'S WRITTEN EMPLOYMENT CONTRACT WITH

DEFENDANT COLLEGE CLEARLY INCORPORATED WITHIN ITS SPECIFIC TERMS THE FACULTY HANDBOOK AND THE OBLIGATION TO TREAT STUDENTS, SUCH AS PLAINTIFF, WITH "COURTESY", "RESPECT", "FAIRNESS" AND "PROFESSIONALISM", THIS WAS PART OF DR. MAKAROV'S WRITTEN EMPLOYMENT CONTRACT.

C. BECAUSE THE INCORPORATED TERMS OF THE FACULTY HANDBOOK IN MAKAROV'S WRITTEN EMPLOYMENT CONTRACT REQUIRED FACULTY MEMBERS, SUCH AS DEFENDANT MAKAROV, TO TREAT STUDENTS WITH "COURTESY", "RESPECT", "FAIRNESS", AND "PROFESSIONALISM" ARE NOT VAGUE, NOR AMBIGUOUS, IN THAT THESE TERMS ARE COMMON WORDS, UNDERSTANDABLE TO PERSONS OF AVERAGE INTELLIGENCE AND EXPERIENCE, THESE ARE ENFORCEABLE PROVISIONS OF MAKAROV'S WRITTEN EMPLOYMENT CONTRACT OF WHICH LEE VERNI AS A STUDENT WAS A THIRD-PARTY BENEFICIARY.

Bailey v. Federated Mut. Ins. Co., 152 S.W.3d 355 (Mo. App. 2004).

Estate of Gross v. Gross, 840 S.W.2d 253 (Mo. App. 1992).

McRaven v. F-Stop Photo Labs, Inc., 660 S.W.2d 459 (1983).

Missouri Civil Rule 72.01(a).

POINT III.

(Response To Respondents-Appellants' Points III And IV)

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL ON THE ISSUE OF DAMAGES, OR, IN THE ALTERNATIVE, ORDERING ADDITUR, BECAUSE THE JURY'S VERDICTS CLEARLY EVIDENCED CONFUSION, MISTAKE, BIAS OR PREJUDICE, IN THAT, ALTHOUGH THE DAMAGES SUFFERED BY APPELLANT-RESPONDENT VERNI WERE IDENTICAL IN REGARD TO THE WRONGFUL ACTIONS OF EACH RESPONDENT, THE JURY RETURNED A VERDICT OF ONLY $10,000.00 AGAINST RESPONDENT DR. ALEKSANDR MARKOV, WHILE INEXPLICABLY RETURNING A VERDICT OF $20,00000 AGAINST RESPONDENT CLEVELAND CHIROPRACTIC COLLGE.

Burnett v. Griffith, 769 S.W.2d 524 (Mo. banc 1989).

Norris v. Barnes, 957 S.W.2d 524 (Mo. App. 1997).

Thornton v. Gray Parts Company, 62 S.W.3d 575 (Mo. App. 2001).

POINT IV.

(Response To Respondent-Appellants' Points III and IV)

THE TRIAL COURT ERRED IN DENYING PLAINTIFF LEE VERNI'S MOTION FOR A NEW TRIAL ON THE ISSUE OF DAMAGES, OR, IN THE ALTERNATIVE, IN FAILING TO ORDER ADDITUR, BECAUSE THE JURY'S VERDICTS WERE AGAINST THE WEIGHT OF THE EVIDENCE AND THE TRIAL COURT IN DENYING PLAINTIFF'S MOTION ABUSED ITS DISCRETION IN THAT THE DAMAGE AWARDS TO PLAINTIFF WERE SO SHOCKING AND GROSSLY AND WOEFULLY INADEQUATE IN VIEW OF THE SUBSTANTIAL EVIDENCE OF DAMAGES SUSTAINED BY THE PLAINTIFF AS DETERMINED BY THE UNCONTRADICTED TESTIMONY OF THE PLAINTIFF'S ECONOMIC EXPERT AS TO LEE VERNI'S LOST WAGES, THIS UNCONTRADICTED AND REASONABLE COMPUTATION BY THAT EXPERT OF THOSE LOST WAGES, WHICH WAS EVEN CORROBORATED BY THE TESTIMONY OF THE DEFENDANT COLLEGE'S PRESIDENT, DR. CLEVELAND, AS TO THE AVERAGE CHIROPRACTOR'S ANNUAL WAGES, ALONE EXCEEDED THE JURY'S VERDICT BY MORE THAN TEN (10) TIMES.

Bailey v. Interstate Automotive, Inc., 219 S.W.2d 333 (Mo. 1949).

Massman Const. V. Highway & Transp. Com'n., 914 S.W.2d 801 (Mo. banc 1996).

Reynolds v. Arnold, 443 S.W.2d 799 (Mo. 1969).

Tucci v. Moore, 875 S.W.2d 115 (Mo. Banc 1989).

POINT V.

(Response To Respondents-Appellants' Point V)

THE TRIAL COURT ERRED IN GRANTING THE COLLEGE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE ACTIONABLE FRAUD MAY BE BASED ON REASONABLE RELIANCE ON THE REPRESENTATIONS OF ANOTHER AND RELIANCE MAY BE INFERRED FROM ALL OF THE FACTS AND CIRCUMSTANCES IN THE CASE;

A. IN THAT THE COLLEGE'S REPRESENTATIONS AS TO THE APPEALS PROCEDURES WERE NOT FOLLOWED BY THE COLLEGE, HAD NOT BEEN FOLLOWED AT ANY TIME AND THE COLLEGE NEVER INTENDED TO FOLLOW THESE REPRESENTED PROCEDURES AND THERE WAS SUBSTANTIAL EVIDENCE THROUGHOUT TRIAL BY THE TESTIMONY OF THE COLLEGE'S VERY OWN STAFF AND FACULTY THAT DEFENDANT COLLEGE HAD *ALWAYS* FAILED TO FOLLOW THOSE VERY IMPORTANT DUE PROCESS PROCEDURES IN THIS AND IN OTHER STUDENT DISCIPLINARY PROCEEDINGS.

B. IN THAT THERE IS SUBSTANTIAL EVIDENCE THAT PLAINTIFF VERNI DID RELY ON THE COLLEGE'S FRAUDULENT REPRESENTATIONS, THAT, IN THE APPEAL HEARING, IT WOULD FOLLOW ITS PUBLISHED DUE PROCESS PROCEDURES, AS SET FORTH IN ITS STUDENT HANDBOOK, AND AS EXPRESSED THROUGH THE COLLEGE'S CORRESPONDENCE TO LEE

VERNI, AND VERNI RELIED ON THOSE REPRESENTATIONS IN HIS PREPARATION FOR HIS APPEAL HEARING AND THEN THE COLLEGE DID NOT FOLLOW ITS PROCEDURE AND HAD NOT FOLLOWED ITS PROCEDURE, EVER.

