[J-114-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JORGE F. FERRER, M.D.,	:	Nos. 52 and 53 EAP 2000
	:	
Appellant	:	Appeal from the judgment of the Superior
	:	Court entered on May 9, 2000 at 1758
	:	EDA 1999 and 1988 EDA 1999 reversing
v.	:	the judgment entered on May 20, 1999 in
	:	the Court of Common Pleas of
	:	Philadelphia County, Civil Division, at
TRUSTEES OF THE UNIVERSITY OF	:	3225 June Term 1992
PENNSYLVANIA, MICHAEL AIKEN,	:	
PROVOST, BARRY S. COOPERMAN,	:	
VICE-PROVOST FOR RESEARCH,	:	
EDWIN ANDREWS, DEAN OF SCHOOL	:	ARGUED: October 15, 2001
OF VETERINARY MEDICINE, AND	:	
JEFFREY ROBERTS, ASSOCIATE DEAN	:	
OF SCHOOL OF VETERINARY	:	
MEDICINE,	:	
	:	
Appellees	:	

DISSENTING OPINION

MR. JUSTICE CAPPY* **Filed: May 23, 2003**

In my view, the majority opinion effects a dramatic and ill-advised change in Pennsylvania's law of contracts relating to damages. Because it is a change that I cannot accept, I must respectfully dissent.

I begin with my understanding of Appellant's case. Appellant's sole theory of

*The author of the Dissenting Opinion is now Mr. Chief Justice Cappy.

recovery sounded in contract, and focused on the nature of the sanctions that Appellees (collectively, "the Trustees") imposed upon him.[1] Paragraph 64 in Appellant's complaint, which was the only allegation that proceeded to trial, stated:

> 64. Even if [the Trustees] had the authority to impose some sanction against [Appellant], the sanctions imposed were so excessive and arbitrary when measured against the conduct and previous record of [Appellant] that said defendants breached their duties as set forth in the Procedures.[2]

(Complaint at ¶64).

According to Appellant, the sanctions that the Trustees imposed upon him caused him to lose the ability to perform scientific research,[3] and the damages he requested were to protect his expectation interest under Section 344 of the Restatement (Second) of Contracts. The only evidence which Appellant submitted on damages was expert evidence to show that the particular research program in which he was involved as a University of Pennsylvania professor would cost $2.9 million to re-establish. The jury awarded Appellant the $2.9 million and more. This award of the research program to Appellant is what the majority upholds, although it reduces the amount of that reward to the $2.9 million figure that Appellant's expert opined would be necessary if the program were to be restored.

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[1] While Appellant's complaint set forth claims for intentional interference with business relations, breach of contract, intentional infliction of emotional distress, defamation, and conspiracy, except for paragraph 64 in his breach of contract count, all of Appellant's claims were either voluntarily withdrawn or dismissed as untimely.

[2] I agree with the majority that Appellant proved that the Trustees breached this promise.

[3] In Appellant's own words: "Although it was undisputed that [Appellant] did not lose salary or fringe benefits as a result of [the Trustees'] unauthorized and improper sanctions, *[he] lost something far more precious and valuable to him: the ability to perform important, if not vital scientific research*…." (Appellant's Brief at 30) (emphasis in original).

The expectation interest is indeed protected in Pennsylvania. Trosky v. Civil Serv. Comm'n, 652 A.2d 813, 817 (Pa. 1995) (citing Restatement (Second) of Contracts §344 cmt. a). The premise of the expectation interest as it currently stands in Pennsylvania jurisprudence is clear. It endeavors to put a promisee in as good a position as he would have been in, had he received what he was promised. Id.

The Trustees assert, inter alia, that the Superior Court's decision to enter judgment in their favor must be upheld because Appellant did not show that he himself suffered any financial loss as a result of the breach of contract. That is to say, Appellant's proof on damages, did not, as the expectation interest requires, show the position he would have been in financially had the Trustees performed their obligations. I agree. Simply stated, Appellant's proof on damages is inconsistent with his expectation interest because Appellant's financial position would not have included the research program's value and Appellant would not have been $2.9 million richer, even if the Trustees had refrained from imposing excessive and arbitrary sanctions upon him.

