MINNESOTA STATE LAW LIBRARY

Nos. A10-1802 and A11-567

State of Minnesota
In Supreme Court

The Board of Regents of The University of Minnesota
and Orlando Henry "Tubby" Smith,

Appellants,

v.

James R. Williams,

Respondent.

APPELLANTS' REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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INTRODUCTION

From the beginning of this action in 2007, James Williams has vacillated between claiming that Tubby Smith and the University breached a promise to employ him as an assistant basketball coach and claiming that his case has nothing at all to do with the University's hiring decision. His initial complaint was filled with employment-related allegations and asserted claims such as breach of contract and promissory estoppel. The district court dismissed these claims for lack of jurisdiction, and the Court of Appeals affirmed, relying upon this Court's decisions, including *Dietz* and *Willis*. *Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646, 651 (Minn. Ct. App. 2009) (citing, *inter alia*, *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992); *Willis v. County of Sherburne*, 555 N.W.2d 277, 282 (Minn. 1996)). But based on Williams's explicit representation that his negligent misrepresentation claim did "not involve a hiring decision, nor any other internal administrative decision or function of [the University],"[1] the courts below proceeded to adjudicate that claim.

Now, in briefing to this Court, Williams not only acknowledges, but repeatedly emphasizes, that his case does indeed involve the University's hiring decision. In fact, his case is revealed to be a garden variety contract repudiation claim:

> "When Tubby Smith became the head coach at the University of Minnesota in March 2007, he *offered Williams a job* as assistant

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[1] Brief of Appellant at 15, *Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646 (Minn. Ct. App. 2009); Supplemental App. 1-2.

> coach. After Williams *accepted the Minnesota job* and resigned his then-existing position at Oklahoma State University, the University's athletic director, Joel Maturi, *repudiated his previous authorization for Williams' hiring*."[2]
>
> "Maturi *decided to repudiate* Williams' hiring."[3]
>
> "Maturi didn't try to *delegate* his authority to approve; he *exercised* his authority to approve . . . just minutes before Smith called Williams with the job offer."[4]

Put simply, Williams now would have this Court believe that Smith did not misrepresent anything to Williams because Maturi authorized Smith's job offer. The wrong instead was Maturi's later repudiation of the employment contract entered into between Smith and Williams on the night of April 2.

This depiction of Williams's action is significant because there is no subject matter jurisdiction in district court over a claim challenging a University employment decision. The only appropriate avenue for such a challenge is by writ of certiorari to the Minnesota Court of Appeals. The Court should reaffirm this long-standing legal principle and dismiss the case for lack of subject matter jurisdiction.

Independently, the Court should reverse the Court of Appeals because, as a matter of law, Williams cannot establish two essential elements of a negligent misrepresentation claim. First, Williams cannot establish reasonable reliance because of the *Jewell Belting* conclusive presumption. Second, Williams cannot

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[2] Brief of Respondent at 2, *Bd. of Regents of the Univ. of Minn. v. Williams*, Nos. A10-1802, A11-567 (Minn. Feb. 22, 2012) (emphasis added).

[3] *Id.* at 15 (emphasis added).

[4] *Id.* at 27 (emphasis added).

establish duty because the University, as a prospective employer, owed no duty of care to Williams. For these reasons, this Court should order that judgment as a matter of law be entered for the University and Smith.

ARGUMENT

I. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF SUBJECT MATTER JURISDICTION.

The University consistently and repeatedly has asserted that this case is, in essence, a challenge to the University's discretionary employment process and decision, and that the district court lacked subject matter jurisdiction over such an action. In 2008 and 2011, the University argued to the Court of Appeals the absence of jurisdiction over the action as characterized, and then tried, by Williams. Both times, Williams denied that his claim had anything to do with the University's employment decision and convinced the Court of Appeals that jurisdiction was proper.[5] Now in this Court, Williams abandons this charade and openly asserts in the very first paragraph of his "Statement of the Case" that this case is about an offer, acceptance, and repudiation of a job opportunity with the University.[6] This is a case Williams may bring only on certiorari review in the Court of Appeals. This Court should vacate the jury verdict and dismiss this case for lack of subject matter jurisdiction.

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[5] *Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646, 651 (Minn. Ct. App. 2009); *Williams v. Smith*, Nos. A10–1802, A11–567, 2011 WL 4905629, at *8 (Minn. Ct. App. Oct 17, 2011).

[6] Resp't's Br. 2.

That Williams waited until now to admit the nature of his claim does not impact the question of jurisdiction. This Court has made clear that "subject matter jurisdiction cannot be conferred by consent of the parties, it cannot be waived, and it can be raised at any time in the proceeding." *Tischer v. Hous. & Redev. Auth. of Cambridge*, 693 N.W.2d 426, 430 (Minn. 2005); *see also Seehus v. Bor-Son Const., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010) ("Defects in subject-matter jurisdiction may be raised at any time, and cannot be waived by the parties."). This Court should therefore decide the issue of subject matter jurisdiction now.