Grosser v. Kandel-Iken Builders, Inc., 647 S.W.2d 911, 914 (Mo. App. 1983).

Sanders Co. Plumbing v. City of Independence**,** 694 S.W.2d 841 (Mo. App. 1985).

Sofka v. Thal, 662 S.W. 2d 502 (Mo. 1983).

Universal C.I.T. Credit Corporation v. Tatro, 416 S.W.2d 696, 703 (Mo. App. 1967).

ARGUMENT

POINT I

(Response To Respondents-Appellants' Point I)

THE TRIAL COURT WAS CORRECT IN ENTERING JUDGMENT IN PLAINTIFF'S FAVOR AND IN DENYING DEFENDANT MAKAROV'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM ARISING FROM THE EMPLOYMENT CONTRACT BETWEEN DEFENDANT MAKAROV AND DEFENDANT COLLEGE, BECAUSE THE PLAINTIFF HAD STANDING TO BRING THAT ACTION IN THE TRIAL COURT SINCE HE WAS A MEMBER OF A CLASS OF INTENDED BENEFICIARIES UNDER THAT WRITTEN CONTRACT BETWEEN DEFENDANT MAKAROV AND DEFENDANT COLLEGE IN THAT THERE WAS SUBSTANTIAL COMPETENT EVIDENCE PRESENTED AT TRIAL THAT CHIROPRACTIC STUDENTS WERE THE INTENDED BENEFICIARIES OF THAT CONTRACT NOT ONLY THROUGH THE EXPRESS TERMS OF THAT EMPLOYMENT CONTRACT WHICH INCORPORATED THE FACULTY HANDBOOK BY REFERENCE, BUT ALSO THROUGH THE TESTIMONY OF DEFENDANT COLLEGE'S STAFF AND FACULTY WHICH CLEARLY DEMONSTRATED THAT THE STUDENTS OF DEFENDANT COLLEGE WERE THE INTENDED THIRD-PARTY BENEFICIARIES OF MAKAROV'S EMPLOYMENT CONTRACT WITH THE COLLEGE.

A. Standard of Review.

In reviewing whether or not there is subject matter jurisdiction in a trial court, that decision is a question of fact left to the sound discretion of the trial judge. James v. Poppa, 85 S.W.3d 8, 9 (Mo. banc 2002).

B. **Argument and Analysis.**

In the present case, the trial court did have jurisdiction to enter judgment on plaintiff's breach of contract claim asserted against defendant Makarov because plaintiff had a protectible interest in the dispute and thus had standing. Plaintiff was a third-party beneficiary of the written employment contract between defendant Makarov and the defendant College. That Plaintiff was an intended beneficiary of Defendant Makarov's contract with defendant College is evident upon a thorough and thoughtful review of the relevant documents. First, the Student Handbook for Cleveland Chiropractic College for the 1998-9 Academic year (Exhibit 81, pp. 4-5, Tr. 73) clearly sets out the objectives of the College:

"The educational mission of the institution consists of:

A. The preparation of competent, entry-level Doctors of Chiropractic.

B. The Preparation of Doctors of Chiropractic as portal of entry, primary health care providers within the health care delivery system, well-educated to diagnose and to care for the human body..."

It is undeniable that the primary purpose of Cleveland Chiropractic College is to provide a service to its students by teaching and preparing them to be competent Doctors of

Chiropractic medicine.

In order to provide that education, the College has set up rules and procedures to be used by the staff and faculty of the College to achieve the College's stated mission. That such staff and faculty are hired to minister to the educational needs of the students is explicitly contained within the student handbook (Exhibit 81) at page 12:

> "In filling faculty positions, the College makes every effort to secure faculty members who are not only highly qualified academically, ***but also those who are competent in the classroom, laboratory and clinic and who have a high degree of insight into the needs and interests of students."*** (Emphasis supplied).

Thus the Defendant College's own Student Handbook demonstrates a clear, express and specific intent to benefit those students who enroll in the college. That language is a clear expression that the promise by faculty members to follow the rules set out in the Student Handbook - or in the Faculty Handbook - was fully intended to benefit students. Students such as Leonard Verni were not mere incidental beneficiaries but were intended, donee beneficiaries of Dr. Makarov's employment contract with the College. That conclusion is further supported by the trial testimony of Dr. Carl S. Cleveland, III, the President of Cleveland Chiropractic College since 1981 (Tr. p. 1083). In his testimony (TR. P. 1142-1143) Dr. Cleveland was questioned by Plaintiff Verni's counsel on direct examination, as follows:

> Q. Now, the provisions set forth in the faculty handbook are there to guide the faculty, correct?

A. That's correct.

Q. And in the faculty handbook, the faculty is obligated to do certain things for their contract, is that correct?

A. That's correct.

Q. They're supposed to appear at their labs, at their lectures, provide material?

A. Correct.

* *

Q. And the beneficiary or the person who benefits from them being there is the student, is that correct?

A. Correct.

Q. And if one of the professors, teachers, instructors, assistants fail to do what was required in the faculty handbook, give tests, give information, perform, treat people fair, that would be a breach of their responsibility set forth in the faculty handbook?

(Objection and order overruling that objection omitted)

A. They would be expected to abide by those policies, if that's your question.

Q. (By Mr. Barnes) And the beneficiary or the person who gets the benefits of that is the student?

A. Correct."

In order for a party to have the status of a third-party beneficiary with standing to sue on a contract, it is not necessary that the goal of benefitting third parties be the "primary object" of the contract, but only that those third parties be the primary "beneficiaries" of that

contract. Andes v. Albano, 853 S.W. 2d 936, 942 (Mo. banc 1983). If the students of the College were the persons for whose benefit the agreements were made then they have standing to enforce the agreement. *Id.* The third-party beneficiary does not need to be named in the contract if the terms of the contract express an intent to benefit an identifiable class of which that party is a member. Volume Services, Inc. v. C.F. Murphy & Associates, Inc., 656 S.W. 2d 785, 794-795 (Mo. App. 1983). The Academic Dean of Defendant College, Mary Ruth Sandefur, confirmed that the students of the College were the class of persons for whose benefit such faculty contracts were intended. Mrs. Sandefur testified under direct examination by Mr. Scott Giffen, Plaintiff's co-counsel, as Mr. Giffen directed Mrs. Sandefur to provisions of the faculty handbook as follows:

> "Q. Would you read that?
>
> A. 'Faculty members have a duty to treat each student with courtesy and respect, fairness and professionalism.'
>
> Q. And the next sentence?
>
> A. 'The student is entitled to expect such treatment and that faculty members will provide an example worth of emulation'."

