

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**

**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 plaintiff while attending the Cleveland Chiropractic College (hereinafter “College”). (L.F. pp 1-67). While at 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 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.

It is Dr. Makarov's position that the trial court lacked subject matter jurisdiction over the breach of contract claim asserted by plaintiff. Given the trial court's lack of subject matter jurisdiction to enter judgment, this Court likewise has no jurisdiction to review the merits of the trial court's Judgment. Rather, lack of jurisdiction requires this Court reverse the Judgment of the trial court and remand the case with instructions to dismiss the breach of contract claim for lack of subject matter jurisdiction. Dr. Makarov's argument regarding this Court's lack of jurisdiction with regard to the breach of contract claim is further addressed under Point I of this Brief.

With the exception of the allegations of error regarding the breach of contract claim against Dr. Makarov as stated above, this appeal is within the jurisdiction of this Court pursuant to the Missouri Constitution, Article V, Section 3.

STATEMENT OF FACTS

This case arises out of an incident that occurred in the spring of 1999. (L.F. pp. 1-67). During that time, plaintiff Lee Verni was a student at Cleveland Chiropractic College (hereinafter “the College”). (Tr. pp. 18-19). Plaintiff was enrolled in a dermatology class taught by Dr. Aleksandr Makarov, a full-time faculty member of the College. (Tr. pp. 19-21). An examination in the dermatology class was scheduled for February 11, 1999. (Tr. p. 21). The day before the examination, an anonymous student contacted the academic dean of the College by telephone and reported that plaintiff was selling copies of the exam that Dr. Makarov was going to administer to his dermatology class the following day. (Tr. pp. 388-391). The anonymous student then mailed a copy of the exam to the dean. (Tr. pp. 393-395). Upon receipt of the exam from the anonymous student, the dean completed and filed an incident report regarding the alleged misconduct. (Tr. pp. 395-396). The College then initiated an investigation. (Tr. pp. 416, 766).

After the investigation was complete, the College made a finding that the evidence supported the charge of “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. pp. 74-75, L.F. pp. 60-61). Based upon the College’s finding, plaintiff was dismissed from the College. (Tr. pp. 74-75). Upon his dismissal from the College, plaintiff was advised of his right to appeal the decision of the College. (Tr. pp. 75-77). Plaintiff, thereafter, filed a written notice of appeal with the College. (Tr. pp. 79-80). The College’s appeal board, which was comprised of the appeal chairperson, two

faculty members and a student of the College, held a hearing on plaintiff's appeal on April 5, 1999. (Tr. p. 104). At the hearing, the appeals board was presented the testimony of the Director of Student Services, the College's staff member who conducted the investigation of the incident, Dr. Makarov, and plaintiff. (Tr. pp. 105-106). After considering the testimony of all witnesses, the appeals board upheld the College's decision to dismiss plaintiff from the College. (Tr. pp. 109-110).

Plaintiff worked various jobs for over a year following his dismissal from the College. (Tr. pp. 161-163). In the fall of 2000, plaintiff enrolled at Texas Chiropractic College to complete his studies. (Tr. p. 171). He obtained his degree from the college in April 2002. (Tr. pp. 172-173). Upon graduation from the Texas Chiropractic College, plaintiff remained in Texas to be with his wife while she completed her graduation. (Tr. pp. 255-256). Plaintiff thereafter intended to move to Louisiana to practice chiropractic medicine. (Tr. p. 186).

Plaintiff filed the present action against defendants Cleveland Chiropractic College and Dr. Makarov arising out of the above-described incident on or about April 26, 2000 in the Circuit Court of Jackson County, Missouri. (L.F. 1-67). Plaintiff's case was tried to a jury on or about February 19, 2003, which trial spanned two weeks. (L.F. pp. 102-104). While Plaintiff's Second Amended Petition asserted fourteen claims for relief against defendants, plaintiff submitted the case to the jury under the following four theories: 1) breach of contract against the College; 2) fraudulent misrepresentation against the College; 3) breach of contract against Dr. Makarov; and 4) fraudulent nondisclosure against the College. (L.F. pp. 1-67, 79-96, 102-104).

In his breach of contract claim against the College, plaintiff alleges that he and the College entered into a contract whereby the College agreed to follow due process procedures specified in the student handbook. (L.F. pp. 11-14, 84). Plaintiff claims the College breached the terms of the contract by failing to follow all of the due process procedures at the appeal hearing regarding his dismissal from the College and plaintiff was thereby damaged. (L.F. pp. 11-14, 84). Specifically, plaintiff's claimed damages include tuition expenses, moving expenses, additional interest incurred on student loans, monthly travel expenses to visit his daughter for the next twelve years, and lost earnings incurred as a result of plaintiff's delay in completing his chiropractic education. (L.F. pp. 11-13).

Plaintiff's fraudulent misrepresentation claim against the College likewise arises out of the alleged representations made by the College concerning the due process procedures to be followed at the appeal hearing. (L.F. pp. 14-19, 87). Specifically, plaintiff claims that the College made representations to him prior to his appeal hearing that the College would follow the appeal procedures set forth in the student handbook. (L.F. pp. 14-19, 87). Plaintiff claims that the representations made by the College that it would follow the due process procedures set forth in the student handbook were false and, further, that the College knew these representations were false at the time they were made. (L.F. pp. 14-19, 87). Plaintiff claims these representations were material and, further, that he relied upon such representations in preparing for and participating in the appeal hearing. (L.F. pp. 14-19, 87). Plaintiff claims that as a direct result of such representations, plaintiff was damaged as previously described. (L.F. pp. 14-19, 87).

In his final claim against the College, fraudulent nondisclosure, plaintiff asserts that the College intentionally concealed the fact that its investigation of plaintiff's alleged misconduct revealed that the anonymous student reporting the incident to the College could have offered testimony that may have assisted plaintiff at his appeal hearing. (L.F. pp. 22-32, 94). Plaintiff claims that the College had a duty to disclose this information to plaintiff based upon the inequality of the position between plaintiff and the College, the College's superior knowledge and its partial disclosures of the information during the investigation and appeal hearing. (L.F. pp. 22-32, 94). Plaintiff claims the College's failure to disclose this information was material and plaintiff further relied upon the nondisclosure in preparing for his appeal hearing which reliance resulted in damage to plaintiff as previously described. (L.F. pp. 22-32, 94).

Plaintiff asserted only one claim against Dr. Makarov, a claim for breach of contract. (L.F. pp. 37-40, 91). In his breach of contract claim against Dr. Makarov, plaintiff alleges he was a third-party beneficiary of the employment contract entered into between the College and Dr. Makarov. (L.F. pp. 37-40, 91). Plaintiff alleges that this employment contract obligated Dr. Makarov to treat each student with courtesy, respect, fairness and professionalism. (L.F. pp. 37-40, 91). Plaintiff alleges that Dr. Makarov breached this term of the employment contract, which breach resulted in damage to plaintiff as described above. (L.F. pp. 37-41, 91).

After the trial, the jury returned a verdict for plaintiff against the College on the fraudulent misrepresentation claim awarding plaintiff damages in the amount of \$20,000.

(L.F. pp. 99, 102-104). Additionally, the jury returned a verdict in favor of plaintiff and against Dr. Makarov on the breach of contract claim. (L.F. pp. 100, 102-104). On his breach of contract claim against Dr. Makarov, the jury awarded plaintiff damages in the amount of \$10,000. (L.F. pp. 100, 102-104). The jury returned a verdict in favor of the College and against plaintiff on the remaining breach of contract and fraudulent nondisclosure claims. (L.F. pp. 98, 101-104).

The Court entered judgment in accord with the jury verdicts in this matter on or about March 7, 2003. (L.F. pp. 102-104). Plaintiff, thereafter, timely filed a Motion for Additur or in the Alternative New Trial on the issue of damages only. (L.F. pp. 105-106). Additionally, Dr. Makarov and the College filed Motions for Judgment Notwithstanding the Verdict. (Supp. L.F. p. 50). On or about April 6, 2003, the trial court denied plaintiff's Motion for Additur and Motion for New Trial on the issue of damages and Dr. Makarov's Motion for Judgment Notwithstanding the Verdict. (L.F. pp. 134-139). On that same date, the Court granted the College's Motion for Judgment Notwithstanding the Verdict and thereby set aside the verdict finding that plaintiff's evidence failed to establish an essential element of his fraudulent misrepresentation claim against the College. (L.F. pp. 136-139). Specifically, the court found that the language of the student handbook upon which plaintiff's fraudulent misrepresentation claim was based was not a current or past representation but, rather, a representation of a future fact which representation will not support submission of a fraudulent misrepresentation claim. (L.F. pp. 136-139). Additionally, the court noted that there was no substantial evidence to support the element of plaintiff's fraudulent

misrepresentation claim that plaintiff relied on the representations in the student handbook. (L.F. pp. 136-139). For these reasons, the trial court sustained the College's Motion for Judgment Notwithstanding the Verdict. (L.F. pp. 136-139).

Both parties appealed the judgment of the trial court. After the Missouri Court of Appeals, Western District, issued its opinion, this Court granted transfer pursuant to Rule 83.04.

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN PLAINTIFF'S FAVOR AND DENYING DEFENDANT MAKAROV'S JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM ARISING OUT OF THE EMPLOYMENT CONTRACT BETWEEN DEFENDANT MAKAROV AND THE COLLEGE BECAUSE PLAINTIFF LACKED STANDING TO ASSERT SUCH CLAIM WHICH DEPRIVED THE TRIAL COURT OF SUBJECT MATTER JURISDICTION OVER THE CLAIM IN THAT PLAINTIFF WAS NOT A PARTY TO OR THIRD-PARTY BENEFICIARY OF THE EMPLOYMENT CONTRACT.