Certiorari review by the Minnesota Court of Appeals pursuant to Minn. Stat. § 606.01 is the exclusive vehicle for reviewing University employment decisions. *Willis v. County of Sherburne*, 555 N.W.2d 277, 282 (Minn. 1996). Principles of separation of powers mandate adherence to the certiorari rule. *Winberg v. Univ. of Minn.*, 499 N.W.2d 799, 803 n.3 (Minn. 1993) (stating that the "internal management of the University has been constitutionally placed in the hands of the regents alone"). "The University is part of the executive branch of state government, and as such, its decisions are given deference by this court under the principle of separation of powers." *Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646, 651 (Minn. Ct. App. 2009) (citation omitted). This deference is reflected in the certiorari rule, which requires that "discretionary decisions be granted deference by the judiciary to avoid usurpation of the executive body's administrative prerogatives." *Tischer*, 693 N.W.2d at 429 (citing *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992)). According to this

Court, "[b]ecause a direct action in the district court would contemplate de novo review, we have concluded that review by certiorari is required to provide appropriate deference and to minimize the judicial intrusion into administrative decision-making." *Tischer*, 693 N.W.2d at 429.

The employment decisions covered by the certiorari rule include, but are not limited to, those relating to hiring, firing, and refusals to reinstate. This Court has held that claims involving employment termination may only be brought by writ of certiorari to the Minnesota Court of Appeals. *See, e.g., Tischer*, 693 N.W.2d at 429. In 1990, this Court held that the only avenue for challenging a denial of a request for reinstatement was by writ of certiorari. *Dokmo v. Indep. Sch. Dist. No. 11, Anoka-Hennepin*, 459 N.W.2d 671, 677-78 (Minn. 1990). This Court has further declared it irrelevant how a plaintiff characterizes a challenge to an employment decision: "[r]egardless [of how] the claim is cloaked," the claim is limited to certiorari review when it involves an inquiry into a public employment decision. *Willis*, 555 N.W.2d at 282.

In light of this settled authority, the Court of Appeals, in its 2009 decision in this case, affirmed the dismissal of Williams's promissory estoppel claim as inextricably linked to a University employment decision.[7] *Williams*, 763 N.W.2d at 652. Based on allegations by Williams regarding his negligent misrepresentation claim, however, the Court of Appeals allowed that claim to

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[7] Williams did not appeal the district court's dismissal of his original breach of contract claim.

proceed in district court, finding that this particular claim "could be" limited in a manner that would avoid inquiry into the discretionary University employment decision. *Id.* at 652-53. In obtaining this ruling, Williams represented to the Court of Appeals that his negligent misrepresentation claim did "not involve a hiring decision, nor any other internal administrative decision or function, of [the University]" and that "the ultimate decision on hiring Williams and how or why it was later made is irrelevant."[8] That representation to the Court of Appeals now has proven utterly hollow.

Indeed, Williams spent the entire trial attacking the University's employment decision and criticizing its hiring process. Beginning in his opening statement, Williams attacked the University's decision-making process, asserting that the University made the wrong employment decision; that Williams was offered the job and accepted it only to have the offer later revoked;[9] that Williams was never given an opportunity to explain what happened in his prior University employment;[10] that no one from the University ever called the NCAA to inquire about Williams;[11] and that other shortcomings existed in the University's

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[8] Brief of Appellant at 15, *Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646 (Minn. Ct. App. 2009); Reply Brief of Appellant at 11, *Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646 (Minn. Ct. App. 2009). Supplemental App. 1-4.

[9] Tr. 32.

[10] Tr. 27.

[11] Tr. 35.

employment decision-making process.[12] His opening statement informed the jury of the true nature of his claim, that he had, in fact, been hired by the University:

> The evidence in this case will show that [Williams] was hired on April 2, that he accepted the offer, and he undertook to take the steps to begin work as an employee of the University of Minnesota.[13]

Based on these arguments and claims in the opening statement about his case, the University immediately moved to dismiss for lack of subject matter jurisdiction.[14] The district court responded by suggesting to Williams's counsel, "Well, I take it that you misspoke, Counsel. Correct?"[15] Counsel assured the district court that he had misspoken.[16] But that assurance proved hollow both during the trial and now in light of his brief to this Court. The opening statement accurately presented the premise of Williams's case to be a direct attack on the University's discretionary employment process and decision to not hire him.