A critical term in that last quoted phrase from the Faculty Handbook is the word "entitled". The American Heritage College Dictionary, Third Edition (1993) at page 459 defines the word "entitle" to mean "2. To furnish with a right or claim to something". Therefore, through its own express language in its Faculty Handbook, the Defendant College gave an identifiable class - chiropractic college students - a contractual right to be treated by

the College's faculty with "courtesy, respect, fairness and professionalism". The Plaintiff, as a student at Defendant College, was an undisputed member of that class of beneficiaries, the primary beneficiaries of Defendant Makarov's contract with Defendant College. Since the Plaintiff, Leonard Verni, was a member of the student class of the College, and as that class was a primary beneficiary of the Makarov employment contract, Plaintiff Verni has standing to enforce that contractual agreement. Andes v. Albano, *Id.*

Further proof that chiropractic students such as Plaintiff Verni were primary beneficiaries of defendant Makarov's employment contract with the College is contained within the Student Handbook (Exhibit 81) at page 90 which states in part:

> "The relationship between faculty and staff with students and vice versa must be one of mutual respect and cooperation with *the goal of providing the student with the finest in education and insuring that those graduating from the College meet the highest standards of qualification."* (Emphasis supplied).

The Plaintiff Verni had standing to bring an action against Defendant Makarov for breach of contract. Therefore, Defendant Makarov's Point I should be denied.

POINT II

(Response to Respondent-Appellants' Point II)

THE TRIAL COURT WAS CORRECT IN DENYING DEFENDANT MAKAROV'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON A THEORY CLAIMED BY DEFENDANT UNDER THE HOLDING OF JOHNSON v. MCDONNELL DOUGLAS CORP., 745 S.W.2d 661 (Mo. banc 1988):

A. BECAUSE A PARTY MAY NOT OBTAIN AN ORDER OF JUDGMENT NOTWITHSTANDING THE VERDICT UNLESS THAT PARTY HAS FIRST PRESERVED ITS ARGUMENT OR ALLEGED ERROR AND ASSERTED THE SPECIFIC GROUNDS THEREFORE IN ITS MOTION FOR A DIRECTED VERDICT, IN THAT DEFENDANT MAKAROV FAILED TO PRESERVE ITS CLAIMED ARGUMENT PURSUANT TO JOHNSON v. MCDONNEL DOUGLAS CORP., Id., IN THAT DEFENDANT MAKAROV'S MOTION FOR A DIRECTED VERDICT AND DID NOT SPECIFICALLY CLAIM THAT AN EMPLOYEE HANDBOOK CANNOT BE PART OF A VALID EMPLOYMENT CONTRACT, NOR DID DEFENDANT MAKAROV CITE JOHNSON, supra, OR ANY SIMILAR AUTHORITY IN HIS MOTIONS FOR DIRECTED VERDICT OR FOR JUDGMENT NOV, THAT ISSUE WAS NOT PRESERVED ON APPEAL.

B. BECAUSE THE INCORPORATION OF OTHER DOCUMENTS INTO CONTRACTS IS WELL RECOGNIZED LAW IN MISSOURI, AND, IN THAT, DEFENDANT MAKAROV'S WRITTEN EMPLOYMENT CONTRACT WITH

DEFENDANT COLLEGE CLEARLY INCORPORATED WITHIN ITS SPECIFIC TERMS THE FACULTY HANDBOOK AND THE OBLIGATION TO TREAT STUDENTS, SUCH AS PLAINTIFF, WITH "COURTESY", "RESPECT", "FAIRNESS" AND "PROFESSIONALISM", THIS WAS PART OF DR. MAKAROV'S WRITTEN EMPLOYMENT CONTRACT.

C. BECAUSE THE INCORPORATED TERMS OF THE FACULTY HANDBOOK IN MAKAROV'S WRITTEN EMPLOYMENT CONTRACT REQUIRED FACULTY MEMBERS, SUCH AS DEFENDANT MAKAROV, TO TREAT STUDENTS WITH "COURTESY", "RESPECT", "FAIRNESS", AND "PROFESSIONALISM" ARE NOT VAGUE, NOR AMBIGUOUS, IN THAT THESE TERMS ARE COMMON WORDS, UNDERSTANDABLE TO PERSONS OF AVERAGE INTELLIGENCE AND EXPERIENCE, THESE ARE ENFORCEABLE PROVISIONS OF MAKAROV'S WRITTEN EMPLOYMENT CONTRACT OF WHICH LEE VERNI AS A STUDENT WAS A THIRD-PARTY BENEFICIARY.

A. Standard of Review.

An appellate court, in reviewing the trial court's ruling on a motion for a judgment NOV must determine whether or not a sufficient motion for a directed verdict was made at the close of the evidence. A motion for a judgment NOV is properly preserved only when a sufficient motion for a directed verdict has been made at the close of the evidence. Estate of Gross v. Gross, 840 S.W.2d 253, 256 (Mo. App. 1992).

Missouri Civil Rule 72.01(a) provides that a party may move for a directed verdict

at the close of the evidence. However, Rule 72.01(a) mandates that the motion "shall state the specific grounds therefore."

A. Argument and Analysis.

In the present case, the Defendants did file a written motion for a directed verdict at the close of the evidence. The Defendant's Motion for Directed verdict was extremely lengthy and covered fifty pages of the Defendants' supplemental legal file, and contained many claimed grounds for relief in general, along with a relatively few specific grounds that were listed with citations to authority. The part of that motion specifically directed to Plaintiff's breach of contract claim against Defendant Makarov appears in the Defendants' Supplemental Legal File on pages 24-28. Therein Defendant Makarov listed 28 separately numbered paragraphs in support of the motion. However, in none of those 28 paragraphs does Defendant Makarov raise the legal issue that he now claims is supported by Johnson v. McDonnell Douglas Corp., 745 S.W. 2d 661 (Mo. banc 1988) namely that an employee handbook does not or cannot constitute part of an employment contract in Missouri. The only suggestion of that theory might be found in paragraph 142 of that motion which states "The evidence fails to establish a mutuality of agreement between plaintiff and defendant Makarov." (Supplemental Legal File, p. 24.) However "bare generalities" do not provide the specific grounds required to sustain a motion for a directed verdict. McRaven v. F-Stop Photo Labs, Inc., 660 S.W. 2d 459, 460 (1983).

