

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.*

**BRIEF OF RESPONDENT JAMES R. WILLIAMS**

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## STATEMENT OF LEGAL ISSUES

1. Did the University of Minnesota and its head basketball coach, Tubby Smith, owe Jimmy Williams a duty not to misrepresent Smith's hiring authority?

The trial court and court of appeals ruled "yes."

**Most apposite cases:**

*M.H. v. Caritas Family Serv.*, 488 N.W.2d 282 (Minn. 1992);  
*Bonhiver v. Graff*, 311 Minn. 111, 122, 248 N.W.2d 291, 298 (1976);  
*Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981).

2. Must the jury's factual finding that Williams reasonably relied on Smith's misrepresentation be set aside based upon a conclusive presumption that Williams knew the extent of Smith's authority?

The trial court and court of appeals ruled "no."

**Most apposite cases:**

*Stein v. Regents of the Univ. of Minn.*, 282 N.W.2d 552 (Minn. 1979);  
*Buflin v. City of Duluth*, 291 N.W.2d 225 (Minn. 1980);  
*Jewell Belting Co. v. Village of Bertha*, 91 Minn. 9, 12, 97 N.W. 424, 425 (1903);  
*Bonhiver v. Graff*, 311 Minn. 111, 122, 248 N.W.2d 291, 298 (1976);  
Minn. Stat. § 3.736, subds. 1, 4 (a).

3. Was the trial court within its discretion in allowing Williams to call two character witnesses?

The trial court and court of appeals ruled "yes."

**Most apposite cases:**

*In re Westby*, 639 N.W.2d 358 (Minn. 2002);  
*Westling v. Holm*, 239 Minn. 191, 58 N.W.2d 252 (1953).

4. Is the jury's damages award supported by the evidence?

The trial court and court of appeals ruled "yes."

**Most apposite cases:**

*Connolly v. Nicollet Hotel*, 258 Minn. 405, 104 N.W.2d 721 (1960);  
*Patton v. Minneapolis St. Ry. Co.*, 287 Minn. 368, 77 N.W.2d 433 (1956);  
*Keenan v. Computer Assoc. Int'l, Inc.*, 13 F.3d 1266 (8th Cir. 1994).

## STATEMENT OF THE CASE

Jimmy Williams has nearly 40 years of experience as a successful, highly respected Division I men's basketball assistant coach. When Tubby Smith became the head coach at the University of Minnesota in March 2007, he offered Williams a job as assistant coach. After Williams accepted the Minnesota job and resigned his then-existing position at Oklahoma State University, the University's athletics director, Joel Maturi, repudiated his previous authorization for Williams' hiring.

This appeal follows a nine-day jury trial before Hennepin County District Court Judge Regina M. Chu. The jury returned a verdict in favor of Williams on the sole claim submitted to the jury, negligent misrepresentation. (Appellants' Addendum ("A.Add.") 3-5.) The jury found that Smith falsely and negligently represented that he had authority to hire assistant basketball coaches. (Id.) It further found that Williams reasonably relied on Smith's misrepresentation and that he suffered harm as a result. (Id.) The jury awarded Williams damages of \$1,247,293. (A.Add.3-5,9.) The trial court ordered judgment against appellants, jointly and severally, in that amount. (Id. at 2.)

Appellants moved for judgment as a matter of law or, alternatively, for a new trial or remittitur. (Id. at 5,9.) The trial court denied appellants' motion for judgment as a matter of law, denied their motion for a new trial, and reduced the jury's verdict to \$1,000,000 pursuant to the Minnesota Tort Claims Act. It ordered judgment against appellants, jointly and severally, in that amount. (Id.) The court of appeals affirmed.

## STATEMENT OF THE FACTS

### A. Williams' background and experience as an NCAA Division I basketball coach

As of March 2007, Jimmy Williams was a longtime college basketball coach with 36 years of uninterrupted employment in Division I men's basketball. During that span, Williams received and accepted seven job offers. Each offer came from a Division I head basketball coach. None came from an athletics director.

#### 1. Williams' 15-year tenure at the University of Minnesota

In 1971, Coach Bill Musselman hired Williams as an assistant coach at the University. (Tr.384-85,404-405.) Musselman offered Williams the position over the telephone, and Williams immediately accepted. (Tr.385.) Two days later, Williams traveled with Musselman to Colorado Springs on a recruiting trip. (Tr.387-89.) Williams spent four years on Musselman's staff. (Tr.397-98.)

In 1975, Musselman resigned. (Tr.405.) His replacement, Jim Dutcher, hired Williams to be his first assistant coach. (Tr.411.) Williams worked for Dutcher for 11 years. (Tr.412,415.) During this time Williams applied for the head basketball coach's position at Drake University. (Tr.414.) Dutcher recommended Williams for the position, as did athletics director Paul Giel, associate athletics director J. Paul Blake, and University President C. Peter Magrath. (Id.; Respondent's Appendix ("R.A.") 37-40.)