In his case-in-chief, Williams presented a parade of witnesses to attest to his truthful and good character,[17] his superior coaching abilities,[18] his "redeemed" record of employment,[19] the failures of the University's hiring process,[20] the extent of the University's due diligence in that process,[21] and the impact of the

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12 Tr. 27, 32, 35, 38.
13 Tr. 31-32.
14 Tr. 63-64.
15 Tr. 63.
16 *Id.*
17 *See, e.g.*, Tr. 91-92, 145, 293, 326, 330
18 *See, e.g.*, Tr. 142-43, 326-27.
19 Tr. 116-17.
20 Tr. 302-03.
21 Tr. 257-58.

University's employment decision (not the alleged misrepresentation) on Williams.[22] All of this evidence was relevant only to the issue of whether the University should have hired Williams, and to show that the University's failure to do so was wrong and harmful to Williams.

Further, Williams's cross-examination of the University's witnesses directly attacked the University's employment process and decision, focusing on an alleged failure to properly investigate or value Williams's background,[23] or to consider the support for Williams from individuals outside the University.[24] Williams cross-examined Maturi as to whether he "bothered" to review NCAA materials, the extent of his investigation into Williams's history of major NCAA rule infractions, whether he spoke to references about Williams and the credence afforded to such references, and other acts of due diligence in the hiring process.[25] Smith faced similar questions that could only be considered relevant to the employment decision-making process itself, including whether he ever confronted Williams about his history of NCAA rule infractions; why Smith did not so confront Williams; and whether Smith considered other information in considering Williams for employment as an assistant coach.[26] None of this has anything to do with a misrepresentation by omission, and everything to do with questioning the University's discretionary employment process.

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22 Tr. 296-97.
23 Tr. 732-34, 736-37.
24 Tr. 786-89.
25 Tr. 732-34, 784-86.
26 Tr. 1220-43.

Throughout the trial, the University repeatedly objected to all of this questioning.[27] The University sought outright dismissal of the action based on subject matter jurisdiction.[28] Williams always responded that his claim had nothing to do with the employment decision or the University's process, and, based upon those representations, the district court permitted the case to proceed to verdict.

Now, in this Court, Williams clearly articulates the true nature of his claim. Williams concedes that his claim has essentially nothing to do with anything Smith said, did or failed to say—the claim is instead a direct challenge to the decision of the Athletic Director to "repudiate" the hiring of Williams. Williams argues *repeatedly* in his brief that the Athletic Director authorized Smith to hire Williams, that Smith carried out that instruction, and that the Athletic Director then decided to repudiate the hiring. Quoting from Williams's brief:

> " [T]he University's athletic director, Joel Maturi, *repudiated* his previous *authorization* for Williams' hiring."[29]
>
> " Maturi *decided to repudiate* Williams' hiring.[30]
>
> "Maturi didn't try to *delegate* his authority to approve; he *exercised* his authority to approve."[31]
>
> "Maturi had *specifically approved* Williams' hiring by telling Smith that it was his call."[32]

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27 *See, e.g.,* Tr. 117, 731-34, 785-86, 1222-27.
28 Tr. 63-64, 751, 762, 1421.
29 Resp't's Br. 2 (emphasis added).
30 *Id.* at 15 (emphasis added).
31 *Id.* at 27 (emphasis added).
32 *Id.* at 29 (emphasis added).

> "Maturi had the authority to hire Williams, [and] Maturi had *exercised that authority*."[33]

Williams now acknowledges that his claim sounds in breach of contract: Maturi authorized Smith to hire Williams by approving his specific hiring; Smith acted upon that authorization; Williams accepted the job; and an employment contract was formed. Thereafter, Maturi repudiated the hiring and Williams suffered damage as a result. This is a contract claim challenging an employment decision, pure and simple, not a claim of misrepresentation for failure to disclose lack of hiring authority.

To be sure, to avoid the jurisdictional bar, Williams cloaked this challenge to the University's employment decision under the title "negligent misrepresentation." The title only obscures the true nature of this case. In his brief to this Court, Williams has removed the veil that disguises his claim. Astonishingly, Williams claims entitlement to the verdict even if Smith had fully disclosed every detail regarding the scope of his authority, asserting that the Court can overlook the absence of a prima facie element of a negligent misrepresentation (the misrepresentation itself) in light of Maturi's unjustified repudiation of the employment contract.[34] There is no subject matter jurisdiction in the district court over such a claim.

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33 *Id.* at 30 (emphasis added).