Because the Defendant did not raise in his motion for directed verdict the argument that an employee handbook cannot be made part of any employment agreement, that issue

was not preserved for review by an appellate court. Thornton v. Gray Automotive Parts Co., 62 S.W.3d 575, 588 (Mo. App. 2001).

B. BECAUSE THE INCORPORATION OF OTHER DOCUMENTS INTO CONTRACTS IS WELL RECOGNIZED LAW IN MISSOURI, AND, IN THAT, DEFENDANT MAKAROV'S WRITTEN EMPLOYMENT CONTRACT WITH DEFENDANT COLLEGE CLEARLY INCORPORATED WITHIN ITS SPECIFIC TERMS THE FACULTY HANDBOOK AND THE OBLIGATION TO TREAT STUDENTS, SUCH AS PLAINTIFF, WITH "COURTESY", "RESPECT", "FAIRNESS" AND "PROFESSIONALISM", THIS WAS PART OF DR. MAKAROV'S WRITTEN EMPLOYMENT CONTRACT.

A. Standard of Review.

In determining whether plaintiff has made a submissible case, the appellate court reviews the evidence in the light most favorable to the plaintiff. Gateway Exteriors, Inc. v. Suntide Homes, Inc. 882 S.W.2d 275, 279 (Mo. App. 1994).

B. Argument and Analysis.

Under Missouri law a contract may incorporate another document by reference and thereby make that other document an enforceable part of the contract. Jim Carlson Const. Inc. v. Bailey, 769 S.W.2d 480 (Mo. App. 1989). The Makarov written employment contract with the College incorporated the college handbooks as part of its provisions.

Plaintiff's breach of contract claim is premised on the written employment contract

between the College and Dr. Makarov. (L.F. pp. 37-41, 91). Plaintiff claims that Dr. Makarov breached the employment contract between the College and Dr. Makarov by failing to act in accord with the requirements set forth in the faculty handbook which provides that faculty members have a duty to treat each student with "courtesy, respect, fairness and professionalism". (L.F. pp. 37-40, 91, Tr. Ex. p. 89, l. 386).

The form of Defendant Makarov's one page employment contract is set out in Exhibit 55, Tr. p. 386) and contained the following provisions within its third paragraph:

> "You are to comply with and support the policy and procedures stipulated in the Faculty Handbook and with any institutional modification enacted during the period of employment."

Unlike the situation in Johnson, Id., there is and was a written contract between the employee, Dr. Makarov, and the employer, the defendant College, and the employee handbook of Defendant College was not merely evidence of the terms of a contract, but constituted the greater part of the contract. Therefore Johnson, Id., is not controlling under the facts of this case.

It would be unreasonable and contrary to the preponderance of the evidence for the Court to interpret Johnson, Id. as holding, that in other factual situations such as this matter now before the Court, that other written materials such as employee handbooks, much like Defendant College's Faculty Handbook, cannot and do not lawfully constitute parts of a binding employment contract. The impact of that ruling would be far reaching and cause great unpredictability in our business and commerce relations. For example, many

beneficial and important policies and rules such as anti-discrimination rules could be unenforceable unless included in new employment contracts or in printed and signed addendums to previously existing contracts. Those results would have great impact on Missouri employers and employees and probably result in other, unintended consequences.

C. BECAUSE THE INCORPORATED TERMS OF THE FACULTY HANDBOOK IN MAKAROV'S WRITTEN EMPLOYMENT CONTRACT REQUIRED FACULTY MEMBERS, SUCH AS DEFENDANT MAKAROV, TO TREAT STUDENTS WITH "COURTESY", "RESPECT", "FAIRNESS", AND "PROFESSIONALISM" ARE NOT VAGUE, NOR AMBIGUOUS, IN THAT THESE TERMS ARE COMMON WORDS, UNDERSTANDABLE TO PERSONS OF AVERAGE INTELLIGENCE AND EXPERIENCE, THESE ARE ENFORCEABLE PROVISIONS OF MAKAROV'S WRITTEN EMPLOYMENT CONTRACT OF WHICH LEE VERNI AS A STUDENT WAS A THIRD-PARTY BENEFICIARY.

Courtesy, respect, fairness and professionalism are not arcane, unusual or little-used terms. In construing the language of a contract, it is to be understood according to the plain and ordinary meaning of the words used, or the meaning that a person of average intelligence, knowledge and experience would deem reasonable. Bailey v. Federated Mut. Ins. Co., 152 S.W.3d 355, 357 (Mo. App. 2004). A jury should be presumed to be composed of persons of "average intelligence, knowledge and experience". Such persons would not have any difficulty in understanding the plain and ordinary meaning of words such as "courtesy", " respect", and fairness". Missouri courts have found dictionaries to be helpful

in arriving at commonly understood meanings of words. Shahan v. Shahan, 988 S.W.2d 529, 535 (Mo. banc 1999). In regard to the present case, *Webster's New Twentieth Century Dictionary Unabridged, Second Edition,* at page 658 defines "fairness", as follows:

> "Fairness. The state, quality or character of being fair."
>
> "Fair. 8. According to the rules . . ."

Surely neither Dr. Makarov, a learned Doctor of Medicine, nor the jury, as persons of average experience and intelligence, would have had no trouble in understanding fairness or courtesy or respect or even professionalism.

In addition to the clear, unambiguous meaning of those specific terms, the intention of the parties to a contract, if uncertain, is to be gleaned from the surrounding circumstances. Terre Du Lac Assn. V. Terre Du Lac., Inc., 737 S.W.2d 206, 213 (Mo. App. 1987). In light of the testimony by all of the witnesses at trial, and the memos and documents of Defendant College that were introduced into evidence, the jury properly found that the preservation of the rights and advancement of the interests of Defendant College's chiropractic students was at the heart of the employment contract between the College and Defendant Makarov and that terms such as fairness, respect and courtesy should be construed accordingly.

The trial court was correct in refusing to set aside the jury's verdict for breach of contract against Defendant Makarov, and therefore, this Court should affirm this decision of the trial court.

POINT III.

(Response To Respondents-Appellants' Points III And IV)

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL ON THE ISSUE OF DAMAGES, OR, IN THE ALTERNATIVE, ORDERING ADDITUR, BECAUSE THE JURY'S VERDICTS CLEARLY EVIDENCED CONFUSION, MISTAKE, BIAS OR PREJUDICE, IN THAT, ALTHOUGH THE DAMAGES SUFFERED BY APPELLANT-RESPONDENT VERNI WERE IDENTICAL IN REGARD TO THE WRONGFUL ACTIONS OF EACH RESPONDENT, THE JURY RETURNED A VERDICT OF ONLY $10,000.00 AGAINST RESPONDENT DR. ALEKSANDR MARKOV, WHILE INEXPLICABLY RETURNING A VERDICT OF $20,00000 AGAINST RESPONDENT CLEVELAND CHIROPRACTIC COLLEGE.