Aufenkamp v. Grabill, 112 S.W.3d 455 (Mo. App. 2003).

Wood v. Centermark Properties, Inc., 984 S.W.2d 517 (Mo. App. 1998).

O.F.W. Corp. v. City of Columbia, 893 S.W.2d 876 (Mo. App. 1995).

Hudson v. River Port Performance Arts Centre, 37 S.W.3d 261 (Mo. App. 2000).

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT MAKAROV'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT WITH REGARD TO PLAINTIFF'S BREACH OF CONTRACT CLAIM ASSERTED AGAINST DEFENDANT MAKAROV BECAUSE MISSOURI LAW IS CLEAR THAT THE TERMS CONTAINED IN A HANDBOOK DISTRIBUTED BY EMPLOYERS TO EMPLOYEES ARE UNILATERAL IN NATURE, GENERALLY STATED IN VAGUE TERMS AND DO NOT CREATE A CONTRACT BETWEEN AN EMPLOYER AND EMPLOYEE IN THAT PLAINTIFF'S BREACH OF CONTRACT CLAIM WAS BASED ON THE VAGUE AND UNILATERAL TERMS CONTAINED IN THE COLLEGE'S FACULTY HANDBOOK AND THEREFORE NOT PART OF AN ENFORCEABLE CONTRACT.

Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. banc 1988).

Kemp Constr. Co. v. Landmark Bancshares Corp., 784 S.W.2d 306 (Mo. App. 1990).

Wilson v. Farrow, 583 S.W.2d 545 (Mo. App. 1979).

POINT III

(Response to Appellant's Points I and II)

THIS COURT SHOULD AFFIRM THE DECISION OF THE TRIAL COURT IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL ON THE ISSUE OF DAMAGES BECAUSE

- (1) THE SIMPLE FACT THAT THE JURY AWARDED DIFFERENT AMOUNTS ON THE SEPARATE CLAIMS AGAINST THE COLLEGE AND DR. MAKAROV DOES NOT INDICATE THAT THE JURY'S VERDICT WAS THE RESULT OF CONFUSION, MISTAKE, BIAS OR PREJUDICE IN THAT THE DIFFERENT AMOUNTS OF THE JURY VERDICTS RESULTED FROM THE SEPARATE CAUSES OF ACTION AGAINST SEPARATE DEFENDANTS BASED ON THE CONDUCT OF EACH DEFENDANT;**
- (2) VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF, IT IS CLEAR THAT THE JURY DID NOT BELIEVE ALL OF PLAINTIFF'S EVIDENCE WHICH IT IS ALLOWED TO DO IN THAT PLAINTIFF'S EVIDENCE REGARDING HIS ALLEGED DAMAGES WAS COMPRISED PRIMARILY OF THE TESTIMONY OF PLAINTIFF AND HIS SPOUSE AND NOT SUPPORTED BY DOCUMENTARY EVIDENCE; AND**
- (3) THE SIZE OF THE JURY'S VERDICT ALONE CANNOT ESTABLISH THAT IT RESULTED FROM BIAS OR PASSION IN THAT PLAINTIFF FAILED TO DEMONSTRATE ANY TRIAL ERROR OR MISCONDUCT OF**

**DR. MAKALOV OR THE COLLEGE THAT PREJUDICED THE JURY
CAUSING IT TO AWARD AN ALLEGED INADEQUATE AMOUNT.**

Voss v. Anderson, 745 S.W.2d 189 (Mo. App. 1987).

Krame v. Waller, 849 S.W.2d 236 (Mo. App. 1993).

Morgan Publications, Inc. v. Squire Publishers, Inc., 26 S.W.3d 164 (Mo. App. 2000).

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

POINT IV

(Response to Appellant's Points I and II)

THIS COURT SHOULD AFFIRM THE DECISION OF THE TRIAL COURT DENYING PLAINTIFF'S MOTION FOR ADDITUR BECAUSE ADDITUR IS PERMITTED ONLY WHERE A NEW TRIAL IS WARRANTED AS A RESULT OF AN INADEQUATE VERDICT IN THAT PLAINTIFF FAILED TO ESTABLISH THE VERDICT WAS INADEQUATE AND FURTHER THAT HE WAS ENTITLED TO A NEW TRIAL ON THE ISSUE OF DAMAGES.

Root v. Manley, 91 S.W.3d 144 (Mo. App. 2002).

Voss v. Anderson, 745 S.W.2d 189 (Mo. App. 1987).

Total Econ. Athletic Mgmt. Am., Inc. v. Pickens, 898 S.W.2d 98 (Mo. App. 1995).

Tucci v. Moore, 875 S.W.2d 115 (Mo. banc 1994).

POINT V

(Response to Appellant's Points III and IV)

THE TRIAL COURT PROPERLY GRANTED THE COLLEGE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S FRAUDULENT MISREPRESENTATION CLAIM BECAUSE EVEN CONSIDERING THE EVIDENCE AND ALL FAVORABLE INFERENCES THEREFROM IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE AGAINST THE COLLEGE FOR FRAUDULENT MISREPRESENTATION IN THAT:

- (1) THE REPRESENTATIONS THAT FORM THE BASIS OF PLAINTIFF'S FRAUDULENT MISREPRESENTATION CLAIM DO NOT CONSTITUTE REPRESENTATIONS OF FACT AS SUCH REPRESENTATIONS DID NOT RELATE TO A PAST OR EXISTING FACT AS REQUIRED BY MISSOURI LAW BUT RATHER ARE AT MOST THE MERE BREACH OF A PROMISE OR FAILURE TO PERFORM UNDER THE ALLEGED CONTRACT; AND**
- (2) THERE IS NO SUBSTANTIAL OR COMPETENT EVIDENCE INDICATING THAT PLAINTIFF RELIED ON THE ALLEGED FALSE REPRESENTATIONS OF THE COLLEGE.**

Joel Bianco Kawasaki Plus v. Meramec Valley Bank, 81 S.W.3d 528 (Mo. banc 2002).

Arnold v. Erkmann, 934 S.W.2d 621 (Mo. App. 1996).

Titan Constr. Co. v. Mark Twain Kansas City Bank, 887 S.W.2d 454 (Mo. App. 1994).

State ex rel. William Ranni Associates, Inc. v. Hartenbach, 742 S.W.2d 134 (Mo. banc 1987).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN PLAINTIFF'S FAVOR AND DENYING DEFENDANT MAKAROV'S JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM ARISING OUT OF THE EMPLOYMENT CONTRACT BETWEEN DEFENDANT MAKAROV AND THE COLLEGE BECAUSE PLAINTIFF LACKED STANDING TO ASSERT SUCH CLAIM WHICH DEPRIVED THE TRIAL COURT OF SUBJECT MATTER JURISDICTION OVER THE CLAIM IN THAT PLAINTIFF WAS NOT A PARTY TO OR THIRD-PARTY BENEFICIARY OF THE EMPLOYMENT CONTRACT.

A. Standard of Review.

Missouri law is well established that subject matter jurisdiction may be raised at any time during the proceedings, including for the first time on appeal. L & L Wholesale, Inc. v. Gibbens, 108 S.W.3d 74, 79 (Mo. App. 2003). Jurisdictional issues are not waived by failing to raise the issue prior to an appeal. Id.

The scope of the trial court's jurisdiction is a question of law. Richardson v. Jallen Inv. Group, Inc., 140 S.W.3d 112, 113 (Mo. App. 2004). An appellate court reviews questions of law *de novo*. Id. Under *de novo* review, no deference is given to the trial court's judgment. Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 442 (Mo. App. 2004).

B. Argument and Analysis.

This Court lacks jurisdiction to review the judgment of the trial court on the merits. An appellate court's jurisdiction to review the judgment of the trial court on the merits is predicated on the trial court's having jurisdiction to enter the judgment. Brock v. Blackwood, 143 S.W.3d 47, 55 (Mo. App. 2004). Thus, where the trial court lacks jurisdiction to enter a judgment, an appellate court has no jurisdiction to review the trial court's judgment on the merits. Parshall v. Buetzer, 121 S.W.3d 548, 551-552 (Mo. App. 2003).

In the present case, the trial court lacked jurisdiction to enter judgment on plaintiff's breach of contract claim asserted against defendant Makarov because plaintiff lacked standing to assert such a claim. Standing is a jurisdictional matter antecedent to the right to relief. Farmer v. Kinder, 89 S.W.3d 447, 450 (Mo. banc 2002). In other words, standing is the requisite interest that a person must have in a controversy before the Court. State ex rel. Mink v. Wallace, 84 S.W.3d 127, 129 (Mo. App. 2002). Standing questions whether the person seeking relief has a right to do so. Id. Standing requires that a party seeking relief have a legally cognizable interest in the subject matter and that he has a threatened or actual injury. Id. Where a party lacks standing to assert a claim, the trial court lacks subject matter jurisdiction over the claim. Querry v. State Highway and Transp. Comm'n, 60 S.W.3d 630, 637 (Mo. App. 2001).

Standing to assert a claim for breach of contract is not automatic. That is, under Missouri law, an individual must be either a party to a contract or an intended third-party

beneficiary of the contract in order to have standing to enforce the rights and obligations under the contract. Aufenkamp v. Grabill, 112 S.W.3d 455, 458 (Mo. App. 2003). In the present case, plaintiff was neither a party to the contract nor an intended third-party beneficiary of the contract. Thus, plaintiff lacked standing to assert his claim for breach of contract against Dr. Makarov. Plaintiff's lack of standing, thereby, deprived the trial court of subject matter jurisdiction.