34 Resp't's Br. 28-30.

Williams's reliance on this Court's decision in *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981) vividly underscores the true nature of this case. That case, Williams argues, involved nearly identical facts.[35] Williams states that "[l]ike in this case, *Grouse* involved the employer's repudiation of an unconditional offer of employment. Group Health's chief pharmacist unconditionally offered a job to Grouse in the Group Health Pharmacy." *Id.* Based on these facts, this Court stated that "the principle of contract law applicable here is promissory estoppel." *Grouse*, 306 N.W.2d at 116. Indeed, the plaintiff in *Grouse* asserted the claim that actually fit the facts, namely promissory estoppel. Because Williams's case presented "nearly identical facts," he did assert an estoppel claim, as well as a breach of contract claim, when this case began. However, these claims proved to be jurisdictionally barred; and Williams failed to pursue his employment-related challenge in the proper forum through writ of certiorari to the Minnesota Court of Appeals. This failure does not somehow create subject matter jurisdiction in district court for a dressed-up challenge to a University employment decision. *See generally Hemmesch v. Molitor,* 328 N.W.2d 445, 447 (Minn. 1983) (explaining that courts, not parties, answer questions of subject matter jurisdiction and courts cannot confer jurisdiction where none exists).

With Williams admitting the true basis, nature, and character of his claim, this Court is presented now with a simple jurisdictional question. Is a challenge to

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[35] Resp't's Br. 38.

the University's decision to allegedly "repudiate" an employment contract, and the University's process in reaching that decision, triable de novo in the district court? The witnesses, arguments, evidence and testimony presented by Williams were unified in their purpose: to attack a discretionary employment decision by the University of Minnesota. "Negligent misrepresentation" has been used as a label to camouflage the true nature of the claim. This Court does not permit creative pleading to circumvent certiorari review. *See Willis*, 555 N.W.2d at 280 (rejecting "creative pleading" as a manner to create district court jurisdiction). Now that the façade has been shattered and Williams has admitted the essential contractual basis of his case, the Court should reaffirm that the appropriate vehicle to hear such a claim is by certiorari petition, not a district court trial, and dismiss this case for lack of subject matter jurisdiction.

II. WILLIAMS'S NEGLIGENT MISREPRESENTATION CLAIM FAILS BECAUSE HE IS CONCLUSIVELY PRESUMED TO KNOW THAT SMITH HAD NO AUTHORITY TO HIRE WILLIAMS.

The lower courts in this case have both acknowledged that under Minnesota law there can be no recovery against a government entity based on an offer or promise by a government employee lacking actual authority. But the lower courts proceeded to avoid this basic principle by importing the disfavored and largely obsolete "proprietary" exception to this long-standing rule. As discussed in the University's initial brief, there is no support for such an exception.

In his brief to this Court, Williams puts his "proprietary" exception argument on the back burner, instead emphasizing two other arguments: (1) that

the conclusive presumption only applies to contract claims; and (2) that the conclusive presumption is irrelevant because the Athletic Director did, in fact, delegate authority to Smith. This second argument is particularly noteworthy as it confirms that under Williams's view of the case, there was no misrepresentation—Smith actually had authority when he extended the alleged offer.

A. The conclusive presumption applies regardless of how a plaintiff characterizes a claim.

That the *Jewell Belting* presumption applies regardless of how a plaintiff characterizes a claim has—until now—never been seriously disputed in this action. Neither the district court nor the Court of Appeals suggested that the nature of a claim had any relevance.[36] But now Williams argues that the nature of the claim does matter, and that the conclusive presumption only applies to contract claims. The law does not support this argument.

Jewell Belting was a contract case, but nothing in the language of that case or subsequent cases applying it suggests a limitation on the principle declared there that those who deal with the government are "conclusively presumed to know the extent of authority possessed by the officers with whom they are dealing." *Jewell Belting Co. v. Vill. of Bertha*, 97 N.W 424, 25 (Minn. 1903). Recovery was barred in *Jewell Belting* even though the plaintiff had very good

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[36] In fact, the Court of Appeals, in a case decided earlier this year, applied the conclusive presumption in a matter involving an equitable estoppel claim. *Contractors Edge, Inc. v. City of Mankato,* No. A11-916, 2012 WL 118409, at *5-6 (Minn. Ct. App. Jan. 17, 2012).

reason to believe that the village president and recorder, in fact, had authority to enter into the contract. *Id.* at 424-25. Despite these facts, this Court did not carve out an exception, but rather applied the principle that the government cannot be liable for the unauthorized promises of its officials. *Id.* There is no reason that a plaintiff—facing the same situation as in *Jewell Belting*—should be able to avoid its holding by crafting a claim as one for negligent misrepresentation by the official, as opposed to breach of contract. Creative pleading cannot avoid the sound doctrinal basis of *Jewell Belting*.

A unanimous panel of the United States Court of Appeals for the Eighth Circuit correctly recognized the scope of the *Jewell Belting* rule. *City of Geneseo v. Utils. Plus*, 533 F.3d 608, 615-16 (8th Cir. 2008). The Eighth Circuit—applying *Jewell Belting* as well as this Court's decision in *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845 (Minn. 1995)—correctly rejected a fraud claim because "it was unreasonable, as a matter of law, for [the plaintiff] to rely on any representations by [the government official] of his authority to bind [the government entity]." *Id.* at 617.