A. Standard of Review.

The size of a damage award may be set aside if found to be woefully inadequate. However it will be upheld if the evidence supports the verdict and suggests that the jury properly considered all categories of damages. Thornton v. Gray Parts Company, 62 S.W.3d 575, 580 (Mo. App. 2001).

B. Argument and Analysis.

The trial court has the authority to set aside a jury's verdict and order one new trial solely on the issue of damages, both compensatory and punitive**.** Burnett v. Griffith, **7**69 S.W.2d 780, 790 (Mo. banc 1989). Under Missouri law**,** a trial judge may grant a new trial

if the jury verdict is against the weight of the evidence. Norris v. Barnes, 957 S.W.2d 524, 527 (Mo. App.1997).

The remedy of ordering a new trial in this case is both appropriate and in the interests of justice. Here, although the jury returned a verdict for Verni against each defendant, those two verdicts were in inexplicably different amounts - a verdict of only $10,000.00 against Dr. Makarov and a verdict for $20,000.00 against Defendant College. Although those verdicts were, respectively, based on breach of contract and on fraud, they were for the identical injury and damages to Verni, namely his expulsion from chiropractic college and all the damages that predictably and consequently resulted therefrom. Neither malice nor outrageous conduct was an element of either verdict and neither defendant's actions should be considered to merit a larger or smaller award then those of the other. Furthermore, neither defendant submitted a jury instruction for comparative fault or for failure to mitigate damages. Therefore the only explanation for such disparate verdicts would be confusion, mistake, bias, or prejudice by the jury towards or against the different defendants and/or confusion or mistake as to the rationale supporting, or the mathematics of, the calculations of lost wages suffered by Plaintiff as explained by the expert witness economist.

Accordingly, this Court should order a new trial on the issue of damages, or, in alternative, order additur in at least the amount of the lost wages suffered by the Plaintiff and the Plaintiff respectfully prays accordingly.

POINT IV.

(Response To Respondent-Appellants' Points III and IV)

THE TRIAL COURT ERRED IN DENYING PLAINTIFF LEE VERNI'S MOTION FOR A NEW TRIAL ON THE ISSUE OF DAMAGES, OR, IN THE ALTERNATIVE, IN FAILING TO ORDER ADDITUR, BECAUSE THE JURY'S VERDICTS WERE AGAINST THE WEIGHT OF THE EVIDENCE AND THE TRIAL COURT IN DENYING PLAINTIFF'S MOTION ABUSED ITS DISCRETION IN THAT THE DAMAGE AWARDS TO PLAINTIFF WERE SO SHOCKING AND GROSSLY AND WOEFULLY INADEQUATE IN VIEW OF THE SUBSTANTIAL EVIDENCE OF DAMAGES SUSTAINED BY THE PLAINTIFF AS DETERMINED BY THE UNCONTRADICTED TESTIMONY OF THE PLAINTIFF'S ECONOMIC EXPERT AS TO LEE VERNI'S LOST WAGES, THIS UNCONTRADICTED AND REASONABLE COMPUTATION BY THAT EXPERT OF THOSE LOST WAGES, WHICH WAS EVEN CORROBORATED BY THE TESTIMONY OF THE DEFENDANT COLLEGE'S PRESIDENT, DR. CLEVELAND, AS TO THE AVERAGE CHIROPRACTOR'S ANNUAL WAGES, ALONE EXCEEDED THE JURY'S VERDICT BY MORE THAN TEN (10) TIMES.

A. Standard of Review.

A jury's verdict may be set aside if the damages that are awarded are so inadequate as to shock the appellate court's conscience. In such a case the appellate court may find that both the jury and the trial judge abused their discretion. Calarosa v. Stowell, 32 S.W.3d 138 (Mo. App. W.D. 2000).

B. Argument and Analysis.

The trial court has long had the authority to increase a jury verdict by additur if the verdict returned by the jury was inadequate. Tucci v. Moore, 875 S.W.2d 115, 116 (Mo. banc 1994). The basis for ordering additur, or a new trial if defendants rejected additur, was that the verdict was against the weight of the evidence. Tucci, Id. In the present case, Lee Verni suffered real and substantial losses as a result of his expulsion from Cleveland Chiropractic College. A new trial may be granted on the issue of damages alone even if substantial damages were awarded by the jury if those damages were still inadequate. It is not necessary to show misconduct on the part of the jury or that the damages awarded were grossly inadequate. Instead, "the purpose of additur, like remittitur" is not to correct juror bias and prejudice, but to correct a jury's honest mistake in fixing damages. Massman Const. v. Highway & Transp. Com'n, 914 S.W. 2d 801, 803 (Mo. banc 1996).

To discover an honest, but serious mistake by the jury in awarding Plaintiff Verni his damages, it is only necessary to look at the amount of wages that Plaintiff proved at trial that he lost due to his expulsion from Cleveland Chiropractic College. The calculation of those damages was based on a simple premise and on simple mathematics. The premise is that if

a person is expelled from a professional school or college before he has an opportunity to graduate, it will take him months, or even longer for him to obtain a similar degree from another professional school of that type since there will be an inevitable delay in transferring to another college and in completing that college's decree requirements. Because it will take that student longer to graduate and obtain his professional decree, it will take equally longer for him to begin his professional career, and, as a logical and proximate result, his career will be shortened by the same length of time.

As proof of Plaintiff's lost wages, he presented the testimony of an expert witness, an economist by the name of Kurt Krueger (Tr. p. 1216), to testify as to the extent of Verni's lost future income proximately and consequently resulting from Verni's expulsion from Cleveland Chiropractic College prior to obtaining his degree. Mr. Krueger's expert credentials and experience (Tr. p. 1218-1219) should have conveyed to the jury both the inevitability of and the extent of Lee Verni's future lost wages.

In explaining his reasoning and methodology to the judge and jury, Mr. Krueger stated: (Tr. p. 1232):

> "Basically a person's lifetime earnings is just the sum of every year that they make over their lifetime. I've kind of extracted this you know, one, two, three, where I have again a number of years, so we don't know the exact number of working years, although the U.S. lifetime earnings are going to be the work life expectancy times their average earnings."

