

Nos. A10-1802 and A11-567

State of Minnesota  
 In Supreme Court

James R. Williams,

*Petitioner-Respondent,*

v.

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

*Appellants.*

**OPPOSITION TO PETITION FOR REHEARING**

MARK B. ROTENBERG (#126263)

General Counsel

BRIAN J. SLOVUT (#236846)

Associate General Counsel

JENNIFER L. FRISCH (#257928)

Associate General Counsel

University of Minnesota

360 McNamara Alumni Center

200 Oak Street S.E.

Minneapolis, MN 55455-2006

Telephone: 612-624-4100

FREDRIKSON & BYRON, P.A.

David L. Lillehaug (#63186)

200 South Sixth Street, Suite 4000

Minneapolis, MN 55402

Telephone: 612-492-7000

*Attorneys for Appellants*

FAFINSKI MARK & JOHNSON, P.A.

Donald Chance Mark, Jr. (#67659)

Alyson M. Palmer (#0341228)

Flagship Corporate Center, Suite 400

775 Prairie Center Drive

Eden Prairie, MN 55344

Telephone: 952-995-9500

HUNEGS LeNEAVE & KVAS, P.A.

Richard G. Hunegs (#0048124)

1650 International Centre

900 Second Avenue South

Minneapolis, MN 55402

Telephone: 612-339-4511

MEAGHER & GEER, P.L.L.P.

Charles E. Spevacek (#126044)

William M. Hart (#150526)

Damon L. Highly (#0300044)

33 South Sixth Street, Suite 4400

Minneapolis, MN 55402

Telephone: 612-338-0661

*Attorneys for Petitioner/ Respondent*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....ii

INTRODUCTION ..... 1

ARGUMENT ..... 1

I. THE MINNESOTA TORT CLAIMS ACT IS NOT A CONTROLLING  
STATUTE ON THE ISSUE DECIDED BY THE COURT ..... 1

II. PETITIONER’S ARGUMENTS ABOUT THE MEANING OF THIS COURT’S  
DECISIONS IN *GROUSE* AND *CARITAS* DO NOT JUSTIFY REHEARING ..... 2

III. WILLIAMS’S ARGUMENT OBJECTING TO THE COURT’S DESCRIPTION  
OF THE FACTS IS MERELY A RECITATION OF THE DISSENT’S VIEW AND  
DOES NOT JUSTIFY REHEARING ..... 3

CONCLUSION ..... 5

Form Certification ..... 7

## TABLE OF AUTHORITIES

### State Cases

<i>Cnty. of Washington v. City of Oak Park Heights</i> , 2012 WL 3192813 (Minn. 2012).....	5
<i>Grouse v. Group Health Plan, Inc.</i> , 306 N.W.2d 114 (Minn. 1981) .....	2
<i>Jewell Belting Co. v. Vill. of Bertha</i> , 97 N.W 424 (Minn. 1903).....	1, 5
<i>M.H. v. Caritas Family Servs., Inc.</i> , 488 N.W.2d 282 (Minn. 1992) .....	3

### State Statutes

Minn. Stat. § 3.736, subd. 3 (2011) .....	2
---	---

### Other Authorities

Minn. R. App. 140 .....	1
Minn. R. Evid. 201(b) .....	4

## INTRODUCTION

Minn. R. App. 140 does not authorize a rehearing to reconsider arguments already presented to the Court, nor is the rule properly invoked as a means of challenging the wisdom of a decision. This Court's decision reflects a detailed and careful review of the issue of duty with regard to the claim of negligent misrepresentation against the University. It also reflects a reasoned dialog between the majority and dissenting members of the Court that fully addresses all significant aspects of that issue. The Petition for Rehearing is little more than a plea for the Court to now reconsider matters already fully briefed and argued by the parties, and considered and decided by the Court. With respect, the Petition should be denied.

## ARGUMENT

### **I. THE MINNESOTA TORT CLAIMS ACT IS NOT A CONTROLLING STATUTE ON THE ISSUE DECIDED BY THE COURT.**

Williams first argues that the Court's decision "overlooks" the Minnesota Tort Claims Act (MTCA)—a law that Williams now alleges is "controlling" on the issue of duty.