In 1986, Dutcher resigned with several games left to play. (Tr.415.) The University named Williams acting head coach, and he finished the season in that capacity. (Tr.416.) Williams then became a candidate for the head coach's position.

(Tr.417,418,578.) University faculty members and members of the athletic department supported his candidacy. (Tr.417.) Ultimately, the University hired Clem Haskins, who brought his own staff of assistant coaches with him. (Tr.418.)

During Williams' time at the University, the NCAA twice investigated the men's basketball program. (R.A.1-36,41-69.) The NCAA imposed penalties on the program in 1976 and 1988. (R.A.26-36,53-69.) The 1976 penalty, in part, prohibited Williams from recruiting for two years. (R.A.1,23.) By the time of the 1976 report, Williams was the only remaining coach from the sanctioned program: Musselman had resigned and the assistant coaches had taken jobs elsewhere. (Tr.405-406.) The University asked Williams to stay on and communicate with the team's players and parents "to try to keep [the] team intact." (Tr.408.) In the 23 years since 1988, Williams has not been found to have violated any NCAA rules.<sup>1</sup> (Tr.361,419.) And in the 30-plus years since 1976, no restrictions have been placed on Williams' duties as an NCAA coach.<sup>2</sup>

## **2. Williams' subsequent coaching history**

After Williams left the University, Coach Hugh Durham offered Williams an assistant coaching job at the University of Georgia.<sup>3</sup> (Tr.419-21.) Williams also received a job offer at the University of Maryland Eastern Shore. (Tr.421.) Williams accepted a third offer, from University of Tulsa Coach J.D. Barnett. (Tr.422-23.) About nine

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<sup>1</sup> The parties stipulated to this fact at trial. (Tr.361.)

<sup>2</sup> The parties also stipulated to this fact at trial. (Tr.361.)

<sup>3</sup> While Williams was working for Dutcher, Durham had also offered him a job as assistant men's basketball coach at Florida State University. (Tr.430-33.)

months later, Coach Jim Brandenburg offered him a job at San Diego State University. (Tr.424-25.) Williams served as Brandenburg's first assistant coach for three years. (Tr.424-26.) In 1993, Coach Danny Nee offered Williams a job at the University of Nebraska. (Tr.426-27.) Williams served there for seven years, first as Nee's first assistant coach and, later, as his associate head coach. (Tr.427-28.)

In 1999, Coach Eddie Sutton hired Williams as an assistant coach at Oklahoma State University ("OSU"). (Tr.430.) He served there for one year, until Flip Saunders hired him as an assistant coach for the Minnesota Timberwolves. Two years later, after the Timberwolves laid him off, Williams became an advance scout for the Golden State Warriors. (Tr.433.) In 2003, Coach Jessie Evans hired Williams as an assistant coach at the University of Louisiana-Lafayette. (Tr.433-34.) Williams served as Evans' assistant for one year. (Tr.434-35.)

In 2004, Eddie Sutton again hired Williams at OSU. (Tr.435.) OSU gave Williams a three-year contract that would expire in 2008. (R.A.70.) His annual salary was \$158,000. (Tr.492.) He also received about \$7,000 per year from OSU's basketball camps. (Id.) OSU also provided Williams with a car, a retirement account,<sup>4</sup> health insurance, life insurance, a cellular telephone, and a country club membership. (Tr.458,492-96.)

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<sup>4</sup> In 2007, Williams was one year away from fully vesting in the OSU retirement program. (Tr.458-59.)

## **B. Smith offers Williams a job as an assistant coach**

### **1. The University hires Smith**

On March 22, 2007, Williams received a telephone call from J.D. Barnett and Tubby Smith. Williams had worked for Barnett at the University of Tulsa, where Tubby Smith later coached as well. (Tr.442,587.) Barnett knew all details concerning the sanctions levied against the University during Williams' 15 years there. (Tr.587.) Williams learned that Smith was considering the head coach's position at the University, and Barnett and Smith wanted his insight on recruiting and coaching there. (Tr.442-43.) Later that day, the University announced that Smith would be the new head coach. (Tr.445.) Following the announcement, Williams received a call from Dutcher. (Tr.446.) Dutcher asked Williams if he had any interest in returning to the University. (Tr.446-47.) Williams told him no; at the time, he had one year left on his OSU contract and was not thinking about leaving. (Tr.447.) In the following days, Williams spoke with several people about the University, including other basketball coaches, such as legendary Coach Ben Jobe, and Flip Saunders. (Tr.448-50.) In addition, former Congressman Jim Ramstad sent Williams a copy of a letter he had sent to Smith recommending that Smith hire Williams as an assistant coach. (Tr.448;R.A.84.)