Referring to Exhibits 130(d), 130(e) and 130(f), Mr. Krueger relied on Department of Labor statistics that showed that chiropractors in the United States made an average of $81,500.00 in the year 2000. (Tr. pp. 1235-36). Mr. Krueger then multiplied that average income figure by the proper multiplier, number of years by which Lee Verni's work life was **shortened** by having no choice but to finish his chiropractic education at another college in Texas. In that manner, the economist used mathematics and statistics to explain Verni's lost wages. Then, to reflect the $20,000.00 in income that Verni was going to receive as a teaching fellow for one year at Texas Chiropractic College, Mr. Kruger deducted that $20,000.00 from Verni's lifetime earnings. (Tr. p. 1236). Then, finally, Mr. Krueger, deducted another $ 6,400.00 to represent what Lee Verni would be earning at a clinic 2 days a week during a 16 week of period. (Tr. p. 1236). By that simple method, the professional economist calculated Lee Verni's loss of future wages as $ 272,432.00 (Tr. p. 1237). A jury, in the absence of mistake or confusion, should have been able to arrive at the same result in assessing Lee Verni's damages for lost wages, if they were not confused or mistaken in their calculations.

Even if the jury might be reluctant to believe Mr. Krueger's testimony of national income statistics of $81,500 per year as an average chiropractor's income, it should be bound to give credence to the testimony of Defendant College's own president, Dr. Carl Cleveland. At trial and under direct examination by Mr. Barnes, Verni's co-counsel, Dr. Carl Cleveland testified as follows: (Tr. pp. 1141-1142) :

"Q. (By Mr. Barnes) On your web site do you have a representation at

to chiropractic college - strike that -. Chiropractors' income; is that correct?

A. Yes, we refer students to government agencies.

Q. And what is the annual income for a chiropractor represented on your web site?

A. You know, I would have to look at that. I would say that it's probably in the $ 60,000 to $ 80,000 range.

Q. Would it be a fair representation to say it was $ 86,000 plus?

A. It's very possible"

Therefore, even in the absence of any testimony by Kurt Krueger, the Defendant College offered evidence through its own president that a chiropractor would earn anywhere from $ 60,000 to $ 86,000 per year on the average. Since there was no countervailing testimony as to damages, the jury should be limited to the uncontradicted testimony in arriving at its verdict. Bailey v. Interstate Automotive, Inc., 219 S.W. 2d 333 (Mo. 1949). The fact that the jury returned a verdict of only $20,000.00 against Defendant College can only mean that the jury believed that Verni lost only one year of future income and that such income would be calculated at what he earned as a lowly teaching fellow at a college rather than as an experienced chiropractor with a patient base and years of experience. That verdict against the College was woefully low and so inadequate that it could have only resulted due to the mistake, confusion and/or miscalculation by the jury. Furthermore a trial court can even infer bias and prejudice from the size of the verdict alone without the need to make

other findings of error or misconduct. Reynolds v. Arnold., 443 S.W. 2d 799, 801 (Mo. 1969).

In regard to the $10,000.00 verdict against Dr. Makarov, that result is even more against the weight of the evidence and is the obvious result of confusion, mistake or miscalculation by the jury. Did Dr. Makarov cause only a third of Plaintiff Verni's damages or only one-half of the injury caused by the College? There certainly was no evidence to that effect, nor did counsel for any party argue such a computation, nor was the jury instructed to take into account malice or comparative fault apportioned between the parties. The jury's action in arriving at those damage awards is as illogical as it is baffling.

Even if the jury decided to find that Verni lost wages for only the first three and two-third's years of his college career, that result would not "compute" nor would in be in accord with the evidence at trial which proved that the first years of chiropractic practice could not be figured in the calculation of damages.

On that critical issue, the economist Kurt Krueger testified that it didn't really matter what a chiropractor would earn in his first years of practice. (Tr. p. 1228).

In response to question from Mr. Giffen, Verni's counsel, Kurt Krueger testified as follows:

> A. [Kurt Krueger] "Now, as expected, and even in the outlook occupation camera, chiropractors are mainly self-employed and they have earnings in their first few years of working life, as they build a business, are likely to be very low. Now, over time, as they build their

practice, their earnings go up higher and higher.

• * *

A. (Krueger, Tr. P. 1230) Now if he only looked at damages for the first four years, if you said well, if he's only lost four years, the first four years, you add these up and its only $70,000, this sum here (indicating), well that's not a true indication of what his lifetime earning losses are."

As there was ample and uncontradicted evidence that Lee Verni, as a practicing chiropractor would most likely earn $81,500 to $ 86,000 per year on the average, the jury verdicts of $20,000. against Defendant College should be set aside and a new trial ordered for Plaintiff Lee Verni on the issue of damages, or, in alternative, order additur in at least the amount of the lost wages of the plaintiff and the plaintiff respectfully prays accordingly.

Accordingly, this Court should, therefore, order a new trial on the issue of damages, or, in alternative, order additur in at least the amount of the lost wages suffered by this plaintiff, in accordance with the uncontroverted evidence, as testified and presented by the expert economist and witness Kurt Krueger.

POINT V.

(Response To Respondents-Appellants' Point V)

THE TRIAL COURT ERRED IN GRANTING THE COLLEGE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE ACTIONABLE FRAUD MAY BE BASED ON REASONABLE RELIANCE ON THE REPRESENTATIONS OF ANOTHER AND RELIANCE MAY BE INFERRED FROM ALL OF THE FACTS AND CIRCUMSTANCES IN THE CASE;

A. IN THAT THE COLLEGE'S REPRESENTATIONS AS TO THE APPEALS PROCEDURES WERE NOT FOLLOWED BY THE COLLEGE, HAD NOT BEEN FOLLOWED AT ANY TIME AND THE COLLEGE NEVER INTENDED TO FOLLOW THESE REPRESENTED PROCEDURES AND THERE WAS SUBSTANTIAL EVIDENCE THROUGHOUT TRIAL BY THE TESTIMONY OF THE COLLEGE'S VERY OWN STAFF AND FACULTY THAT DEFENDANT COLLEGE HAD *ALWAYS* FAILED TO FOLLOW THOSE VERY IMPORTANT DUE PROCESS PROCEDURES IN THIS AND IN OTHER STUDENT DISCIPLINARY PROCEEDINGS.

B. IN THAT THERE IS SUBSTANTIAL EVIDENCE THAT PLAINTIFF VERNI DID RELY ON THE COLLEGE'S FRAUDULENT REPRESENTATIONS, THAT, IN THE APPEAL HEARING, IT WOULD FOLLOW ITS PUBLISHED DUE PROCESS PROCEDURES, AS SET FORTH IN ITS STUDENT HANDBOOK, AND AS EXPRESSED THROUGH THE COLLEGE'S CORRESPONDENCE TO LEE

VERNI, AND VERNI RELIED ON THOSE REPRESENTATIONS IN HIS PREPARATION FOR HIS APPEAL HEARING AND THEN THE COLLEGE DID NOT FOLLOW ITS PROCEDURE AND HAD NOT FOLLOWED ITS PROCEDURE, EVER.