First, there is no basis for alleging that this Court overlooked the MTCA. The MTCA was cited and briefed by both sides before this Court. For example, Williams argued in his Respondent's brief that the MTCA somehow negated the impact of *Jewell Belting Co. v. Village of Bertha*, 97 N.W. 424 (Minn. 1903). See Resp't's Br. at 23-24. The University asserted that the MTCA extinguished the proprietary/governmental distinction. Appellants' Br. at 18-19.

Second, the MTCA is not “controlling” on the question this Court decided: whether public policy compels the creation of a new legal duty between the University and a prospective employee of the University. The MTCA merely opened up the potential for tort liability against the government where a private entity would, under the same circumstances, face liability. But the MTCA does not itself create any new legal duties or substantive rights. For that matter, it does not even mandate identical treatment of the government and private entities in all circumstances. To the contrary, the MTCA expressly provides that the courts may find “additional cases [beyond the many listed exclusions] where the state and its employees should not, in equity and good conscience, pay compensation for personal injuries or property losses.” Minn. Stat. § 3.736, subd. 3 (2011). The provisions of the MTCA are not in any way dispositive of the issue faced by the Court here.

**II. PETITIONER’S ARGUMENTS ABOUT THE MEANING OF THIS COURT’S DECISIONS IN *GROUSE* AND *CARITAS* DO NOT JUSTIFY REHEARING.**

Much of Williams’s Petition (over eight pages) is consumed with an argument about two cases—both of which were fully briefed by the parties and argued to this Court.

*Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981)—described by Williams as “controlling authority”—understandably does not appear in either the majority or the dissenting opinions as it did not involve a negligent misrepresentation claim at all, but rather a promissory estoppel claim. 306 N.W.2d at 116. For this reason it cannot be considered “controlling authority.” Williams’s suggestion that *Grouse* was

“overlooked” is astonishing given the discussion of the case in briefing, Appellants’ Br. at 11, 24, and the Court’s questions about it at oral argument—questions which specifically pointed out the fact that the case involved a promissory estoppel claim and did not create a legal duty in tort in the prospective employment context.

*M.H. v. Caritas Family Servs.*, 488 N.W.2d 282 (Minn. 1992) not only was fully briefed by both parties, but is discussed in both the majority and the dissenting opinions. *See* Slip op. at 17-19, 21, 27-28, C/D-1, C/D-6-7. Understandably, Williams prefers the dissent’s treatment of *Caritas*. But the fact that the Court chose to apply *Caritas* in a different manner is not a basis for rehearing under Rule 140.

**III. WILLIAMS’S ARGUMENT OBJECTING TO THE COURT’S DESCRIPTION OF THE FACTS IS MERELY A RECITATION OF THE DISSENT’S VIEW AND DOES NOT JUSTIFY REHEARING.**

Williams’s final argument essentially recites his agreement with the dissent’s view of the facts. Paraphrasing the dissent, Williams argues that the Court failed to appropriately view the facts in the light most favorable to Williams. *See* Slip op. at C/D-5-6. The Court majority obviously considered this argument offered in the dissent and did not find it persuasive. Such a disagreement is common in cases where a dissent is written, and certainly does not constitute a basis for a rehearing.

The University offers two additional brief points on this issue.

First, Williams argues as though the issue presented to the Court was one of fact, rather than one of law. His argument suggests that this appeal was all about the sufficiency of the evidence before the jury. It was not. Rather, this appeal was about whether a legal duty exists. The issue considered by the Court was whether, “as a matter

of public policy, [it] should extend the protection against negligent misrepresentation to prospective employees of the University of Minnesota.” Slip op. at 3. The factual details giving rise to Williams’s claim do not determine the broad question of whether public policy justifies the imposition of a new duty in the prospective employment relationship. Nor do the facts pointed to by Williams in his Petition contradict the Court’s fundamental conclusion that “Williams and Smith did not stand in a professional or fiduciary relationship to each other during the negotiations over prospective employment with the University, nor was Smith acting in an advisor capacity to Williams.” Slip op. at 21.