### **2. Smith interviews Williams**

On March 30, 2007, Williams attended the NCAA Final Four basketball tournament in Atlanta, Georgia. (Tr.451; Appellants' Appendix ("App.") 56.) Smith had been the University's head coach for eight days, and the recruiting period was scheduled to begin in another seven days. While in Atlanta, Williams received a second telephone

call from Smith. (Tr.452;App.57.) Smith asked Williams to come to his hotel room. (Id.;Tr.1045.) They spent nearly two hours talking about the University and the role Williams could play as an assistant on Smith's staff. (Tr.453,1045-46;App.58.) They also discussed the compensation it would take for Williams to leave OSU. (Tr.456-57.) Smith recalled that Williams "might have mentioned" some of the NCAA violations that occurred while he was at the University. (Tr.1046-47.) Williams testified that he believed Smith already knew about the violations:

Well, number one, it was in national news at the time, and the coaching fraternity, it's a very small fraternity, and [Smith] knew that I worked at the University of Minnesota during the time that the things you were referring to occurred. And, also my first job after I left the University of Minnesota was to the University of Tulsa, where [Smith's] advisor, [J.D. Barnett], was the head coach. And, he knew my background completely.

(Tr.587.)

Following the interview, Smith was "very impressed" with Williams. (Tr.1048.) He told Williams that he wanted to talk again the next day. (Tr.453-54,1048.) But Smith had to leave the next day for a family matter, so he asked Williams to call him that weekend. (Tr.454.)<sup>5</sup> Williams called Smith on April 1, and they again discussed Williams becoming an assistant coach at the University. (Tr.454-55.) Smith asked

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<sup>5</sup> The appellants' brief wrongly tries to imply that Williams had pursued Smith for a job at the University of Minnesota, when the undisputed facts show the opposite—that Smith pursued Williams and convinced him to leave OSU to return to Minnesota. (UofM at 6 (describing events as including "the time [Williams] attempted to return to the University"); UofM at 7 (stating that "Smith returned a phone call from Williams" without mentioning that Smith had solicited the call)). Williams reminds the court here and elsewhere that he is entitled to a view of the evidence in a light most favorable to the verdict.

Williams to fax his resume to the University's basketball office. (Tr.455.) Williams did so the next day. (Tr.455-56;R.A.99-105.)

**3. April 2, 2007—Smith makes a job offer to Williams, and Williams accepts**

By waiting until late March to hire Smith, the University caused an immediate urgency for hiring staff because by then the critical recruiting period was just days away. A coach is not permitted to recruit for two programs at once. And he must complete NCAA compliance requirements before recruiting for a new program. (R.A.221.) At 8:03 p.m. on April 2, Smith offered Williams a job. (R.A.87,line 724;R.A.95,line 263.) Just minutes before making that offer, Smith spoke with the University's athletics director, Joel Maturi. (R.A.95,lines 261-62;R.A.97,lines 473 & 475.) Williams told Maturi that he wanted to hire Ron Jirsa, Saul Smith (Smith's son), and Jimmy Williams as his assistant coaches. (R.A.221.) They discussed an unfavorable newspaper article regarding Jirsa. (Tr.718;R.A.220.) They also discussed some concerns that had been raised about Williams by senior associate athletics director Regina Sullivan.<sup>6</sup> (Tr.720;R.A.220.) Smith reassured Maturi about both Jirsa and Williams. (Tr.718-19,722;R.A.220.) Maturi recalled his conversation with Smith as follows: "*[Smith] was also concerned about [Regina Sullivan's] remarks about Jimmy Williams. He said he knows [Williams] well and has no reservations as to his integrity and honesty. He said he has spoken to others about [Williams] and received positive feedback. I told him those were his calls. . . . I have such respect for Tubby that I am not overly concerned. I*

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<sup>6</sup> Sullivan oversees the University's men's and women's basketball programs. (Tr.717.)

*believe he will hire the two of them as well as his son. They may even come in this week.*” (R.A.220 (emphasis added).) A few minutes after this Smith/Maturi discussion, at 8:03 p.m., Smith called Williams.

As mentioned, it was during this call that Smith offered Williams the job of assistant men’s basketball coach at the University.<sup>7</sup> (Tr.456,510,1300;App.59.) Smith asked Williams if he was “ready to join him at the University of Minnesota.” (Tr.459-60; App.62-63.) Williams immediately accepted Smith’s offer. (Tr.460;App.63.) Smith told Williams that he could offer the amount of money they had talked about at the Final Four: \$175,000 from the University and \$25,000 from basketball camps. (Tr.456-57,1056,1179;App.59-60.)<sup>8</sup>

There was no confusion in Williams’ mind as to what had just happened: Smith’s job offer “was very usual to the other jobs that I had received over the phone.” (Tr.460,533-34,582-83;App.63.) Williams considered Smith to be a man of integrity, an honest man, a sincere man, and a man of the highest reputation. (Tr.541;App.85.) Williams assumed that Smith had the authority to hire him as an assistant coach.