Plaintiff's breach of contract claim is premised on the employment contract between the College and Dr. Makarov. (L.F. pp. 37-40, 91). Specifically, plaintiff alleges that Dr. Makarov entered into a written employment contract with the College. (L.F. pp. 37-40, 91). Plaintiff further asserts that the terms of the contract required Dr. Makarov treat each student with courtesy, respect, fairness and professionalism. (L.F. pp. 37-40, 91). Plaintiff alleges that Dr. Makarov breached this provision of his employment contract with the College which breach entitled plaintiff, as a student and thus an intended third-party beneficiary of the employment contract between Dr. Makarov and the College, to assert his breach of contract claim. (L.F. pp. 37-41, 91).

Plaintiff was clearly not a party to the employment contract between the College and Dr. Makarov. The only true parties to the contract were the College and Dr. Makarov. See, e.g. Grossoehme v. Cordell, 904 S.W.2d 392, 395 (Mo. App. 1995). Thus, because plaintiff was not a party to the contract, in order to have standing to assert a breach of contract claim against Dr. Makarov plaintiff must establish that he was an intended third-party beneficiary

of the employment contract between the College and Dr. Makarov. See, Aufenkamp v. Grabill, 112 S.W.3d 455, 458 (Mo. App. 2003).

Third-party beneficiary is the nomenclature given to one who is not privy to a contract nor to its consideration, but to whom the law gives the right to maintain a claim for breach of contract. Wood v. Centermark Properties, Inc., 984 S.W.2d 517, 526 (Mo. App. 1998). Not all third-party beneficiaries have standing to assert a breach of contract claim. Under Missouri law there are two types of third-party beneficiaries: intended beneficiaries and incidental beneficiaries.¹

Intended beneficiaries have a recognized right to bring an action upon the contract to which they are third-party beneficiaries, even though they are not privy to the contract or its consideration. Ernst v. Ford Motor Co., 813 S.W.2d 910, 922 (Mo. App. 1991). However, only those third parties for whose primary benefit the contracting parties *intended* to make the contract have standing as third-party beneficiaries to maintain a breach of contract action. Id.; Wood, 984 S.W.2d at 526. Thus, not every contract benefitting a third party gives the third party who was neither privy to the contract nor to the consideration a right of action under the contract. Id. at 526 (citing Stephens v. Great Southern Sav. & Loan Assn., 421 S.W.2d 332 (Mo. App. 1967)). Rather, there must be specific intent in the contract that such contract was made for the benefit of a third party as its object. Id. Moreover, the third party must be the party intended to be benefitted. Id. The intent necessary to establish the status

¹ Intended beneficiaries can be further divided into the subcategories of donee beneficiary and creditor beneficiary.

of a third-party beneficiary is not merely the desire or purpose to confer a benefit on the third party or to advance his interests or promote his welfare, but instead it must be the intent of the contracting parties that the promisor assume a direct obligation to the third party. Id.

To establish the existence of a third-party beneficiary, the terms of the contract must directly and clearly express an intent to benefit an identifiable person or class. O.F.W. Corp. v. City of Columbia, 893 S.W.2d 876, 879 (Mo. App. 1995). In the absence of such an expressed declaration, there is a strong presumption against the existence of a third-party beneficiary. State ex rel. William Ranni Associates, Inc. v. Hartenbach, 742 S.W.2d 134, 141 (Mo. banc 1987); Laclede Inv. Corp. v. Kaiser, 596 S.W.2d 36, 42 (Mo. App. 1980). The rationale behind the presumption against third-party beneficiaries is that persons usually contract and stipulate for themselves and not for third persons. Laclede, 596 S.W.2d at 42. In order to overcome the strong presumption that the parties contracted only for themselves and not for the benefit of others, the plaintiff must demonstrate that the benefit to the third party was the cause of the creation of the contract. Chmielecki v. City Prods. Corp., 660 S.W.2d 275, 289 (Mo. App. 1983). This evidence must be so strong as to amount to an expressed declaration. Laclede, 595 S.W.2d at 42. A court may not speculate from the language in the contract as to whether the contracting parties intended to make the plaintiff a third-party beneficiary. Id. at 41.

In the present case, plaintiff failed to overcome Missouri's strong presumption against third-party beneficiaries. The terms of the employment contract between Dr. Makarov and the College do not express a clear intent to benefit plaintiff. The terms of the contract

provide that Dr. Makarov would remain a full-time faculty member for the period of one year. (Tr. Ex 55, p. 386). As a full-time faculty member, Dr. Makarov was required to be on campus a minimum of 40 hours a week, at least five hours of which must be regularly scheduled hours. (Tr. Ex. 55, p. 386). Pursuant to the terms of his employment contract, Dr. Makarov would be assigned additional responsibilities (which classes to teach) each trimester by a designated school official. (Tr. Ex. 55, p. 386). In exchange for the services Dr. Makarov agreed to provide as a full-time member of the faculty, Dr. Makarov was provided monetary compensation and benefits by the College. (Tr. Ex. 55, p. 386). This employment contract was clearly not made for the primary benefit of plaintiff. The terms of the employment contract plainly indicate Dr. Makarov and the College contracted for their own benefit. The cause of the creation of the employment contract was therefore certainly not to benefit any third parties, including plaintiff.

The terms of the employment contract between Dr. Makarov and the College do not express any intent of the parties that Dr. Makarov assume a direct obligation to plaintiff. Any benefit plaintiff may have received from the employment contract between Dr. Makarov and the College is merely incidental to the parties' performance of their obligations under the contract. Plaintiff was, therefore, no more than an incidental beneficiary to the contract. An incidental beneficiary acquires no right of action against the parties to the contract and is thus not afforded a remedy under the contract. O.F.W Corp. v. City of Columbia, 893 S.W.2d at

879-880. Accordingly, plaintiff, as an incidental beneficiary to the employment contract between Dr. Makarov and the College, is not afforded a remedy under the contract and thereby lacks standing to assert a breach of contract claim against Dr. Makarov.

The facts in the present case are quite similar to the facts and circumstances set forth in Wood v. Centermark Prop., Inc., 984 S.W.2d 517 (Mo. App. 1999); O.F.W. Corp. v. City of Columbia, 893 S.W.2d 876 (Mo. App. 1995); and Hudson v. Riverport Performance Arts Centre, 37 S.W.3d 261 (Mo. App. 2000). A review of these cases further demonstrates plaintiff was nothing more than an incidental beneficiary to the employment contract between Dr. Makarov and the College.

In Wood, 984 S.W.2d 517 (Mo. App. 1999), the family of a mall tenant's employee sued the owner and manager of the mall for wrongful death, resulting from the car-jacking, abduction and murder of the employee in the mall's parking lot. Id. at 526. In their wrongful death claim against the mall, the family claimed the employee was a third-party beneficiary of the lease agreement between the mall owners and her employer, Dillard's. Id. The contract provided that the mall owners would provide adequate security on the common areas of the mall premises, including the parking lot where decedent was car-jacked and abducted, to protect the tenants, their employees and invitees. Id. While the Wood Court found that the mall was contractually obligated to provide protection to the mall patrons, tenants and employees, the family failed to overcome the strong presumption that the parties contracted solely for their own benefit. Id. The Court further reasoned that the parties' mere desire to confer a benefit on third persons such as mall employees is not sufficient to provide the mall

employees with enforceable rights under the contract between the mall owner and Dillard's. Id. The Wood Court, therefore, concluded that the Dillard's employee was not an intended beneficiary under the contract, but rather at best, an incidental beneficiary to the contract between the mall owners and Dillard's. Id.

Likewise, in O.F.W. Corp., 893 S.W.2d 876 (Mo. App. 1995), a real estate developer sued the City of Columbia arguing that the developer was a third-party beneficiary of a sewer service contract between the City and the County Sewer District. Id. at 876. The contract between the city and the county provided for the extension of city sewer lines to subdivisions in the county outside the city limits. Id. at 877-78. The developer sought to force the city to connect city sewer lines to a subdivision the developer was building in the county outside the city limits. Id. The developer argued that because the purpose of the contract between the city and the county was to benefit sewer customers in developing areas, the developer was a third-party beneficiary with standing to enforce the contract. Id. On appeal, the Court of Appeals rejected that argument, finding that although the contract benefitted the developer, the provision was merely a description of the obligations between the city and the county. Id. at 880. The Court, therefore, held that because the contract did not clearly express an intent to create a right in the developer as a third-party beneficiary, the developer lacked standing to assert a breach of contract claim. Id. The Court accordingly concluded that the developer was merely an incidental beneficiary to the contract between the city and the county. Id.

Similarly, in Hudson v. River Port Performance Arts Centre, 37 S.W.3d 261 (Mo. App. 2000), an amphitheater in St. Louis contracted with a security service to provide security at its events. Id. at 263. The contract called for the security service to use its “best efforts” to ensure the safety and welfare of the amphitheater’s patrons. Id. at 265. Plaintiff, a concertgoer who was assaulted by another concertgoer, sued the security service for breaching its contract with the amphitheater. Id. The plaintiff argued that he was a third-party beneficiary to the contract between the amphitheater and the security service. Id. The Hudson Court, however, rejected this argument, stating that while the security service was contractually obligated to ensure the safety and welfare of the amphitheater’s patrons, nothing indicated that the contract was intended to confer a direct benefit on the concertgoer. Id. at 266. The Court, therefore, concluded that plaintiff was an incidental beneficiary. Id. In finding plaintiff was an incidental beneficiary to the contract between the amphitheater and the security service, the Hudson Court held that plaintiff had no standing to assert a breach of contract claim against the security service. Id.