Williams responds to this holding of *Geneseo* by simply asserting that the Eighth Circuit's decision is an unsupported extension of *Jewell Belting* to tort claims. To the contrary, the rule of *Jewell Belting* is of general application, and this Court should decline Williams's request to carve out an exception for negligent misrepresentation. The Eighth Circuit's application of *Jewell Belting* to all claims—not just contract claims—is logical, straightforward, and well-

grounded in Minnesota law. In the decision the Eighth Circuit affirmed, *City of Geneseo v. Utils. Plus*, Civil No. 05-2689, 2007 WL 1027294 (D. Minn. Apr. 3, 2007), Judge Montgomery applied the rule of *Jewell Belting* not only to contract and promissory estoppel claims, but also to a fraud claim. *Id.* at *7. In so doing, Judge Montgomery expressly relied on both *Jewell Belting* and *Morris v. Perpich*, 421 N.W.2d 333 (Minn. Ct. App. 1988), and also cited *Plymouth Foam Prods., Inc. v. City of Becker*, 120 F.3d 153 (8th Cir. 1997) (affirming U.S. District Court Judge David Doty's grant of summary judgment to a city on a claim of fraud for lack of authority to contract). *City of Geneseo*, 2007 WL 1027294, at *7.

Williams then claims that *Nicollet Restoration* has no relevance here because this Court did not expressly cite *Jewell Belting* or mention the conclusive presumption. Williams simply ignores the stated basis for this Court's decision in *Nicollet Restoration*: this Court found as a matter of law that reasonable reliance could not be established because the government officials in that case lacked "any authority to bind the City," and could not guarantee adoption by the city council. Therefore, there was a complete absence of proof of reliance. *Nicollet Restoration, Inc.*, 533 N.W.2d at 848. In other words, there could be no reasonable reliance when the officials lacked actual authority to carry out the governmental action. While this Court did not use the term "conclusive presumption," this Court's reasoning and result was consistent with the principle set forth in *Jewell Belting*, as correctly recognized by the Eighth Circuit in *Geneseo*.

Williams next argues that public policy does not support applying *Jewell Belting* in this case because (1) the financial risk to government entities is not great enough to warrant application of the conclusive presumption in non-contract cases; and (2) the University is not entitled to any special rules or exceptions. Neither argument undermines the application of *Jewell Belting* here.

First, Williams argues that the conclusive presumption is not needed in tort cases because exposure is limited to the "slight" amount of $300,000 by the Minnesota Tort Claims Act.[37] As an initial matter, the University notes that the cap is now $500,000 for claims arising after July 1, 2009. Minn. Stat. § 3.736, subd. 4(c).[38] But more significantly, that Williams may believe these amounts are slight is irrelevant. What is relevant is that countless government bodies (cities, counties, the University, etc.) would not agree that half a million dollars is a de minimis amount. Opening the door to expose governmental entities to $500,000 liability, per claim, for acts of employees without actual authority presents a real risk to the public purse. Even so, nothing in *Jewell Belting*, *City of Geneseo*, or *Nicollet Restoration* suggests that application of the conclusive presumption should depend on the level of potential exposure.

Second, Williams argues that the University is not entitled to special rules, stating repeatedly in one form or another, that the University needs no "special rule exempting its athletic director and head basketball coach from the obligation

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[37] Resp't's Br. 23.

[38] The Municipal Tort Claims Act provides the same limits. Minn. Stat. § 466.04.

to conduct themselves in the same manner as every other citizen."[39] This is a straw man. The University is not now—and has never—asked for special treatment in this case. The University simply is asking that century old Minnesota law be applied in the same manner in this case as it would apply in any matter involving a Minnesota government entity. The principles in this case do not simply affect the University, but instead countless government entities at all levels throughout the state.

Minnesota law is that government cannot be bound by its employees' promises unless they have actual authority. This rule of law—followed in this state for at least 100 years, and the federal government for many decades—was denied by neither the district court nor the Court of Appeals. The conclusive presumption applies in this case.

B. Williams admits—in trying to avoid the conclusive presumption—that there was no misrepresentation of authority.

Williams then argues that application of the conclusive presumption here would not change the outcome of the case because "imputing knowledge to Williams would have revealed that Smith offered a job to Williams with Maturi's approval."[40] This argument is irrelevant as to whether the conclusive presumption applies, but is noteworthy to the continued viability of Williams's negligent misrepresentation claim. If the alleged misrepresentation was not a misrepresentation, as Williams now admits, then he has failed to prove an essential

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39 *Id.*; *see also* Resp't's Br. 26.