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<sup>7</sup> Smith testified that he “[doesn’t] remember all the details” of this call. (Tr.1055.)

<sup>8</sup> Appellants wrongly try to imply not only that Williams pursued Smith for a job, but that he “negotiated” with Smith by making demands. (UofM at 7) (stating that Smith told Williams that he “could get him the money Williams had demanded (\$200,000).”). In fact, Smith asked at their March 30 meeting what it would take to interest Williams in changing his mind about leaving OSU. (Tr.456-57;App.59-60.) Williams told him, and Smith then offered that amount on April 2. Williams again reminds the court that he is entitled to a view of the evidence in a light most favorable to the verdict.

(Tr.532.) In his experience,<sup>9</sup> head basketball coaches had the authority to hire their staff—especially a “power coach” like Smith. (Tr.491-92.) Williams testified that he would not have resigned from OSU, would not have listed his house for sale, and would not have made arrangements to leave Oklahoma had he not been offered the job.<sup>10</sup> (Tr.607.) Although Smith said he was well aware that the job offer was subject to Maturi’s approval, he neglected to so inform Williams. (Tr.491,535;App.69,81.)

### C. Williams resigns from OSU

After Williams accepted the job, the two discussed recruiting. (Tr.460;App.63.) The recruiting period was scheduled to begin that weekend, and Smith wanted Williams to travel to Arkansas or Houston to recruit for the University. (Id.) Williams told Smith that he already had a recruiting trip scheduled with OSU head coach Sean Sutton that Thursday, April 5.<sup>11</sup> (Id.) Williams told Smith that, “if I was going to go out, join his staff, I accept the job, that we need to call Sean that night.” (Id.) Smith, however, did

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<sup>9</sup> In addition to his personal experiences, Williams was involved in hiring assistant coaches (with Coach Danny Nee) at the University of Nebraska. (Tr.522,579.)

<sup>10</sup> In their brief, appellants assert that Williams “admitted that an individual who needs someone else to ‘sign off’ does not have complete and final hiring authority.” (UofM, p.8.) This statement, however, takes Williams’ testimony out of its proper context and again attempts to present the evidence in a light most favorable to appellants. In truth, Williams was asked the following *hypothetical* question: “If Coach Smith *had said to you that night of April 2nd* that he needed the athletic director to sign off on your hiring, you would have known that Coach Smith did not have complete and final hiring authority; isn’t that correct?” (Tr.537;App.82 (emphasis added).) But Smith *in fact* did not provide this information to Williams on April 2. (Tr.491,535;App.69,81.) He waited until the next day, and even then he suggested that obtaining Maturi’s approval was nothing more than a formality. (Tr.536,551,557.)

<sup>11</sup> Sean Sutton had replaced Eddie Sutton as OSU head coach.

not suggest calling Maturi first. Instead, Smith offered to call Sutton, on Williams' behalf, and inform him that Williams would immediately be leaving OSU. (Tr.461;App.64.) Williams believed that "the proper thing to do" was for him to personally "call [Sutton] immediately and let him know what just transpired." (Id.) Again, Smith did not suggest calling Maturi first. Instead, he counseled Williams to personally call Sutton and resign. (Tr.461-62,1057-58,1182-83.)

Williams spoke with Sutton at 9:36 p.m. (Tr.549,589;R.A.87,line 739.) Williams told Sutton that Smith had offered him a job at the University, that he had accepted Smith's offer, and that he was resigning from OSU. (Tr.589.) Sutton was disappointed but understood Williams' decision. (Tr.464;R.A.148.) Sutton asked Williams to submit a resignation letter the next day. (Tr.464,589;R.A.148-49.)

Williams made numerous other telephone calls on April 2. He called his realtor, Kay Burns, to put his house on the market. (Tr.465-66.) He called OSU athletics director Bob Battisti, OSU assistant coach James Dickey, OSU director of basketball operations Kyle Keller, and OSU basketball staff member Mike Hatch to tell them about his job with the University. (Tr.465-67.) He also called Flip Saunders, John Lucas, J.D. Barnett, and Stu Starner. (Id.)

On April 3, Williams arrived at OSU around 7:45 a.m., wrote his resignation letter, and asked a secretary to type it for him. (Tr.472-73;R.A.108.) Sutton received the letter that afternoon. (R.A.156.) Before then, however, Sutton replaced Williams on his staff. Like Smith, the immediacy of recruiting obligations prompted quick action. Before he received Williams' resignation letter, Sutton called Corey Williams and

reached a verbal agreement with him to replace Jimmy. (R.A.149-50,154,156-157.)

Sutton, therefore, considered Williams' resignation letter to be a mere formality, because he already "knew what Jimmy was going to do and I knew what I was going to do":

Q: How was the resignation — I'm trying to — how does the resignation letter fit in here in terms of timing?