To me, it is self-evident that the law of contracts protects the economic expectations of parties to a contract and redresses the economic injuries that a contracting party suffers as a consequence of the contract's breach. See John E. Murray, Jr., Grismore on Contracts, §195 (Rev. ed. 1965) ("Inasmuch as the promisee in a contract is primarily entitled to have performance, if he cannot get it, the law endeavors to put him, as nearly as it can, in as good a position financially as he would have been in, had he received what he was promised.") (emphasis added).

Therefore, when I assess Appellant's theory of recovery and the propriety of the jury's award under the expectation interest, I ask a straightforward question: if Appellant had received what the parties' contract promised him, would his economic position have included the research program or its worth? I can only answer this question in the negative. My reasons are two-fold. First, the parties' contract, as Appellant set it forth in

paragraph 64 of his complaint, did not include a promise that the research program would be his. Second, the undisputed facts of record establish that Appellant had no ownership or other legally-recognized interest in the research program, its underlying funding or in its components, nor did he expect to be given or gain such an interest under the parties' agreement.[4] In other words, Appellant did not lose the research program or its value due to the Trustees' breach, and would not have acquired it, even if the Trustees had fulfilled their contractual obligation. Thus, Appellant's award does not place him in the financial position he would have been in had the Trustees performed. Rather, by giving him the monetary equivalent of the research program, the award put him in a much better financial situation.

In my view, therefore, Appellant's award runs contrary to the expectation interest as the law of contracts defines it. Accordingly, Appellant failed to satisfy his burden on damages, an essential element of his case, see Spang & Co. v. U.S. Steel Corp., 545 A.2d 861, 866 (Pa. 1988), and a judgment in the Trustees' favor is warranted, notwithstanding the jury's verdict.[5]

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[4] Appellant's expert, Frederick Murphy M.D., confirmed that the research program did not belong to Appellant, and never would have belonged to him. Dr. Murphy testified that the grant money that purchased all of the items that constituted the research program in which Appellant worked--the animals, supplies, personnel and equipment--was given to the University of Pennsylvania and placed into a segregated university account. (N.T. 12/4/98 at 158-160). In this context, therefore, the majority's repeated references to "Dr. Ferrer's research program; "his research staff"; and "his animal colonies" are incorrect and misleading. See, e.g., Majority Opinion at 20, 22, 23, 30.

[5] I do not disagree with the majority opinion's discussion of an appellate court's standard of review when confronted with a motion for j.n.o.v., as far as it goes. (Majority Opinion at 5). I would add, however, that judgment n.o.v. may be entered if the movant is entitled to a judgment as a matter of law. Boettger v. Miklich, 633 A.2d 1146, 1148 n.2 (Pa. 1993). When deciding a question of law, this court's review is de novo and its scope of review is plenary. Buffalo Township v. Jones, 813 A.2d 659, 664 n.4 (Pa. 2002).

Recalling Appellant's description of what he lost as a result of the Trustees' breach, i.e., his ability to conduct research, Appellant should have presented evidence of the value of what would have accrued to his economic well-being because he had the opportunity to work in the research program. For example, had Appellant offered expert testimony to the effect that by virtue of his continuing research, he could have secured a higher salary at another institution or some other personal financial gain, he might have established the damages element of his case. If no such proof were available, or if compensatory damages were inadequate, Appellant could have pursued injunctive relief, to enjoin the Trustees from imposing the sanctions. See Rogoff v. Buncher Co., 151 A.2d 83, 86 (Pa. 1959).

I submit that the majority's decision to uphold the jury's award to Appellant, which disregards the traditional underpinnings of the expectation interest, is unprecedented, and will alter substantially the rights and liabilities which flow between plaintiffs and defendants in Pennsylvania in breach of contract actions. In my view, the majority opinion will work an injustice in many cases. Accordingly, I dissent, and would affirm the Superior Court's memorandum opinion and order, reversing the trial court, and concluding that judgment should be entered in the Trustees' favor.[6]

[6] I read pages 9 through 11 of the Superior Court's memorandum opinion as voicing the conclusion that the jury's award cannot stand because it did not fall within Appellant's expectation interest insofar as Appellant had no economic interest in the research program's funding or that which it bought.