40 Resp't's Br. 27.

element of the negligent misrepresentation claim and judgment must be entered for the University.[41]

C. Importation of the proprietary exception should be rejected.

In its initial brief, the University detailed the reasons why importation and expansion of the "proprietary" exception by the Court of Appeals was incorrect and, in fact, controverts this Court's direction that the exception is disfavored. One of the clearest statements by this Court regarding the "proprietary" exception appears in *Imlay v. City of Crystal Lake* in which this Court refused to resurrect the "proprietary" exception, stating that it did "not wish to reinstate this troublesome dichotomy." 453 N.W.2d 326, 330 (Minn. 1990). Williams, though, does not address *Imlay*, and sidesteps this Court's expressed reservations about this dichotomy by relying on three cases that pre-date *Imlay*.

First, Williams cites *Stein v. Regents of the Univ. of Minn.*, 282 N.W.2d 552 (Minn. 1979), the only case relied upon by the Court of Appeals. *Stein* is fully addressed and distinguished in the University's initial brief. *Stein* did not involve the conclusive presumption, but rather an issue relating to sovereign immunity, which is not relevant here.

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[41] Williams's admission also negates his damages. Williams specifically admits that nothing in this case would be different if Williams had accurately known "the extent of the authority possessed by" Smith. Resp't's Br. 28. Therefore, his alleged damages did not flow from any purported misrepresentation (since Williams does not actually believe there was a misrepresentation), but from Maturi's decision to allegedly repudiate Smith's hiring of Williams.

Second, Williams cites *Mesaba Aviation Div. of Halvorson of Duluth, Inc. v. County of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977), a surprising choice due to its express rejection of the "proprietary" exception. In *Mesaba,* this Court characterized the exception as "difficult to apply" and "misleading," stating:

> Although the governmental-proprietary distinction might once have been a progressive test of the proper circumstances in which to estop the government, we no longer find it a useful tool for that purpose. The distinction is difficult to apply and is to some extent misleading.

258 N.W.2d at 880. This Court went on to hold that in some circumstances an equitable estoppel claim will lie against the government, but only where the equities favor such a claim. *Id.* This is not an estoppel case, and, in fact, no Minnesota court has extended the "proprietary" exception to a negligent misrepresentation case.

Finally, Williams cites, but does not discuss, *Bufkin v. City of Duluth*, 291 N.W.2d 225 (Minn. 1980). *Bufkin* was a terse and narrow decision addressing the standard of care in a negligence action based on a slip-and-fall outside a municipal auditorium. This Court held that the "mere slipperiness doctrine" does not apply when the government operates an auditorium for profit. *Id.* at 226-27. Given *Bufkin*'s narrowness, this case not being about standard of care, and this Court's subsequent statements in *Imlay*, *Bufkin* sheds no light on the question of whether the "proprietary" exception should be expanded into this new area.

D. Williams's arguments further show the troublesome nature of the "proprietary" exception.

Williams's arguments only further demonstrate the troublesome nature of applying the "proprietary" exception. His arguments highlight the lack of any standard for determining the nature of a government function, the deceptive nature of only focusing on revenue, and the impossible task of judicially weighing the relative value of financial and non-financial considerations.

First, Williams cites to no specific standard to determine whether the men's basketball program (or any other government function) is "proprietary." The closest he comes is citing *Stein* for the proposition that "if the government is to enter into businesses ordinarily reserved to the field of private enterprise, it should be held to the same responsibilities."[42] But after quoting *Stein,* he never even attempts to apply this "standard." He does not, for example, assert that the University—when it started its men's basketball program—was entering a business ordinarily reserved to the field of private enterprise. The failure to undertake this analysis is understandable given that the University's men's basketball program was started over one hundred years ago and there is no reason to believe that the University was entering—or even intended to enter—a "business" reserved to "private enterprise." Plainly, *Stein* fails to provide a clear standard that could apply in this case, and Williams fails to offer any other standard.

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[42] Resp't's Br. 30.

Second, Williams's argument is purely based on gross revenue. But there is no basis in the record to draw any conclusion as to the actual "profit" of the men's basketball program. Even the use of the word "profit" is practically meaningless here because any revenues from intercollegiate athletics activities are shared by the entire University Athletic Department. Williams cites hearsay information found nowhere in the record (newspaper articles) and record information with no foundation (also newspaper articles). Nothing in the record provides any admissible information on the cost of running the program, the sources of funding, or the dramatic changes in gross revenue over the years. Williams's position is simply that because newspaper articles say the basketball program brings in a lot of money, the program is "proprietary." This unfounded reasoning was the entire basis for the conclusion of the Court of Appeals on the issue.

Third, Williams's argument trivializes the non-monetary benefits of the men's basketball program. He completely ignores his own testimony and that of his witnesses that a vital function of the men's basketball program is to provide mentoring, tutoring, and counseling to student-athletes.[43] The many components that determine why the Regents of the University of Minnesota maintain a men's basketball program, and the relative value that gross revenue plays in that decision from year to year, is simply an issue upon which there is no record at all.