Applying the reasoning and holdings in these Missouri appellate cases to the facts and circumstances in the present matter further confirms that plaintiff was, at best, an incidental beneficiary to the employment contract between Dr. Makarov and the College. The fact that the parties’ performance under the employment contract may have incidentally benefitted plaintiff is not sufficient to afford plaintiff a right of action under the contract. See Wood, 984 S.W.2d 517; O.F.W. Corp., 893 S.W.2d 876; Hudson, 37 S.W.3d 261. Moreover, as the Wood Court explained, the mere desire to confer a benefit on a third party is not

sufficient to create enforceable rights under the contract. Id. at 526. As in O.F.W. and Hudson, the employment contract between Dr. Makarov and the College does not express a clear intention for Dr. Makarov to assume a direct obligation to plaintiff. Plaintiff failed to overcome the burden against the existence of third-party beneficiaries. Plaintiff, therefore, has no standing to assert a claim under the terms of the employment contract against Dr. Makarov. The trial court accordingly exceeded its jurisdiction in entering judgment on the merits of plaintiff's breach of contract claim against Dr. Makarov. Because the trial court lacked jurisdiction, this court should reverse the decision of the trial court and remand the case with instructions to dismiss plaintiff's breach of contract claim against Dr. Makarov for lack of subject matter jurisdiction.

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT MAKAROV'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT WITH REGARD TO PLAINTIFF'S BREACH OF CONTRACT CLAIM ASSERTED AGAINST DEFENDANT MAKAROV BECAUSE MISSOURI LAW IS CLEAR THAT THE TERMS CONTAINED IN A HANDBOOK DISTRIBUTED BY EMPLOYERS TO EMPLOYEES ARE UNILATERAL IN NATURE, GENERALLY STATED IN VAGUE TERMS AND DO NOT CREATE A CONTRACT BETWEEN AN EMPLOYER AND EMPLOYEE IN THAT PLAINTIFF'S BREACH OF CONTRACT CLAIM WAS BASED ON THE VAGUE AND UNILATERAL TERMS CONTAINED IN THE COLLEGE'S FACULTY HANDBOOK AND THEREFORE NOT PART OF AN ENFORCEABLE CONTRACT.

A. **Standard of Review.**

The standards of review for the denial of a motion for directed verdict and the denial of a motion for judgment notwithstanding the verdict are essentially the same. Giddens v. Kansas City Southern Ry. Co., 29 S.W.3d 813, 818 (Mo. banc 2000). The review consists of determining whether the non-movant made a submissible case. Massman Constr. Co. Missouri Highways and Transp. Comm'n., 31 S.W.3d 109, 112 (Mo. App. 2000). To make a submissible case, substantial evidence must support every fact essential to liability. Gateway Exteriors, Inc. v. Suntime Homes, Inc., 882 S.W.2d 275, 279 (Mo. App. 1994).

“Substantial evidence is that which, if true, has prohibitive force upon the issues, and from which the trier of facts can reasonably decide a case.” Hurlock v. Park Lane Medical Ctr., Inc., 709 S.W.2d 872, 880 (Mo. App. 1985). The question of whether evidence in a case is substantial and whether the inferences drawn are reasonable are questions of law. Id. An appellate court reviews questions of law *de novo*. Richardson v. Jallen Inv. Group, Inc., 140 S.W.3d 112, 113 (Mo. App. 2004). Under *de novo* review, no deference is given to the trial court’s judgment. Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 442 (Mo. App. 2004).

In determining whether plaintiff has made a submissible case, this court reviews the evidence in the light most favorable to plaintiff. Gateway Exteriors, 882 S.W.2d at 279. While this court presumes plaintiff’s evidence is true and gives plaintiff the benefit of all reasonable and favorable inferences to be drawn from the evidence, an appellate court shall not supply missing evidence or give plaintiff the benefit of unreasonable, speculative or forced inferences. Id. The evidence and inferences must establish each and every element and not leave any issue to speculation. Id.

B. Argument and Analysis.

Plaintiff failed to make a submissible case on his breach of contract claim asserted against Dr. Makarov. To establish a submissible breach of contract case, a plaintiff must establish (1) the existence of a valid and enforceable contract, (2) the rights and obligations of the respective parties, (3) a breach, and (4) damages. White v. Pruiett, 39 S.W.3d 857, 861-862 (Mo. App. 2001). In the present case, plaintiff’s evidence failed to establish the first element, the existence of an enforceable contract.

Plaintiff's breach of contract claim is premised on the 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 requirement 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 terms of the faculty handbook, however, are not a contract and create no contractual duty owed to plaintiff by either Dr. Makarov or the College.

This Court has conclusively ruled that the terms contained in an employer's handbook distributed to its employees do not create a valid and enforceable contract between the employer and employee. See, Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. banc 1988). In holding that the terms of an employee handbook do not create a valid and enforceable contract between the employer and the employee, this Court relied on two major distinctions between an employee handbook and a traditional contract. Id., at 662.

First, the Court reasoned that an employer's distribution of an employee handbook to its employees does not meet the required elements of an enforceable contract: offer acceptance and consideration. Id. In support of its reasoning, the Court explained that an employer's unilateral act of publishing the handbook does not constitute a contractual offer under Missouri law. Id. Rather, the Court described the employee handbook as an informational statement of the employer's self-imposed policies which are often couched in general terms that are undoubtedly open to broad discretion and interpretation. Id. It is a

fundamental principle in contract law that for an agreement to be binding, it must be “sufficiently definite to enable the court to determine its exact meaning and to definitely measure the extent of the promisor’s liability.” Kemp Constr. Co. v. Landmark Bancshares Corp., 784 S.W.2d 306, 308 (Mo. App. 1990). Where the terms of an alleged contract are overly vague and general, such terms are impossible to enforce. See, Wilson v. Farrow, 583 S.W.2d 545, 546 (Mo. App. 1979).

Additionally, in distinguishing an employee handbook from a traditional contract, the Johnson Court recognized that an employee handbook is subject to change at any time. Johnson, 745 S.W.2d at 662. The Court, therefore, reasoned that where an employer reserves the right to alter the terms of the handbook, no reasonable employee could construe the handbook’s distribution as an offer, acceptance of which would constitute a contract. Id. Moreover, because the terms of the handbook are continually subject to change at the employer’s discretion, without prior notice to the employee, reliance upon such terms is also not reasonable given the circumstances.

Application of the holding and supporting rationale in Johnson to the facts and circumstances in the present case clearly reveals that the terms of the faculty handbook distributed to Dr. Makarov did not create a contract between the College and Dr. Makarov. The College’s publishing and distribution of the faculty handbook does not constitute a contractual offer under Missouri law. See, Johnson, 745 S.W.2d at 662, 663. The employee handbook was merely the College’s informational statement of its self-imposed policies.

Moreover, the provisions contained in the employee handbook were couched in overly general terms. Specifically, plaintiff bases his breach of contract action upon the vague terms in the faculty handbook requiring that “faculty members have a duty to treat each student with courtesy, respect, fairness and professionalism.” (L.F. pp. 37-40, 91). Not only do the terms of the employee handbook not create a contract, these terms contained therein are too vague to permit enforcement. See, Kemp Constr., 784 S.W.2d at 308; Wilson, 583 S.W.2d at 546. The meaning and measures of the terms such as “courtesy,” “respect,” “fairness,” and “professionalism,” are undoubtedly arbitrary. These terms have absolutely no objective measure. What is considered fair or professional to one person is not necessarily considered fair and professional by all. Thus, the terms in the faculty handbook are too vague to permit enforcement. See, Kemp Constr., 784 S.W.2d at 308; Wilson, 583 S.W.2d at 546.

Furthermore, as in Johnson, the employee handbook distributed by the College to Dr. Makarov was subject to change at any time. (Tr. p. 385). That is, the College expressly reserved the right to unilaterally change the terms of the employee handbook. (Tr. p. 385). The employment contract between Dr. Makarov and the College explicitly stated the College may modify the handbook during the period of Dr. Makarov’s employment. (Tr. p. 385). Thus, it is clear that the College’s employee handbook is nothing more than an informational statement of the College’s self-imposed and continually-subject-to-change policies. Based upon the holding of this Court in Johnson, the employee handbook distributed by the College to Dr. Makarov does not constitute a valid and enforceable contract as a matter of law. Johnson, 745 S.W.2d at 662, 663. Therefore, because plaintiff’s breach of contract claim

against Dr. Makarov was based upon the terms of the employee handbook, plaintiff failed to establish a required element of any breach of contract action, the existence of an enforceable contract. Plaintiff, accordingly, failed to make a submissible case against Dr. Makarov on his breach of contract claim. The trial court, therefore, erred in denying defendant Makarov's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict. For these reasons, the Judgment of the trial court against Dr. Makarov on the breach of contract claim should be reversed.