A: It doesn't. I made the decision that was made. Jimmy said he was going to Minnesota, and I was replacing him on my staff.

(R.A.153,157.)

**D. The University's emails regarding Williams' hiring**

The next morning, April 3, Maturi sent several emails to University personnel regarding Williams' hiring. At 5:49 a.m., he sent an email to Regina Sullivan.

(R.A.220.) In it, Maturi stated:

I spoke at length with Tubby last night about his staff. He received my emails about Coach Jirsa and said he spoke to him about it. Says it is an "old" article that is not portraying the situation accurately. He said he has worked with him for years and trusts him implicitly. *He was also concerned about your remarks about Jimmy Williams. He said he knows him well and has no reservations as to his integrity and honesty. He said he has spoken to others about him and received positive feedback. I told him those were his calls. He needs to feel good about his staff and yet understand Minnesota and the absolute need to be rule conscious and student-athlete friendly.*

*I have such respect for Tubby that I am not overly concerned. I believe he will hire the two of them as well as his son. They may even come in this week.*

(Id.) (emphasis added). As of 8:00 a.m. on April 3, Maturi had Williams' resume. He had discussed Williams with Regina Sullivan. He had discussed Williams with Tubby Smith. He had told Smith that hiring Williams was Smith's call. He expected Smith to

hire Williams. He expected Williams to quit immediately so he could recruit that week for Minnesota. Given all this, he then took the necessary steps to formalize the hiring. At 8:22 a.m. on April 3, Maturi sent an email to Ellen Downing and Caitlin Mahoney. (R.A.221.) In it, he stated:

I have been speaking daily with Coach Smith about his staff. Last night he indicated to me that he would like to hire Ron Jirsa, Jimmy Williams and his son, Saul. ... *Please help facilitate this* as I am out of town and Regina [Sullivan] does not return until later Wednesday or Thursday. They will need temporary housing, transportation, University paper work, keys, ID, etc. *We also will need to do the compliance work necessary so they can recruit asap.*

(Id.) (emphasis added). The University also prepared a Memorandum of Agreement for Williams. (R.A.106-07.)

Both Maturi and Smith testified that the University does not provide housing, transportation, keys, or IDs to mere coaching candidates. (Tr.726-27,1167-68.) Nor does the University prepare a Memorandum of Agreement for mere coaching candidates. (Tr.727,1172-74.)

#### **E. Maturi reverses course and repudiates Williams' hiring**

While Maturi was taking steps to formalize the hiring so Williams could recruit, Smith called Williams. (R.A.88,line 755.) For the first time, Smith told Williams that Maturi needed to approve his hiring. (Tr.550-52;App.90-92.) According to Williams, Smith said that "the AD is going to have to sign off on my hiring, and he said he don't see no problems with it, but he said I got to go do that." (Tr.551;see also Tr.536.) Williams characterized this conversation as matter-of-fact and stated that, "[t]here was no alarm that this was not going to happen." (Tr.557.) Indeed, Maturi had already directed

University employees to facilitate all formalities for hiring Williams. (R.A.221.)

Smith and Williams spoke several more times on April 3. (R.A.88,lines 765 (11:31 a.m. for 18 minutes), 771 (1:27 p.m. for 23 minutes), and 792 (4:20 p.m. for 17 minutes).) During their 11:31 a.m. call, Smith informed Williams that Maturi had concerns about hiring him due to his history of NCAA violations. (Tr.477,552-53;R.A.88,line 765;App.66,92-93.) Williams suggested that the University contact the NCAA and assured Smith that he had worked at seven different jobs since leaving the University. (Tr.477-78;App.66-67.) Smith indicated that he was going to talk to Maturi and suggested that Williams and Maturi meet to discuss the University's concerns. (Tr.478,1188;App.67.) Williams was willing to attend such a meeting. (Tr.479;App.68.) During their 1:27 p.m. call, Smith and Williams again discussed recruiting. (Tr.594-95.)

Appellants' statement of facts states that although Williams saw Sutton on April 3, he "did not tell his coach that Maturi had not approved his hire, or that Maturi strongly opposed hiring him at the University." (UofM at 9.) Appellants further state that Sutton "would have been happy if Williams had changed his mind and had decided to stay at OSU" and that "he would have postponed contacting another individual to fill Williams' assistant coach position" had he known that Maturi had yet to finally approve Williams's hiring. (Id. at 9-10.) Again, however, Williams reminds the court that he is entitled to a view of the facts in a light most favorable to the verdict, and that the appellants' brief was supposed to include the facts that tend to sustain the verdict. Minn. R. Civ. P. 128.02, subd. 1(c) (requiring appellant to summarize "the evidence, if any, tending directly or by reasonable inference to sustain the verdict"). At trial the jury learned how Smith had

assured Williams that he foresaw no problem obtaining Maturi's approval and how Smith continued discussing Williams' performance of job duties—recruiting—even after Maturi indicated opposition to the hiring. (Tr.447,536,551-53,594-95;App.66,91-93.) Thus, the jury had evidence from which it could conclude that Smith gave Williams no reason to inform Sutton that his job offer from the University was somehow in question.