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[43] App. 70 (Tr. 500); Tr. 142-45, 292, 324-26.

The lower courts should never have reached the issue of whether the University's men's basketball program is a "proprietary" function. Their treatment of the issue, as well as Williams's arguments to this Court, well illustrate why the "proprietary" exception should remain essentially obsolete. The Court of Appeals refused to apply the conclusive presumption solely because of a "proprietary" exception. The Court of Appeals should be reversed.

III. THERE IS NO LEGAL DUTY BETWEEN AN EMPLOYER AND A PROSPECTIVE EMPLOYEE.

The absence of any recognized legal duty is fatal to this negligent misrepresentation action. Section 552 of the Restatement (Second) of Torts governs negligent misrepresentation claims in Minnesota. *Bonhiver v. Graff*, 248 N.W.2d 291, 298 (Minn. 1976); *see also Florenzano v. Olson*, 387 N.W.2d 168, 174 n.3 (Minn. 1986). Comment "a" provides that a duty of care arising under Section 552 is "[u]nlike the duty of honesty" and is limited in scope. Restatement (Second) of Torts § 552 cmt. a (1965)). In Minnesota, like other jurisdictions, the duty arises in actions "against professionals who negligently supply inaccurate information to a client and cause pecuniary loss to the party receiving the information." *Vaa v. Clay County*, No. A04-311, 2004 WL 2590602, at *3 (Minn. Ct. App. Nov. 16, 2004), *rev. denied* (Minn. Jan. 26, 2005). Williams cites no case in any jurisdiction extending a duty under Section 552 beyond this limited scope. In fact, Williams makes no reference to Section 552.

While disregarding existing law interpreting Section 552 in the prospective employment context, Williams beseeches this Court to blaze a new trail by imposing liability in a situation where "a prospective employer . . . misrepresent[s] the firmness of job offers."[44] There is no need to create a new legal duty in the prospective employment context. Prospective employees already have available adequate remedies under established legal theories, including fraud to redress intentional misconduct and promissory estoppel or breach of contract to redress unfulfilled promises. As illustrated in this case, Williams *actually sought relief under precisely these theories*: he tried but then abandoned his fraud claim just before the jury received the case, and he failed to pursue his other claims in the proper forum through writ of certiorari to the Court of Appeals. *Williams*, 763 N.W.2d at 649. That Williams failed to fully pursue or perfect available claims does not mean that this Court should accommodate his choices now by creating out of whole cloth a new legal duty between one who makes "employment related overtures" and a prospective employee.[45]

Williams fails in his attempt to distinguish the authorities that have ruled that Section 552 does not recognize a duty of care between employer and job applicant. The particular subject matter of an alleged misrepresentation has nothing to do with whether a legal duty arises in the first instance. Duty is a threshold question of law, not fact. Under Section 552, that duty originates from

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[44] Resp't's Br. 35.

[45] Resp't's Br. 42.

the nature of the business relationship between the parties, not from the nature of the wrong. It applies only to professional purveyors of information and to those who are in the business of supplying advice to others, such as accountants or lawyers. *See Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 50 (Iowa 1999); *Fry v. Mount*, 554 N.W.2d 263, 266 (Iowa 1996). College basketball coaches are not in the business of supplying professional business advice to each other and therefore, no duty exits under Section 552.

The authority cited by Williams underscores the adequacy of other legal theories. Williams cites *Hoyt Props., Inc. v. Prod. Res. Grp., LLC*, 736 N.W.2d 313 (Minn. 2007), for the proposition that a misrepresentation claim is actionable in an arms-length transaction. Indeed it is. *Hoyt* is a *fraud* case involving intentional misrepresentations between commercial parties. Williams also cites *Grouse* to support his claim. However, *Grouse* does not discuss negligent misrepresentation, but rather holds that repudiation of an employment contract is actionable in *promissory estoppel*. 306 N.W.2d at 116. Neither case makes any mention of the scope of the legal duty arising under Section 552 nor do they recognize a negligent misrepresentation claim in an arms-length transaction. Neither case even hints that a duty of care may exist between employer and prospective employee under a negligence theory. Williams's plea about a so-called "blanket rule" prohibiting any cause of action whatsoever for the wrongs he alleged is entirely hollow. Prospective employees have multiple avenues of relief available to them under established law.

Williams tries to escape the limitations of Section 552 by alleging that he was not engaged in an arms-length or commercial transaction, an assertion that belies both the record and his own assertions. Williams is a self-characterized long-time basketball coach, with 36 years of uninterrupted employment at multiple Division 1 programs, and has negotiated multi-year, six-figure employment contracts.[46] Williams describes the University's basketball program as "big business," involving the state's top-paid employee. The contract negotiations between Williams and Smith spanned 10 days, involved many telephone calls, the submission of a resume, and an in-person interview. The parties discussed job responsibilities and negotiated salary terms with Williams stating that he would not leave his current position without a "much better contract."[47] Williams and Smith thereafter had several discussions about the salary demands, including funding sources and ancillary work at a basketball camp.[48] During these negotiations, Smith independently evaluated related matters, including the limited University budget and distribution of that budget among several members of his staff.[49] According to Williams, Smith stated that he ultimately "got the money [Williams] requested."[50] The University is unaware of any authority imposing a duty upon such sophisticated parties in the course of employment contract negotiations of this type.