POINT III

(Response to Appellant's Points I and II)

THIS COURT SHOULD AFFIRM THE DECISION OF THE TRIAL COURT IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL ON THE ISSUE OF DAMAGES BECAUSE

- (1) THE SIMPLE FACT THAT THE JURY AWARDED DIFFERENT AMOUNTS ON THE SEPARATE CLAIMS AGAINST THE COLLEGE AND DR. MAKAROV DOES NOT INDICATE THAT THE JURY'S VERDICT WAS THE RESULT OF CONFUSION, MISTAKE, BIAS OR PREJUDICE IN THAT THE DIFFERENT AMOUNTS OF THE JURY VERDICTS RESULTED FROM THE SEPARATE CAUSES OF ACTION AGAINST SEPARATE DEFENDANTS BASED ON THE CONDUCT OF EACH DEFENDANT;**
- (2) VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF, IT IS CLEAR THAT THE JURY DID NOT BELIEVE ALL OF PLAINTIFF'S EVIDENCE WHICH IT IS ALLOWED TO DO IN THAT PLAINTIFF'S EVIDENCE REGARDING HIS ALLEGED DAMAGES WAS COMPRISED PRIMARILY OF THE TESTIMONY OF PLAINTIFF AND HIS SPOUSE AND NOT SUPPORTED BY DOCUMENTARY EVIDENCE; AND**
- (3) THE SIZE OF THE JURY'S VERDICT ALONE CANNOT ESTABLISH THAT IT RESULTED FROM BIAS OR PASSION IN THAT PLAINTIFF FAILED TO DEMONSTRATE ANY TRIAL ERROR OR MISCONDUCT OF**

**DR. MAKAROV OR THE COLLEGE THAT PREJUDICED THE JURY
CAUSING IT TO AWARD AN ALLEGED INADEQUATE AMOUNT.**

A. Standard of Review.

An appellate court reviews the trial court's denial of a motion for a new trial for an abuse of discretion. Kehr v. Knapp, 136 S.W.3d 118, 123 (Mo. App. 2004). A trial court's denial of a motion for a new trial will not be reversed on appeal unless there is a substantial glaring injustice. Id. In cases where the trial court denies a motion for new trial for alleged inadequacy of the verdict, the rule on appeal is that the jury's exercise of its discretion in the assessment of damages is conclusive, especially when the verdict has been approved by the trial court in an order overruling a motion for a new trial, unless the verdict is so shockingly inadequate as to indicate that it is the result of passion and prejudice or of a gross abuse of such discretion. Tomlin v. Guempel, 54 S.W.3d 658, 659 (Mo. App. 2001); Chapman v. King, 396 S.W.2d 29, 34 (Mo. App. 1965). If reasonable minds can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Sherar v. Zipper, 98 S.W.3d 628, 632 (Mo. App. 2003).

In reviewing the trial court's denial of a motion for new trial, an appellate court seeks only to ascertain whether the trial court abused its discretion and, therefore, does not weigh the evidence. Chapman, 396 S.W.2d at 34. An appellate court's inquiry is therefore limited to whether, viewing the record in the light most favorable to the trial court's ruling on the complaint of inadequacy, it reasonably may be said that the verdict was supported by substantial evidence. Miller v. Harner, 373 S.W.2d 941, 947 (Mo. 1964). Where the trial

court denies a motion for new trial asserting the amount of the jury's verdict is inadequate, on review the appellate court considers only the evidence which supports the trial court's denial of the motion. Voss v. Anderson, 745 S.W.2d 189, 192 (Mo. App. 1987). It is only where there is a complete absence of probative facts to support a verdict that an appellate court will interfere. Lauber v. Buck, 615 S.W.2d 89, 91 (Mo. App. 1981). An appellate court must bear in mind that the credibility of the witnesses and the weight and value to be accorded to their testimony were, in the first instance, matters peculiarly within the province of the jury, in keeping with the fundamental principle that the jury may believe all or none of the testimony of any witnesses, or may accept it in part and reject it in part, just as it finds the same to be true or false when considered in relation to the other testimony and the facts and circumstances of the case. Chapman, 396 S.W.2d at 34-35.

B. Argument and Analysis.

The first two points asserted in plaintiff's appellate Brief present nothing for appellate review. Specifically, Points I and II of plaintiff's Brief provide as follows:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A
NEW TRIAL ON THE ISSUE OF DAMAGES ... BECAUSE THE JURY'S
VERDICTS WERE AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT ...

A claim of error that the jury's verdict was against the weight of the evidence presents nothing for appellate review. Voss, 745 S.W.2d 189 at 192; Joseph v. Orscheln Bros. Truck Line, Inc., 609 S.W.2d 238, 240 (Mo. App. 1980). Since the jury and the trial judge observed the evidence and testimony first hand and made determinations as to the credibility

of the witnesses, the jury initially, and the trial court in ruling on a motion for new trial, are charged with passing on the weight of the evidence. Summers v. Fuller, 729 S.W.2d 32, 34 (Mo. App. 1987). An appellate court, on the other hand, does not weigh the evidence. Lauber, 615 S.W.2d at 91. Rather, the appellate court views the evidence in the light most favorable to the verdict, disregarding all evidence to the contrary. Summers, 729 S.W.2d at 34. That is, where the trial court denies a motion for new trial asserting the amount of the jury's verdict is inadequate, on review the appellate court considers only the evidence which supports the trial court's denial of the motion. Voss, at 192. Therefore, only the trial court may grant a new trial on the grounds that a verdict is against the weight of the evidence. Joseph, 609 S.W.2d at 240; see also Bakelite Co. v. Miller, 372 S.W.2d 867 (Mo. 1963). Thus, plaintiff's claim that the jury's verdicts are against the weight of the evidence are not reviewable by this Court on appeal. This Court should, accordingly, affirm the judgment of the trial court.

1. Different claims against separate defendants resulted in different amount of verdicts.

While Point I of plaintiff's Brief preserves nothing for appellate review, plaintiff claims therein that the fact that the jury returned verdicts in different amounts against the College and Dr. Makarov indicates the verdicts could only be the result of mistake, confusion, bias or prejudice. Plaintiff, however, fails to explain how the single fact that the jury returned separate verdicts in different amounts against the College and Dr. Makarov demonstrates the verdicts were the result of mistake, confusion, bias or prejudice.

In the present case, the jury was free to award different amounts against the separate defendants. The amount awarded to a plaintiff as damages is a matter wholly within the discretion of the jury hearing the case. Parker v. Pine, 617 S.W.2d 536, 541 (Mo. App. 1981). Here, the jury's verdicts were based on different claims and conduct giving rise to such claims. The jury's verdict against the College was based on a claim of alleged fraudulent misrepresentation whereas the jury's verdict against Dr. Makarov was based on an alleged breach of contract. The fraudulent misrepresentation claim arose out of the College's alleged conduct in misrepresenting the due process procedures that would be followed at the appeal hearing. (L.F. p. 87). The College's alleged fraudulent misrepresentations are unrelated to the breach of contract claim against Dr. Makarov. The breach of contract claim arose out of Dr. Makarov's conduct in allegedly failing to treat plaintiff with courtesy, respect, fairness and professionalism. (L.F. p. 91). Dr. Makarov's conduct in breaching the alleged contract is unrelated to the fraudulent misrepresentation claim against the College.

The conduct of the separate defendants is clearly different, unrelated and gives rise to different theories of liability. Accordingly, it must logically follow that for the jury, the different conduct of the defendants resulted in different damages to plaintiff. Plaintiff's damages resulting from Dr. Makarov's breach of contract are limited to those damages proximately caused by Dr. Makarov's alleged failure to treat plaintiff with courtesy, respect, fairness and professionalism. Plaintiff was not entitled to recover damages from Dr. Makarov that were the direct result of the College's alleged fraudulent misrepresentation.

Likewise, the damages resulting from the College's alleged fraudulent misrepresentation are limited to those damages caused by plaintiff's reliance on the College's alleged representation that it would follow the due process procedure set forth in the student handbook at plaintiff's appeal hearing. Thus, any damages not caused by the College's alleged tortious conduct but rather directly resulting from Dr. Makarov's alleged breach of his employment contract do not fall within the liability of the College. Accordingly, it is only expected that the damage awards resulting from the separate verdicts against the two defendants based upon different conduct would not be identical. Thus, the differing jury awards were not the result of mistake, confusion, bias or prejudice on the part of the jury. For this reason, the trial court correctly denied plaintiff's Motion for New Trial and the judgment of the trial court should be affirmed by this Court.

2. Jury was free to believe all, some or none fo plaintiff's evidence.

In Point II of his Brief, plaintiff claims that the defendants failed to controvert plaintiff's evidence on the issue of damages and, therefore, the jury should have awarded plaintiff the entire amount of all his claimed damages. Again, this argument asks this Court to weigh the evidence. An appellate court does not weigh the evidence on appeal. Lauber, 614 S.W.2d at 91. Thus Point II of plaintiff's Brief should be denied.

Plaintiff's argument in Point II additionally overlooks the fact that the jury was free to believe all of the testimony of any witness, or none of it, or may accept it in part and reject it in part. Krame v. Waller, 849 S.W.2d 236, 239 (Mo. App. 1993); Voss, 745 S.W.2d at 192. This rule applies equally to expert witnesses. Id.

Plaintiff's evidence concerning his claimed damages lacked credibility with the jury. Plaintiff claimed at trial that he was entitled to damages in the amount of \$356,155 from both the College and Dr. Makarov. (Appellant's Brief pp. 10-14). Plaintiff's claimed damages consisted of damages for lost wages, tuition expenses, relocation costs and future travel expenses to visit his daughter. (Appellant's Brief pp. 10-14). These claimed damages were remote and speculative. Plaintiff's evidence regarding these claimed damages consisted primarily of the in court testimony of plaintiff and his spouse, and additionally the testimony of an economist with regard to his lost wage claim. The jury is not required to accept and believe the testimony of these witnesses. See Krame, 849 S.W.2d at 239. It is wholly within the jury's discretion to reject the testimony of plaintiff and his spouse, as well as the economist. See Voss, 745 S.W.2d at 192. The amount of the jury's verdicts reflect that the jury did not believe the testimony of plaintiff and his witnesses. The jury was not required to return a verdict that mirrored plaintiff's own calculation of his claimed damages. Rather, the jury considered and rejected most of plaintiff's claimed damages, a decision which does not constitute an abuse of discretion. Accordingly, the trial court properly denied plaintiff's Motion for New Trial and the judgment of the trial court should be affirmed.