Second, this Court’s decision accurately reflects the record, and in large part is derived from the testimony of Williams himself. For example, the timeline detailed by the Court regarding Williams’s conversations with Coach Smith and the submission of his letter of resignation was from the testimony of Williams himself and his witnesses, not from the University or Coach Smith. *See* Appellants’ Br. at 8-10. Thus, the notion that the Court improperly or selectively considered the University’s version of events is simply wrong.<sup>1</sup>

---

<sup>1</sup> The Petitioner’s argument about the Court’s reference to the internet publication of the University’s delegations of authority is a red herring. The Court properly took judicial notice of this website, which indisputably contains information capable of accurate and ready determination that cannot reasonably be questioned. *See* Minn. R. Evid. 201(b). But even in the absence of this publicly available and accurate information, the Court properly found – *based on Williams’s own testimony* – that he had *actual notice* of Maturi’s exclusive authority to hire *before* Williams gave up his contractual or legal right to employment at Oklahoma State. Tr. Ex. 101 at 5. In any event, these factual issues are not central to the legal issue of public policy decided by the Court.

As a final observation, the University notes that Williams poses no challenge to the Court's express rejection of the governmental/proprietary dichotomy, Slip op. at 29, the linchpin of Williams's defense to the conclusive presumption established in *Jewell Belting Co. v. Village of Bertha*, 97 N.W. 424, 425 (Minn. 1903), 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." *See also Cnty. of Washington v. City of Oak Park Heights*, 2012 WL 3192813 (Minn. 2012). The Court's decision may be affirmed on this alternative, fully briefed ground without any rehearing.

#### CONCLUSION

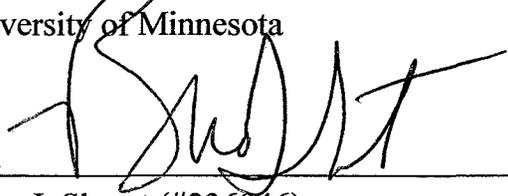
Rehearing is not an opportunity for a disappointed litigant to repeat fully briefed, but rejected arguments. A petition for rehearing should present a focused and compelling reason for the Court to reconsider its decision. Here, the majority and dissent discussed at length the very issues that are advanced as grounds for rehearing. No point would be served by renewing that discussion through further proceedings.

Dated: August 28, 2012

Respectfully submitted,

MARK B. ROTENBERG (#126263)  
General Counsel  
University of Minnesota

By



Brian J. Slovut (#236846)  
Jennifer L. Frisch (#257928)  
Associate General Counsel  
360 McNamara Alumni Center  
200 Oak Street SE  
Minneapolis, MN 55455-2006  
(612) 624-4100

FREDRIKSON & BYRON, P.A.  
David L. Lillehaug (#63186)  
200 South Sixth Street, Suite 4000  
Minneapolis, MN 55402  
612-492-7000

Attorneys for Appellants

**Form Certification**

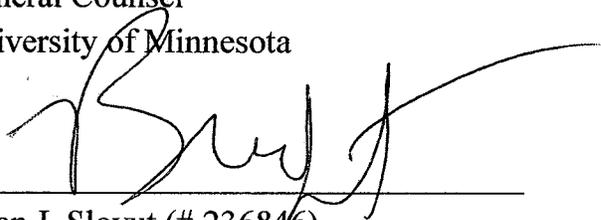
I hereby certify that this brief was produced with a proportional font of 13 pt. This brief was prepared using Microsoft Office Word 2010 software.

Dated: August 28, 2012

Respectfully submitted,

MARK B. ROTENBERG (# 126263)  
General Counsel  
University of Minnesota

By



Brian J. Slovit (# 236846)  
Jennifer L. Frisch (# 257928)  
Associate General Counsel  
360 McNamara Alumni Center  
200 Oak Street SE  
Minneapolis, MN 55455-2006  
(612) 624-4100

FREDRIKSON & BYRON, P.A.  
David L. Lillehaug (#63186)  
200 South Sixth Street, Suite 4000  
Minneapolis, MN 55402  
612-492-7000

Attorneys for Appellants