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46 Resp't's Br. 3-5.
47 App. 60 (Tr. 457).
48 Tr. 1179, 1180, 1262-63.
49 Tr. 1180.
50 Tr. 1301.

Williams claims that Smith's acts ran afoul of "settled law" that "if one chooses to speak he must say enough to prevent the words from misleading the other party," as set forth in *M.H. v. Caritas Family Servs., Inc.*, 488 N.W.2d 282, 288 (Minn. 1992). This law is far from "settled," as this Court expressly limited *Caritas* to its facts, explaining that the Court "answered only the narrow question" of whether a negligent misrepresentation action exists when an adoption agency undertakes a duty to disclose information to a couple seeking to adopt a child. *Smith v. Brutger Cos.*, 569 N.W.2d 408, 414 n.4 (Minn. 1997) ("In answering this question, we decided solely that a negligent misrepresentation claim against an adoption agency was not barred under the specific facts of that case. We did not, however, specifically adopt the tort of negligent misrepresentation in all contexts.") Thereafter, this Court reaffirmed the narrow construction of the duty of care in commercial transactions, announcing its reluctance "to impose a duty to protect between those conducting business with one another." *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674 (Minn. 2001).

Notwithstanding the inapplicability of *Caritas* beyond its facts, and this Court's reluctance to impose duties upon parties doing business with one another, Williams claims that Smith's "guidance" somehow created a duty between the parties. Even if that were the law, the undisputed factual record underscores that Williams did not act as a result of any sort of professional "guidance" supplied by Smith. Williams exclusively controlled each act of reliance. Contrary to the characterizations in his brief, Williams himself testified that *he* provided guidance

to Smith regarding consultation with his then-current employer at OSU, not the other way around. Williams expressly told Smith *not to contact* Sean Sutton, the OSU head basketball coach, and Smith agreed.[51]

In addition, Williams acted in an entirely independent manner in resigning from OSU. Williams prepared his resignation letter entirely by himself without discussing it with Smith.[52] In fact, Williams wrote his resignation letter at the direction of *Sutton*, not Smith.[53] That letter was not delivered until the afternoon of April 3, 2007. Prior to the delivery of that resignation letter, Smith had told Williams that Maturi needed to approve the hiring and that Maturi had serious reservations about hiring Williams.[54] Williams acted in complete disregard of these statements and in an entirely independent manner when he thereafter tendered his written resignation to OSU.[55]

Nor did Smith provide any guidance or advice regarding the other tasks Williams undertook on his own initiative: to clean out his office or turn in his office keys and car;[56] to put his house on the market;[57] or to call James Dickey, Flip Saunders, Kyle Keller, Bob Battisti, or anyone else.[58] Williams performed each of these tasks entirely on his own initiative, without consulting or informing

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51 App. 63-64 (Tr. 460-61).
52 Tr. 472.
53 App. 89-90 (Tr. 549-50).
54 App. 90 (Tr. 551); App. 92-93 (Tr. 552-53).
55 Ct. Ex. F 30-31.
56 Tr. 206.
57 Tr. 474-76.
58 Tr. 465.

Smith. The fact that Smith and Williams may have had discussions about future possible job duties does not translate into directions to quit a job or sell a house or guidance on any other act by Williams. In a prospective employment situation like this, Smith cannot as a matter of law have undertaken any duty of care to Williams.

The extension of negligence liability into the pre-employment context is far beyond the scope contemplated by Section 552. The claimed misrepresentation *by omission* of Smith to disclose his lack of unilateral authority to hire is no different legally than a misrepresentation regarding assurances of upward employment mobility, or guarantees of length of employment, or promises regarding continuity of business leadership and supervision. In all of these cases, the aggrieved prospective employee has essentially the same claim, i.e., the prospective employer represented something that was not true. In all such cases, the prospective employee's remedy is in breach of contract or fraud or, in the case of a public employee in Minnesota, a petition for certiorari review by the Minnesota Court of Appeals. A claim for negligent misrepresentation in this context is both unprecedented and unnecessary.

CONCLUSION

The Court of Appeals decision should be reversed. This Court should order that judgment as a matter of law be entered in favor of the University and Smith. In the alternative, the case should be remanded for a new trial, or damages should be reduced to a level supported by the evidence.

Dated: March 6, 2012

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Certificate of Brief Length

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