Moreover, plaintiff's argument misstates the evidence. Plaintiff claims that the evidence regarding his claimed damages was uncontroverted. However, plaintiff did not present competent evidence on the issue of damages and additionally any such evidence was discredited by defendants on cross-examination. Certainly it was plaintiff's burden to establish his claimed damages resulting from Dr. Makarov's breach of contract and the

College's tortious conduct. Plaintiff failed to meet this burden on each of the elements of his claimed damages.

a. Lost Wage Claim

Plaintiff's lost wage claim represented a significant portion of his claimed damages. Plaintiff sought lost wages in the amount of \$278,832. (Tr. pp. 198-203, 1224, 1235-1236). This amount was based on a claim that plaintiff lost \$81,500 a year for 3 2/3 that he did not work as a chiropractor. (Tr. pp. 198-203, 1224, 1235-1236). First, plaintiff claims that he was delayed from beginning his practice by 3 2/3 years as a result of the conduct of defendants. This claim was controverted by defendants. Plaintiff was dismissed from the College in April of 1999. (Tr. pp. 19, 109-110). At the time he was dismissed from the College, plaintiff needed an additional three trimesters to graduate, which would have been completed by December 1999. (Tr. pp. 19, 168-169, 172). However, after he was dismissed from the College in April of 1999, plaintiff did not immediately enroll at another college. (Tr. pp. 161-163, 170-171). In fact, plaintiff did not resume his chiropractic education until August of 2000, sixteen months after his dismissal from the College. (Tr. pp. 170-171). Plaintiff graduated from Texas Chiropractic College less than 1 1/2 years after he enrolled at the college in April of 2002. (Tr. p. 173). Moreover, the jury was presented with evidence that plaintiff failed or was required to retake classes as a result of his poor performance in such classes. (Tr. pp. 211-215). Thus, the jury was free to believe that plaintiff's delay in graduating was the result of his poor academic performance. While plaintiff graduated in April of 2002, he claimed that he could not begin his practice as a chiropractor until August

2003. (Tr. pp. 198-203, 1224). On cross-examination, plaintiff explained that he could not begin his practice until almost 1 ½ years after his graduation because plaintiff chose to wait for his wife to finish school. (Tr. pp. 256-1248). Plaintiff did not take any of these factors into account in his calculation of time for lost wages. The jury, therefore, for good reason may have discredited plaintiff's testimony regarding this element of his damages.

Furthermore, plaintiff's expert economic calculated the amount of plaintiff's claimed lost wages using the national average earned per year by a chiropractor in private practice. (Tr. pp. 1225-1236). This national average is not specific to a geographic location. (Tr. p. 1253). Additionally, in using this amount, the economist assumed, among many other facts, that plaintiff would enter private practice despite the fact that when questioned about his business plan to open his own clinic, plaintiff was unable to provide any details whatsoever. (Tr. pp. 224, 1250). Furthermore, this projected annual income did not take into account the hardship that a practitioner faces in the first few years after opening his own clinic. (Tr. pp. 1228-1230, 1254). Moreover, this projected annual income was based on the assumption that plaintiff would pass his boards on the first attempt notwithstanding the fact that the evidence indicated that it took plaintiff three attempts to pass his first round of boards. (Tr. pp. 218-219).

Finally, and most importantly plaintiff presented no correlation between his claimed lost wages, or any other element of his damages, and the conduct of either the College or Dr. Makarov. The evidence indicated plaintiff was dismissed from the College as a result of his own conduct in obtaining a copy of the dermatology exam prior to its administration. (Tr.

pp. 74-75, 341, L.F. pp. 60-63). Accordingly, the jury was free to believe plaintiff's lost wages were the result of his own conduct and not caused by his reliance on the College's alleged misrepresentations or Dr. Makarov's breach of contract.

b. Moving expenses.

Plaintiff additionally claimed damages in the amount of \$5,000 for relocation expenses. Plaintiff claimed that in order to complete his chiropractic education, he was required to relocate to Texas. Plaintiff, however, failed to present any competent evidence to the jury as to the cost of the relocation. Rather, plaintiff's evidence regarding these expenses consisted of his testimony. Plaintiff's testimony was as follows:

Q: And did it cost a little bit of money to get down there?

A: Yes, it did.

Q: And do you know about how much?

A: I think total moving expenses and getting a truck and paying the deposit and utilities and all that stuff, I think is in the neighborhood of about \$5,000.

(Tr. p. 171). This testimony did not provide the jury with any competent evidence of the alleged damage. Aside from offering a ballpark figure, plaintiff did not offer any invoices or cancelled checks to substantiate his alleged loss. In fact, plaintiff was unable to state with any certainty the exact amount of such loss. Not only was plaintiff's testimony insufficient to meet his burden of proof on this element of damages, the jury was not required to believe plaintiff's testimony that he spent "in the neighborhood of about \$5,000" for moving expenses.

c. *Future travel expenses.*

Similarly, the evidence negated plaintiff's claim for damages relating to the future travel expenses necessary to visit his daughter. Essentially, plaintiff claimed that he was unable to practice chiropractic medicine in the Kansas City area. Plaintiff, however, acknowledged that there was no person keeping him from returning to the Kansas City area. (Tr. p. 192). More important, on cross-examination plaintiff admitted that the reason that he could not return to the Kansas City area was because he had not completed the portions of the national exam that are required to practice in the Kansas City area. (Tr. p. 189). Plaintiff additionally agreed that he had not made any attempts to return to the Kansas City area, it was simply his belief that he could not. (Tr. pp. 189-192).

Furthermore, the amount of plaintiff's claimed expenses for travel was discredited by the evidence. Plaintiff claimed he would travel to Kansas City once a month to visit his daughter until she becomes an adult. Plaintiff sought damages in the amount of \$350 a month, for 12 years, for his travel expenses to return to the Kansas City area to visit his daughter. (Tr. pp. 192-197). Plaintiff, however, acknowledged that he had not been visiting his daughter at the time of trial as frequently as requested in his damage calculation. (Tr. p. 197). Plaintiff also agreed that his custody and visitation agreement might change at some point in the future that would alleviate plaintiff's claim for damages for travel expenses. (Tr. pp. 195-196). Additionally, plaintiff offered no explanation or supporting documentation for the \$350 a month figure used to calculate this element of his damages. As such, the evidence

presented to the jury did not support the amount of plaintiff's claimed damages and additionally did not support the frequency of travel sought by plaintiff.

d. Tuition reimbursement.

Finally, plaintiff claimed damages in the amount of \$19,972 for reimbursement for his tuition expenses. Plaintiff offered absolutely no evidence with regard to how much he personally paid for his tuition at Texas Chiropractic College. The only evidence even remotely related to this element of his damages was the testimony of plaintiff's spouse. Plaintiff's spouse stated that she paid \$5,600 a trimester in tuition at Texas Chiropractic College. (Tr. p. 544). However, she did not specify at what point in time she paid this amount in tuition. The evidence at trial was clear that plaintiff's spouse was still enrolled and paying tuition at Texas Chiropractic College at the time of trial, a year after plaintiff had graduated. (Tr. pp. 256, 1248). Plaintiff's spouse did not indicate that the tuition amount was the same when plaintiff was enrolled at the school. Plaintiff's spouse accordingly did not offer any evidence regarding how much plaintiff paid in tuition expenses at Texas Chiropractic College. The jury was, therefore, not presented sufficient evidence to award plaintiff damages for his claimed tuition expenses.

The evidence regarding plaintiff's claimed damages was clearly controverted. Therefore, viewing the evidence in the light most favorable to the amount of the verdict and disregarding all evidence to the contrary, it cannot be said that the amount of the verdict was inadequate. Accordingly, the trial court did not abuse its discretion in denying plaintiff's Motion for New Trial on the issue of damages.

3. Dr. Makarov and/or the College did not commit any trial error or misconduct that prejudiced the jury.

In Points I and II of his Brief, plaintiff claims that given the amount of the jury's verdicts, such awards were the result of bias, confusion, mistake or prejudice. Missouri law is clear that the size of the jury award alone does not establish that such award resulted from bias or passion. Morgan Publications, Inc. v. Squire Publishers, Inc., 26 S.W.3d 164, 176 (Mo. App. 2000). Rather, a party asserting a verdict's inadequacy must show that some trial error or misconduct of the prevailing party was responsible for prejudicing the jury. Norris v. Barnes, 957 S.W.2d 524, 527 (Mo. App. 1997). Plaintiff has failed to demonstrate any trial error or misconduct on the part of Dr. Makarov or the College that prejudiced the jury. Moreover, plaintiff has failed to demonstrate that the alleged prejudice to the jury caused the jury to award plaintiff damages in an inadequate amount. Accordingly, plaintiff has failed to establish the error necessary for reversal of the trial court's decision. See Norris, 957 S.W.2d at 527. This Court should, therefore, affirm the decision of the trial court in denying plaintiff's Motion for a New Trial.