Smith and Williams' telephone discussions continued throughout the week. On April 6, they again discussed the possibility of Williams meeting with Maturi. (Tr.600.) The meeting never happened, however, because Maturi decided to repudiate Williams' hiring. (Tr.479,673-75,1086-87;R.A.111;App.68.) Maturi was concerned about the potential media reaction to Williams' hiring. (Tr.810-12;R.A.111.) Although Smith did not believe that Williams would be a "repeat offender" regarding NCAA violations, he was concerned about his own reputation and did not want to get off on the wrong foot with his new athletics director. (Tr.1191-92,1241,1243.) Eight weeks later, Smith sent Williams a letter thanking him for his application and informing him that the position of assistant men's basketball coach had been filled. (R.A.110.)

**F. Williams is unable to find alternative employment**

Following Maturi's decision, Williams made attempts to find other coaching positions. These jobs typically open up at the end of the college basketball season and are usually filled within a few weeks. (Tr.490.) They rarely open up during the summer, fall, or in mid-season. (Id.) Williams made hundreds of telephone calls looking for job openings. (Tr.601-602;App.106-107.) He talked with 25 to 30 head basketball coaches around the country. (Tr.606;App.110.) He wrote letters to Coach Billy Gillespie at the

University of Kentucky, Coach Leonard Hamilton at Florida State University, and Coach Kelvin Sampson at Indiana University. (Tr.481,483,488;R.A.112-14.) Unfortunately, he could not explain what had happened at the University of Minnesota, *i.e.*, why he was offered the job, resigned from OSU, and then never given the job. (Tr.484,606.)

Williams testified:

Whenever an opportunity presented itself, you know, I usually call and try to get the lay of the land type thing and see what's going on. Some jobs I know right away may not be a right fit for me or for them, and so. But my reputation was damaged. No one don't quite understand what happened.

(Tr.489-90.) Indeed, both Kentucky and Florida State expressed concerns about what had happened at the University. (Tr.482-84,604.)

**G. Williams suffers damages**

Williams' base salary at OSU was \$158,000 per year. (Tr.492.) He received an additional \$7,000 per year from OSU basketball camps. (Id.) Williams also received a car, health insurance, life insurance, a cell phone, and a country club membership. (Tr.458,492-96.) The value of these additional benefits was \$550 per month for the car, \$350 per month for the health insurance, \$400 per month for life insurance, \$140 per month for the cell phone, and \$2,400 per year for the country club membership. (Tr.494-97.) Williams also lost approximately \$16,000 in matching funds that would have been deposited into his OSU retirement account. (Tr.494.)

Williams' goal was to continue coaching for five more years, until he turned 68. (Tr.503-504.) Given his nearly 40 years as a basketball coach, there was no evidence that he would not have been able to meet that goal. But between April 2007 and the entry of

judgment, Williams was unable to find another coaching job. He did not have any health or life insurance. (Tr.501-502;App.71.) After April 2007, he worked one-on-one with players on skill development. (Tr.502;App.71.) In 2007 and 2008, he made approximately \$15,000 doing this. (Tr.502-503;App.71-72.) In 2009, he made approximately \$18,000. (Tr.503;App.72.) As of May 2010, he had made “[n]ot that much.” (Id.) He has lived off his savings account and was forced to take money out of his retirement account (at a penalty). (Id.)

## ARGUMENT

### I. Standard of review.

Appellants seek review of the trial court’s denial of their motion for judgment as a matter of law or, alternatively, a new trial. An appellate court reviews the denial of a motion for JMOL de novo, and must affirm if “in considering the evidence in the record in the light most favorable to the prevailing party, there is any competent evidence reasonably tending to sustain the verdict.” *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003) (quotation omitted); *see Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (“Where JNOV has been denied by the trial court, on appellate review the trial court must be affirmed, if, in the record, there is any competent evidence reasonably tending to sustain the verdict.”) (quotation omitted); *see also Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009) (applying standard of review for denial of JNOV to denial of JMOL).