A. Standard of Review.

The trial court cannot and should not take a case away from a jury unless the evidence is so strongly against the plaintiff that no room remains for reasonable minds to differ on the issue. Where reasonable minds can differ on a question before a jury, the court may not disturb the verdict. The Court of Appeals in its reviewing the trial court's action only considers evidence and inferences supporting the verdict, disregarding defendant's evidence except as it may support the verdict. Sanders Co. Plumbing v. City of Independence, 694 S.W.2d 841, 845 (Mo. App. 1985).

B. Argument and Analysis.

The trial court erred in its order setting aside the jury verdict on the stated basis that the College merely failed to perform its contract in the future rather than make a representation of present or past fact. Missouri courts recognize that a false representation of intention is actionable if the statement is reasonably interpretable as expressing a firm intention. Grosser v. Kandel-Iken Builders, Inc., 647 S.W.2d 911, 914 (Mo. Ct. App. 1983). The evidence at trial does not support the trial court's opinion that the College merely broke a promise to follow its own due process procedures instead of Plaintiff's claims that the College falsely represented that it would follow those procedures.

Any analysis of this situation must start with the undisputed fact that the College's own Student Handbook does not use the future tense in its statement of student due process rights. That handbook does not state "the student will be allowed . . . . . to see and/or hear the evidence against him." Rather the handbook uses the present tense of the verb by stating "the student ***"is"*** allowed." (Ex. 81)(emphasis supplied).

There was substantial evidence before the Court and the jury that while Defendant College continued to represent that it follows due process procedures in the appeal of student misconduct determinations, it had not done so in the past and did not feel bound to follow those procedures in the future. The due process procedures in the Student Handbook (Ex. 81) for the year 1998-99 set out in unambiguous language a student's rights at a disciplinary hearing. Those rights, in part, were:

> "At the hearing of the case, the following procedures will be followed:
>
> a) The student is allowed:
>
> • * *
>
> i. To see and/or hear all evidence presented against him/her, unless a complaining witness has been promised that he/she will not have t confront the student due to the nature of the allegations, in which case the committee will summarize orally for the student the substance of the witness's testimony;
>
> • * *
>
> iv. To question any testimony presented by witnesses as evidence

against him/her;"

Despite the clear language of those rules, there was no evidence before the judge or jury that Defendant College had ever followed all of its due process procedures in the past. In fact, there was substantial evidence that it had never followed its own due process procedures. The College's administrators believed that they were not obligated to follow those due process procedures. Marcia Thomas, the permanent chairperson of the Appeals Committee testified about the College's custom and practices in appeal hearing hearings: (Tr. P. 962)

> "Q. What's been your standard policy as to whether you allow students to be in the hearing room?
>
> A. Our standard policy is that the student is in the hearing room only when they are presenting their information."

That policy was in direct contradiction to the explicit language of the Student Handbook's due process rules. Thus the statement in those due process procedures that a student 'is allowed" to see and/or hear all evidence against him is a false statement of present or past fact. Also a false representation of intent can constitute a false representation of fact. As this Court ruled in Sofka v. Thal, 662 S.W.2d 502, 507 (Mo. 1983):

"While the mere giving of a promise, though breached the following day, would not give rise to an action for tortuous fraud, a promise accompanied by a ***present intent not to perform*** is a misrepresentation of present state of mind, itself an existing fact, sufficient to constitute actionable fraud." Id.

In Defendant College's formal written notice to Verni on March 23, 1999, dismissing Verni from college (Tr. p. 74), Cindy Miller referred to the Student Handbook in ***no*** uncertain terms:

> "Should you wish to appeal this sanction, you must abide by the procedures for due process set forth in the attached document . . . . If you choose to appeal, please refer to the due process procedures as described in the attached pages of the Student Handbook."

Clearly through Cindy Miller the College was representing that the due process provisions of the Student Handbook would control the conduct of the appeal hearing. But that was a false representation. The College did not, and had not in the past, abided by those procedures in several critical respects. Cindy Miller testified at trial that the College had not permitted students to see and/or hear evidence against them.

(Tr. p. 1168) (Questioning Verni's co-counsel Scott Giffen)

"Q. Okay. How many times would you say you went before the appeal committee during your time as director of the office of student services?

A. Any time a student appealed a decision, I would appear.

Q. Right. I understand that. How many times?

A. 12 to 15, I would say.

Q. Okay. And in any of those appeal hearings, was the student allowed to be present while you testified?

A. No.

Q. So that was standard operating procedure while you were there not to allow the student to be present while you testified?.

A. As best as I can recollect, yes, that's what happened."

(Tr. p. 1170) (again questioning by Mr. Giffen)

"Q. And, again, my question is, while you were the director of the office of student services wasn't it the policy of the college to exclude the student who was appealing from being in the appeal hearing room during witnesses' testimony against the student?

A. I think that was generally standard operating procedure. Yes.

Q. And you knew that, correct?

A. Yes, uh-huh.

Q. And you knew that when you told Mr. Verni to refer to the Student Handbook procedures in that letter of dismissal on March 23, 1999, correct?

A. Yes."

The testimony of Marcia Thomas, the permanent chairperson of the Appeals Committee since 1996 (Tr. p. 930) also confirmed the College's custom and practice. It is probative of her state of mind that Ms. Thomas referred to the college's due process rules and procedures as "guidelines" and that they had interpreted those rules as guidelines. (Tr. p. 938). For many years she used a form letter similar to that sent to Verni (Tr. p. 940-41) which contained language referring to the due process procedures. In Lee Verni's hearing she allowed Aaron Lorenzen and Cindy Miller to remain in the hearing room to hear the

evidence. (Tr. p. 947, 954) Ms. Thomas testified that neither Ruth Sandefer nor the anonymous witness appeared or testified. (Tr. p. 957-58). Ms. Thomas further testified that the College's standard policy was that students who were the subject of disciplinary sanctions were permitted to be in the hearing room only when they, the students, testified, but not when the witnesses against them testified. (Tr. p. 962). Marcia Thomas further testified that it was the College's policy at the time to not summarize testimony of witnesses concerning the student who was the subject of the hearing. (Tr. p. 972). Even though Ms. Thomas intended for Lee Verni to rely on the due process procedures in the Student Handbook (Tr. p. 974), she also knew that Verni would not be allowed in the hearing room to hear the testimony of other witnesses. (Tr. p. 975) As further evidence that it had long been the practice of Defendant College to fail to follow its due process rules, Ms. Thomas testified as to a case that had happened years earlier when the College decided not to permit a student to be present to hear evidence against her and which resulted in a lawsuit. (Tr. p. 1013-15). Lee Verni submits that the evidence at trial established that the College continued to represent that it would follow its own due process rules even though it had not followed those rules ever, had no present intention to follow those rules, yet the College continued to represent to its students and specifically to Plaintiff Verni that it did follow those rules. Consequently the jury had ample evidence for its finding of fraudulent representations by the College.