POINT IV

(Response to Appellant's Points I and II)

THIS COURT SHOULD AFFIRM THE DECISION OF THE TRIAL COURT DENYING PLAINTIFF'S MOTION FOR ADDITUR BECAUSE ADDITUR IS PERMITTED ONLY WHERE A NEW TRIAL IS WARRANTED AS A RESULT OF AN INADEQUATE VERDICT IN THAT PLAINTIFF FAILED TO ESTABLISH THE VERDICT WAS INADEQUATE AND FURTHER THAT HE WAS ENTITLED TO A NEW TRIAL ON THE ISSUE OF DAMAGES.

A. Standard of Review.

An appellate court reviews the trial court's denial of a Motion for Additur for an abuse of discretion. Root v. Manley, 91 S.W.3d 144, 147 (Mo. App. 2002). An appellate court will reverse the denial of a Motion for Additur if it finds that the jury verdict was so grossly inadequate that it shocks the court's conscience and convinces the court that there was a clear abuse of discretion. Id. Norris v. Barnes, 957 S.W.2d 524, 527 (Mo. App. 1997).

B. Argument and Analysis.

The first two Points asserted in plaintiff's appellate brief present nothing for appellate review. Specifically, Points I and II of plaintiff's Brief provide as follows:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL ON THE ISSUE OF DAMAGES, OR, IN THE ALTERNATIVE ORDER ADDITUR, BECAUSE THE JURY'S VERDICTS WERE AGAINST THE WEIGHT OF THE EVIDENCE ...

A claim of error that the jury's verdict was against the weight of the evidence presents nothing for appellate review. Voss v. Anderson, 745 S.W.2d 189, 192 (Mo. App. 1987); Joseph v. Orscheln Bros. Truck Line, Inc., 609 S.W.2d 238, 240 (Mo. App. 1980). Since the jury and the trial judge observed the evidence and testimony first hand and made determinations as to the credibility of the witnesses, the jury initially, and the trial court in ruling on the motion for a new trial and/or additur, are charged with passing on the weight of the evidence. Summers v. Fuller, 729 S.W.2d 32, 34 (Mo. App. 1987). An appellate court, on the other hand, does not weigh the evidence. Lauber v. Buck, 615 S.W.2d 89, 91 (Mo. App. 1981). Thus, plaintiff's claim that the jury's verdicts are against the weight of the evidence is not reviewable by this Court on appeal. This Court should, accordingly, affirm the decision of the trial court.

Plaintiff's claim of error regarding the trial court's denial of additur is also not reviewable on appeal because Missouri law provides that a denial of additur where the trial court denied an accompanying motion for a new trial is not reviewable on appeal. Total Econ. Athletic Mgmt. Am., Inc. v. Pickens, 898 S.W.2d 98, 107 (Mo. App. 1995). In Total Econ., plaintiff sought a new trial, or in the alternative, additur, following a verdict which plaintiff claimed was inadequate. Id. The trial court denied both plaintiff's Motions for New Trial and Additur. Id. On appeal, the plaintiff argued that the trial court's denial of its Motion for Additur was erroneous. Id. The Court of Appeals denied plaintiff's appeal finding that because the trial court denied the plaintiff's Motion for a New Trial, the denial of additur is not appealable. Id. Applying this rule in Missouri to the facts of the present

case, plaintiff's claim of error relating to the trial court's denial of his Motion for Additur is not reviewable by this Court. Points I and II of plaintiff's Brief should accordingly be denied.

Moreover, the trial court was correct in denying plaintiff's Motion for Additur. To sustain a motion for additur, the trial court must determine that a new trial is necessary. Root, 91 S.W.3d at 147. Thus, additur requires a prerequisite finding by the trial court that a new trial is required. Tucci v. Moore, 875 S.W.2d 115, 116-17 (Mo. banc 1994). The trial court in the present matter made a finding that plaintiff was not entitled to a new trial. (L.F. pp. 134-135). Moreover, as explained in Point III, the trial court was correct in denying plaintiff's Motion for a New Trial. As such, the trial court properly denied plaintiff's Motion for Additur. The judgment of the trial court should, accordingly, be affirmed on appeal.

POINT V

(Response to Appellant's Points III and IV)

THE TRIAL COURT PROPERLY GRANTED THE COLLEGE'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S FRAUDULENT MISREPRESENTATION CLAIM BECAUSE, EVEN CONSIDERING THE EVIDENCE AND ALL FAVORABLE INFERENCES THEREFROM IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE AGAINST THE COLLEGE FOR FRAUDULENT MISREPRESENTATION IN THAT:

- (1) THE REPRESENTATIONS THAT FORM THE BASIS OF PLAINTIFF'S FRAUDULENT MISREPRESENTATION CLAIM DO NOT CONSTITUTE REPRESENTATIONS OF FACT AS SUCH REPRESENTATIONS DID NOT RELATE TO A PAST OR EXISTING FACT AS REQUIRED BY MISSOURI LAW BUT RATHER ARE AT MOST THE MERE BREACH OF A PROMISE OR FAILURE TO PERFORM UNDER THE ALLEGED CONTRACT; AND**
- (2) THERE IS NO SUBSTANTIAL OR COMPETENT EVIDENCE INDICATING THAT PLAINTIFF RELIED ON THE ALLEGED FALSE REPRESENTATIONS OF THE COLLEGE.**

A. Standard of Review.

An appellate court's review of the trial court's ruling on a motion for judgment notwithstanding the verdict consists of determining whether the non-moving party made a

submissible case. Payne v. City of St. Joseph, 135 S.W.3d 444, 449 (Mo. App. 2004). To make a submissible case, plaintiffs must present substantial evidence establishing each and every element of their claim. Id. at 450. Substantial evidence is competent evidence from which the trier of fact can reasonably decide a case. Id.

In determining whether plaintiff has made a submissible case, this court reviews the evidence in the light most favorable to plaintiff. Gateway Exteriors, Inc. v. Suntide Homes, Inc., 882 S.W.2d 275, 279 (Mo. App. 1994). While this Court presumes plaintiff's evidence is true and gives plaintiff the benefit of all reasonable and favorable inferences to be drawn from the evidence, an appellate court shall not supply missing evidence or give plaintiff the benefit of unreasonable, speculative or forced inferences. Id. The evidence and inferences must establish each and every element and not leave any issue to speculation. Id.

B. Argument and Analysis.

Plaintiff failed to make a submissible case on his fraudulent misrepresentation claim against the College. Fraud is never presumed and the burden of proof rests upon the party asserting it. Board of Educ. v. Elam, 70 S.W.3d 448 (Mo. App. 2000). To establish a submissible case based on fraudulent misrepresentation, plaintiff must present substantial evidence supporting the following essential elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it be acted on by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and

proximate injury. Joel Bianco Kawasaki Plus v. Meramec Valley Bank, 81 S.W.3d 528 (Mo. banc 2002); Heberer v. Shell Oil Co., 744 S.W.2d 441, 443 (Mo. banc 1988).

1. Representations are insufficient as a matter of law.

The trial court properly entered judgment notwithstanding the verdict on plaintiff's fraudulent misrepresentation claim against the College as the jury's verdict against the College is contrary to Missouri law. In his fraudulent misrepresentation claim, plaintiff asserts that the College represented to plaintiff, prior to his appeal hearing, that it would follow the appeal procedures set forth in the student handbook. (L.F. pp. 14-19, 87). These allegedly false representations that form the basis of plaintiff's claim for fraudulent misrepresentation do not constitute representations of fact required to support a claim of fraud under Missouri law.

The law in Missouri is clear that to constitute representations sufficient to provide the basis for a claim of fraud, the representations must relate to a past or existing fact. Arnold v. Erkmann, 934 S.W.2d 621, 626-627 (Mo. App. 1996); Titan Constr. Co. v. Mark Twain Kansas City Bank, 887 S.W.2d 454, 459 (Mo. App. 1994). Statements and representations as to expectations and predictions for the future are insufficient to authorize recovery for fraudulent misrepresentation. Arnold, 934 S.W.2d at 627. Moreover, the mere breach of a promise or failure to perform does not constitute a misrepresentation of fact as the promise to perform is a representation as to a future event. Titan, 887 S.W.2d at 459. While the failure to perform as promised may give rise to a breach of contract action, the breach of a duty arising out of a contract is insufficient to create tort liability. State ex rel. William

Ranni Associates, Inc. v. Hartenbach, 742 S.W.2d 134, 140 (Mo. banc 1987). The act, not the breach, gives rise to tort liability. Khulusi v. Southwestern Bell Yellow Pages, Inc., 916 S.W.2d 227, 230 (Mo. App. 1995). Therefore, if in the absence of a contract, the act would not be a tort, the mere breach of an agreement will not create one. Id. Thus, when a plaintiff makes an allegation that a duty created by the terms of a contract has been breached, the breach cannot give rise to a fraudulent misrepresentation claim. See William Ranni Associates, 742 S.W.2d at 140.

In the present case, the statements that form the basis of plaintiff's fraudulent misrepresentation claim are not representations of past or existing facts. Plaintiff's claim is based on representations allegedly made by the College that it would abide by the due process procedures in the student handbook at plaintiff's appeal hearing. (L.F. pp. 14-19, 87). Specifically, in his fraudulent misrepresentation claim submitted to the jury, plaintiff claimed that the College represented to him that he would be allowed to present and give evidence in support of his side of the case, to see and/or hear all evidence presented against him, to question any testimony presented by witnesses as evidence against him, and to have an advisor or counselor present during the hearing. (L.F. pp. 14-19, 87, Tr. pp. 77-79). At the time the representations were made, the appeal hearing was a future event. Thus, the representations were not representations regarding a past or existing fact, but rather a future event.