Also, this court reviews a trial court’s denial of a motion for new trial for an abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910

(Minn. 1990). “The admission of evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.” *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). “Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party’s ability to demonstrate prejudicial error.” *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990); see *M. & M. Secs. Co. v. Dirnberger*, 190 Minn. 57, 64, 250 N.W. 801, 804 (1933) (“There must be prejudice before such result [of a new trial] follows.”). Similarly, it is within the trial court’s discretion to deny remittitur, and this court will not interfere absent a clear abuse of discretion. *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 400-401 (Minn. 1977). Remittitur may be granted only if an excessive verdict appears to have been given under the influence of passion and prejudice or the damages are not justified by the evidence. *Id.*

Finally, “[i]f the trial court arrives at a correct decision, that decision should not be overturned regardless of the theory upon which it is based.” *Brecht v. Schramm*, 266 N.W.2d 514, 520 (Minn. 1978); see *Penn Anthracite Min. Co. v. Clarkson Secs. Co.*, 205 Minn. 517, 520, 287 N.W. 15, 17 (1939) (“[I]f the record presents any good reason, even though it is not the one assigned by the trial judge, in support of the decision, [a party] may use it.”); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 728 (Minn. 1990) (holding appellate court “will not reverse a correct decision simply because it is founded on incorrect reasons.”).

**II. Williams satisfied all the legal requirements to hold Smith and the University liable for negligent misrepresentation.**

This court has defined the tort of negligent misrepresentation as follows:

One who, in the course of his business, profession or employment, or in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*Bonhiver v. Graff*, 311 Minn. 111, 122, 248 N.W.2d 291, 298 (1976). In this case, the jury found that appellants' conduct met each of these elements. (A.Add.13-14.) Seeking reversal, the appellants argue on appeal that Smith had no duty to communicate truthful and accurate information to Williams, because a duty imposed upon the head basketball coach—the highest paid public employee in the state—to be truthful and accurate would create “massive fiscal uncertainty” for the University. (UofM at 12; 27-35.) It is therefore of utmost public importance, argues the University, that its head basketball coach not be legally capable of “otherwise creat[ing] liability” through his negligent misrepresentations. (Id.) The appellants further argue that the reliance element of the *tort* negligent misrepresentation is missing as a matter of law because of a conclusive presumption that applies to persons who seek enforcement of a *contract* with the government. The court should reject these arguments and affirm the judgment against Smith and the University.

**A. No authority or rationale supports appellants' argument that a "conclusive presumption" provides grounds to overturn the jury's verdict.**

The jury found that Williams reasonably relied on Smith's misrepresentations. (A.Add.14.) The appellants do not, however, contend that there is insufficient evidence to support that finding. Instead, to defeat the element of reasonable reliance, the appellants rely exclusively on a "conclusive presumption" that reliance is absent. As authority, appellants rely on the established rule that a plaintiff may not enforce a contract against an arm of government unless the government representative who entered into the contract had the authority to do so, and the corresponding rule that "all persons contracting with municipal corporations are conclusively presumed to know the extent of authority possessed by the officers with whom they are dealing." *See Jewell Belting Co. v. Village of Bertha*, 91 Minn. 9, 12, 97 N.W. 424, 425 (1903). But the appellants are wrongly attempting to extend that doctrine from the law of contract to all potential forms of liability, including the tort of negligent misrepresentation. Relying on *Jewell Belting*, therefore, appellants make *two* arguments: "For over one hundred years, Minnesota government entities have had exclusive authority over [1] who may bind them to public contracts, *and* [2] which governmental agent's statements may otherwise result in liability." (UofM at 13-14) (emphasis and alterations added). This is not an action attempting to bind the University to a contract, so the first point in the appellants'

argument is not in dispute.<sup>12</sup> As for government statements that “may otherwise result in liability,” *Jewell Belting* does not support the conclusion that a tort claim for negligent misrepresentation is, or should be, controlled by the conclusive presumption stated in that case. The *Jewell Belting* presumption should have no application here.

*Jewell Belting* was an action to enforce a written contract against an incorporated state village. The dispute occurred after the village council passed a motion to authorize the village president and recorder to enter into a contract for the purchase of a fire pump. 97 N.W. at 424. The president and recorder subsequently entered into a formal written contract for the purchase of a pump at a specified price. *Id.* But when the sales representative delivered the pump, the village council refused to accept or pay for it. This court held that the contract was not binding because the village council alone was, by statute, “clothed with power and authority to enter into such contracts . . . .” *Id.* And because the power to contract requires the exercise of judgment and discretion, it could not be delegated to a committee (the president and recorder). *Id.* at 425. The court went on to note that “[o]f the want of authority on the part of the council to authorize the president and recorder to enter into the contract, [the sales representative] was required to take notice.” *Id.* The court supported the latter statement with the rule, quoted above, that “[a]ll persons contracting with municipal corporations are conclusively presumed to know the extent of authority possessed by the officers with whom they are dealing.” *Id.*

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<sup>12</sup> At the University’s insistence, the court of appeals’ first decision in this case affirmed the dismissal of Williams’ contract-related claims. (R.A.232.) That outcome confirms that this case was tried on a theory distinct from contract, namely, negligent misrepresentation.