B. IN THAT THERE IS SUBSTANTIAL EVIDENCE THAT PLAINTIFF VERNI DID RELY ON THE COLLEGE'S FRAUDULENT REPRESENTATIONS,

THAT, IN THE APPEAL HEARING, IT WOULD FOLLOW ITS PUBLISHED DUE PROCESS PROCEDURES, AS SET FORTH IN ITS STUDENT HANDBOOK, AND AS EXPRESSED THROUGH THE COLLEGE'S CORRESPONDENCE TO LEE VERNI, AND VERNI RELIED ON THOSE REPRESENTATIONS IN HIS PREPARATION FOR HIS APPEAL HEARING AND THEN THE COLLEGE DID NOT FOLLOW ITS PROCEDURE AND HAD NOT FOLLOWED ITS PROCEDURE, EVER.

The effect of the College's failure, even refusal, to follow those rules was predictable. Verni could not challenge the adequacy of the evidence against him or make objections as to hearsay, or draw conclusions as to bias or prejudice, or question the accuracy and source of the charges against him. Verni couldn't question the thoroughness of the investigation against him or inquire into the specifics and possible weaknesses of Aaron Lorenzen's investigation or attack the conclusions contained therein if he wasn't allowed to even hear Mr. Lorenzen's testimony. He could not confront Dr. Makarov, attempt to impeach his testimony, or elicit from him evidence that might have contradicted the charges or otherwise been exculpatory.

Ms. Thomas, testified that Cindy Miller (again without the presence of Lee Verni in the room) told the appeals committee what her thought processes were in reaching her critical conclusion that Lee Verni was guilty of misconduct meriting dismissal. (Tr. p. 949). Since Lee Verni was not present at Cindy Miller's testimony, how could he challenge the facts she felt supported her decision or question the logic of the decision? How could Lee Verni even

know what rebuttal testimony to give to the appeals board? Undoubtedly Lee Verni was prejudiced and hampered in his defense by not being able to see or hear the evidence against him or, at the very least, have that evidence against him summarized by a member of the appeals panel.

It is within the common experience and training of lawyers, judges, and probably well within the understanding of the average juror who has watched televised trials or courtroom dramas that there are multiple ways to confront and refute charges by a plaintiff or a prosecutor in any hearing. One approach is to call one's own witnesses. Since Plaintiff Lee Verni did not know who were the witnesses who would testify against him, it was not realistic, or even possible, for him to decide which witnesses to call on his behalf. Instead, he obviously planned to listen to and contest or refute any testimony against him. However, he didn't know he would not be able to cross-examine Aaron Lorenzen, the investigator in Verni's case. But Lee Verni was not allowed to be present to hear Mr. Lorenzen's testimony. (Tr. p. 946-47). He would have been ready to cross-examine Ruth Sandefur, the person who filed the initial complaint against him, but she was not called by the Appeals Board to Testify. (Tr. p. 957). Lee Verni desired to cross-examine Dr. Makarov, but he was not allowed to be present when Dr. Makarov testified. (Tr. p. 959). Even more critically, and outrageously, when Dr. Makarov was called back to respond to testimony by Lee Verni, Verni was not allowed to be present to hear that response or refutation (Tr. p. 961) and, consequently, Verni could not comment on Dr. Makarov's second statements. In such circumstances Plaintiff Verni's reliance could only be shown by appearing at the hearing (Tr.

p. 102), by reviewing the materials in the appeal packet given to him containing the charge and the interviews (Tr. p. 107), by bringing the textbook for the Dermatology class to show where that he got the practice questions he wrote out for himself and as requested by Dr. Makarov, and not through stealing Dr. Makarov's test, and by being prepared to point out the discrepancies between Dr. Makarov's handwritten questions, Lee Verni's handwritten questions, and the typed test actually administered by Dr. Makarov to his Dermatology class. (Tr. p. 352-53). Plaintiff Leonard Verni relied on the representations by Defendant College the best, and in fact, the only way he could. To the extent that Lee Verni's attempts to defend himself from the charges that led to his expulsion were ineffectual, that was the natural and foreseeable consequences of Defendant College's failure to allow Lee Verni his full and promised appeal rights and protections all as fraudulently represented to him by the defendant College.

In proving the elements of the tort of misrepresentation, the fact of reliance on the false representation does not require direct proof and reliance may be inferred from all the facts and circumstances in the case. Universal C.I.T. Credit Corporation v. Tatro, 416 S.W.2d 696, 703 (Mo App. 1967). In the facts and circumstances surroundiung Lee Verni's appeal hearing, the jury was justified in inferring that Verni did rely on the representations of Defendant College that it would follow its published due process procedures.

For all of the above and foregoing reasons it is clear that the jury had substantial evidence to support its finding that Defendant College made false representations of present or past fact to Plaintiff Verni, which Lee Verni relied on, and therefore, the trial court erred

in entering a judgment notwithstanding the jury's verdict in Plaintiff's favor and against Defendant College.

CONCLUSION

In conclusion, Plaintiff Lee Verni seeks the order of this Court setting aside the trial court's order of judgment notwithstanding the verdict against Defendant Cleveland Chiropractic College. Plaintiff Lee Verni further prays that this Court order additur of the original verdicts against Defendant College Cleveland Chiropractic College and Defendant Aleksandr Makarov, in the sum of $ 272,432.00 against each defendant, and, if refused by either, or both, that a new trial be ordered solely on the issue of damages as to each of said parties that refuses additur.

Respectfully Submitted,

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RULE 84.06(c) CERTIFICATION

The undersigned counsel hereby certifies that this brief includes the information required by Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b). This brief contains 10,810 words counted using Corel WordPerfect No. 9. Counsel also certifies that the attached floppy disk containing this brief has been scanned viruses and is virus-free.

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Theodore D. Barnes # 25443

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Substitute Brief of Appellant-Respondent along with a copy of this Certificate of Mailing/Hand-delivery, were hand-delivered this 5th day of September, 2006, to: John E. Franke, Franke, Schultz & Mullen, P.C., 8900 Ward Parkway, Kansas City, Missouri 64114, Attorneys for Cleveland Chiropractic College and Aleksandr Makarov.

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