Moreover, these representations are nothing more than a promise to perform (follow the due process procedures) at some point in the future (plaintiff's appeal hearing).

Plaintiff's allegations of fraud are clearly based on the College's alleged failure to perform under the alleged contract by failing to follow the due process procedures described in the student handbook. Plaintiff's alleged misrepresentations are nothing more than a disguised claim that the College breached its alleged agreement with plaintiff to follow the due process procedures at the appeal hearing. Absent the alleged contract providing the due process procedures, the College owed plaintiff no duty to follow the procedures. Accordingly, the failure to perform under the contract does not create a remedy in tort. See Khulusi, 916 S.W.2d at 230. Therefore, the representations relied upon by plaintiff in his claim against the College are insufficient as a matter of law to form the basis of his fraudulent misrepresentation claim. As such, plaintiff failed to make a submissible case on his fraudulent misrepresentation claim and accordingly the trial court was correct in sustaining the College's Motion for Judgment Notwithstanding the Verdict.

The claimed misrepresentations in the present matter are similar to the representations at issue in Titan Constr. Co. v. Mark Twain Kansas City Bank, 887 S.W.2d 454 (Mo. App. 1994). In Titan, plaintiff attempted to assert a claim for fraudulent misrepresentation based upon representations made by the defendant that it would abide by the terms of a previously entered contract between plaintiff and defendant. The trial court entered Summary Judgment in defendant's favor on the fraudulent misrepresentation claim finding that a breach of contract does not constitute fraud. Id. On appeal, the Court of Appeals held that the alleged misrepresentation of the defendant that it would abide by the terms of a previously entered contract do not support a claim for fraud. Id. at 459. The Court explained that to constitute

fraud, the alleged representation must relate to a past or existing fact. Id. Additionally, in Titan, the Court held that the mere failure to perform a contract cannot serve as the basis of tort liability including liability arising out of a fraudulent misrepresentation. Id. The Court explained that the breach of a promise or failure to perform does not constitute a misrepresentation of fact, and accordingly affirmed the trial court's summary judgment stating that plaintiff failed to establish the elements necessary to support a fraud claim. Id.

Like the representations in Titan, plaintiff's fraudulent misrepresentation claim in the present matter is based upon representations made by the College that it would abide, at some point in the future, by the due process procedures contained in the student handbook. The alleged representations are, therefore, not representations relating to a past or existing fact. These alleged misrepresentations clearly relate to the future conduct of the College at an appeal hearing, which the Court, in Titan, explained is insufficient to support a claim of fraud. Moreover, as the Titan Court stated, the alleged breach of the duty to follow the due process procedures does not constitute a misrepresentation of fact. The mere failure to perform a contract cannot serve as the basis of a fraudulent misrepresentation claim. Id. The statements relied upon by plaintiff in his fraudulent misrepresentation claim are, therefore, insufficient as a matter of law to constitute a "representation" as required under the essential elements of a fraudulent misrepresentation claim. As such, plaintiff failed to make a submissible case under his fraudulent misrepresentation claim. For these reasons this Court should affirm the trial court's entry of judgment notwithstanding the verdict on plaintiff's fraudulent misrepresentation claim against the College.

2. No Substantial or Competent Evidence Indicating Plaintiff Relied Upon The Alleged False Representations.

The trial court properly entered judgment notwithstanding the verdict on plaintiff's fraudulent misrepresentation claim against the College as plaintiff failed to present any substantial or competent evidence indicating he relied on the alleged false representations of the College. Reliance is an essential element to a claim for fraudulent misrepresentation. Heberer, 744 S.W.2d at 441. Accordingly, in order to establish a submissible case based on fraudulent misrepresentation, plaintiff must present substantial and competent evidence establishing his reliance on the representations made by the College. Id.

Plaintiff did not present any substantial or competent evidence that he relied on the representations made by the College. Specifically, plaintiff was required to present evidence that he relied upon the representations that the College would follow the due process procedures at his appeal hearing. According to plaintiff, these due process procedures were first introduced to him when he enrolled in the College. (Tr. pp. 8-16). Specifically, plaintiff claims that the due process procedures were a part of his contract for education with the College in that they were contained in the student handbook distributed to plaintiff upon his application to the College. (Tr. pp. 8-16). Thus, in order to support a claim for fraud, the statements in the student handbook regarding the College's due process procedures must have been a material fact in plaintiff's decision to enroll at the College. There is absolutely no evidence in the record that the due process procedures in the handbook induced plaintiff to attend the College. While plaintiff claims to have received the student handbook prior to

his enrollment, plaintiff indicated that he never gave any thought to the due process provisions contained therein before he enrolled in the College. (Tr. p. 335). In fact, plaintiff testified that the due process provisions in the student handbook played no role in his decision to enroll in the College. (Tr. p. 35. This evidence is clear that plaintiff did not rely on the due process provisions contained in the student handbook at the time he enrolled in the College.

Additionally, there is no substantial or competent evidence indicating plaintiff relied on the due process provisions in preparing for his appeal hearing. In his testimony plaintiff never indicated he relied on the alleged representations of the College. Plaintiff also failed to offer any evidence demonstrating how he changed, altered or conformed his conduct in his preparations for the appeal hearing in reliance on the due process representations. Rather, the clear weight of the evidence indicates that the due process provisions in the handbook played no role in plaintiff's preparation for the appeal hearing. The due process provisions regarding the appeal hearing provide that the student involved may have an advisor or counselor present at the hearing, may present and give evidence in support of his or her side of the case, and may present witnesses or written affidavits on his behalf. (Tr. pp. 77-79). Despite these due process protections provided in the student handbook, plaintiff did not bring an advisor or counselor to the hearing. (Tr. p. 99). At trial, plaintiff testified that he consulted with an attorney prior to the appeal hearing. (Tr. pp. 342, 346). However, in the face of the provision providing for the same, plaintiff chose not to bring his attorney or counselor to the appeal hearing. (Tr. p. 99).

Plaintiff also did not present any witnesses in his defense. (Tr. p. 342). At the appeal hearing for his dismissal from the College, in his defense plaintiff claimed that he wrote the questions contained in Dr. Makarov's Dermatology examination as his study guide and further claimed that Dr. Makarov used his study guide as the test. (Tr. pp. 106-109). Plaintiff also claimed that his girlfriend at the time, now wife, saw plaintiff write the questions. (Tr. p. 343-344). Additionally, two other study partners of plaintiff, Chad McClain and Rob Selig, also allegedly saw the test questions written in plaintiff's handwriting. (Tr. p. 344). Plaintiff, however, did not call these witnesses or any other witnesses to offer testimony during the appeal hearing even though plaintiff claims they could have verified his story. (Tr. pp. 342-345). In fact, plaintiff specifically told his girlfriend, now wife, that he did not want her to come to the appeal hearing even though she told him she would if he asked her. (Tr. p. 581). Plaintiff also did not offer any written affidavits on his behalf. (Tr. pp. 342-343). Plaintiff could have obtained and presented to the appeal committee statements or affidavits from his claimed witnesses, however, again in the face of the provisions allowing for the same, plaintiff did not. (Tr. p. 342-343).

The evidence plainly indicates plaintiff did nothing in reliance on the due process provisions. The evidence and inferences therefrom establish plaintiff did not rely on the alleged representations of the College. The trial court, therefore, was correct in sustaining the College's Motion for Judgment Notwithstanding the Verdict on plaintiff's fraudulent misrepresentation claim as reliance is an essential element of the claim. This Court should accordingly sustain the judgment of the trial court.

3. Failing to Uphold the Trial Court's JNOV Allows for Inconsistent Jury Verdicts.

Failing to uphold the trial court's Judgment Notwithstanding the Verdict in favor of the College on Verni's fraudulent misrepresentation claim would allow for inconsistent jury verdicts in this case given the jury's verdict in favor of the College on Verni's breach of contract claim against the College. Verni's fraudulent misrepresentation claim was based upon the College's alleged breach of contract in failing to comply with the due process procedures in the student handbook. Specifically, Verni alleged that the College fraudulently misrepresented that it would follow the due process procedures set forth in the student handbook. The jury, however, as evidenced in its verdict on the breach of contract claim, found that the College did not breach the terms of the student handbook by failing to comply with the due process procedures contained therein. As such, it would be inconsistent to find the College liable for fraudulent misrepresentation arising out of an alleged representation that the College would follow the due process provisions contained in the handbook. This further demonstrates that the present fact scenario should not give rise to a claim of fraudulent misrepresentation. The trial court was thus correct in sustaining the College's Motion for Judgment Notwithstanding the Verdict on plaintiff's fraudulent misrepresentation claim. This Court should accordingly sustain the judgment of the trial court.

CONCLUSION

WHEREFORE, for the above-stated reasons, Dr. Aleksandr Makarov prays for an order from this Court reversing the Judgment of the trial court based on lack of jurisdiction, and remanding the case to the trial court with instructions to dismiss plaintiff's breach of contract claim or in the alternative, reversing the Judgment of the trial court and entering Judgment in favor of Dr. Makarov. Dr. Makarov additionally prays for an order of this court denying Points I and II of Plaintiff's Brief and for such other and further relief as this Court deems just and proper. Cleveland Chiropractic College prays for an order of this Court affirming the Judgment of the trial court and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Substitute Brief of Respondents-Appellants, along with a copy of this Certificate of Mailing, were mailed this 7th day of July, 2006, to:

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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 14,599 words counted using Corel WordPerfect 10. Counsel also certifies that the attached floppy disk containing this brief has been scanned viruses and is virus-free.

Nikki Cannezzaro #49630

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