No authority or rationale supports extending *Jewell Belting*'s presumption to the appellants' liability for negligent misrepresentation. The rationale for the presumption is the government's need for fiscal control over its contractual commitments. This is a concern because the state has unlimited authority to enter into contracts, and its liability for breach of contract is correspondingly unlimited. *See Goszler v. Corp. of Georgetown*, 19 U.S. 593, 597 (1821) ("When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution."). Therefore, if an unauthorized employee could *contractually* bind the government to purchase, for example, 1,000 or even 1,000,000 fire pumps, the damage to fiscal continuity could be substantial. *See, e.g., Frank v. Jansen*, 303 Minn. 86, 95-96, 226 N.W.2d 739, 745 (1975) ("The rule of common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."). Given the law as it applies to contracts, the *Jewell Belting* presumption has a sound rationale.

But the same is not true for the tort of negligent misrepresentation. As a threshold matter, *Jewell Belting* was decided in 1903, well before the state even *had* tort liability. Indeed, this court did not recognize the tort of negligent misrepresentation for any defendant, public or private, until 1976. *Bonhiver*, 248 N.W.2d 241. This court could not have meant for *Jewell Belting* to apply to state tort liability, not only because the plaintiff in that case sought recovery only under an express written contract, but also because tort liability did not even exist at the time that case was decided. *Jewell Belting*

is not, therefore, direct authority on the issue presented here, despite the appellants' attempt to argue otherwise.

In addition, the rationale undergirding the *Jewell Belting* presumption has no application to tort liability. The “massive fiscal uncertainty” the appellants advance as the driving need for a reversal is illusory; it is hyperbole. (UofM at 12.) The state’s tort liability is capped by statute. *See* Minn. Stat. § 3.736, subd. 4(a) (R.A.244) (setting a \$300,000 tort cap for this case). Of course, a state entity that purchases insurance exceeding the cap waives its cap limit to the extent of the insurance. Minn. Stat. § 3.736, subd. 8 (R.A.246.)<sup>13</sup> Not only is insurance the polar opposite of “massive fiscal uncertainty,” but the University has already taken advantage of its limited tort liability by receiving a nearly \$250,000 reduction in what the jury determined is full and fair compensation. Moreover, a \$300,000 liability cap not only is slight in 2012 terms, it is conspicuously quite different from the unlimited (and uninsurable) liability that exists under the law of contract. The University of Minnesota needs no special rule exempting its athletics director and head basketball coach from the obligation to conduct themselves in the same manner as every other citizen, and *Jewell Belting* is not authority to the contrary. *See Bufkin v. City of Duluth*, 291 N.W.2d 225, 226-27 (Minn. 1980) (stating that “the scope of the rule [limiting governmental liability] is defined by the reason for its existence”).

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<sup>13</sup> The University undisputedly has insurance covering its liability for the underlying judgment with a limit of \$1,000,000. (*See, e.g.,* A.Add.32.)

Also, applying *Jewell Belting* here would contradict the Minnesota Tort Claims Act, under which the state is liable in tort *as if it were a private person*. See Minn. Stat. § 3.736, subd. 1 (R.A.243); *Lund v. Comm’r of Pub. Safety*, 783 N.W.2d 142, 143 (Minn. 2010) (citing *Lienhard v. State*, 431 N.W.2d 861, 863-64 (Minn. 1988)). Providing a special rule to the University of Minnesota for the tort element of reliance could not be reconciled with the mandate that the state be liable in tort as if it were a *private* person. None of the great private Minnesota institutions—for example, 3M; the Minnesota Twins; Medtronic—can claim that its top-paid officials have a special exemption from tort liability for what the court of appeals aptly described here as an “extensive misrepresentation.” No authority, and no rationale, exists for providing such an exemption to the University of Minnesota.<sup>14</sup>

The appellants rely on *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845 (Minn. 1995), but nothing in that decision supports applying the presumption stated in *Jewell Belting*. In fact, the *Nicollet Restoration* decision does not even cite *Jewell Belting*. And it’s easy to see why. *Jewell Belting* was decided based upon a conclusive presumption. But *Nicollet Restoration* does not even use the terms “presumption” or “presumed.” Instead, this court decided that case based on what it called “a complete failure of proof” as to the reasonableness of the plaintiff’s reliance. 533 N.W.2d at 848. The court examined the specific proof and determined that it was deficient in that the

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<sup>14</sup> The brief of amicus curiae League of Minnesota Cities argues that this exemption is needed to protect against bankrupting “the public purse” (Amicus Br. 12-15), echoing the University’s threat of “massive fiscal uncertainty.” But as already discussed, Minn. Stat. § 3.736 caps the state’s exposure to tort liability. Therefore, the League’s concern that public funds will be subject to unlimited draw, is unwarranted.

plaintiff had failed to offer evidence that performance of the promise would have assured a favorable city council vote. *Id.* Had the court been applying a conclusive presumption, it would have cited to *Jewell Belting*, used some variation of the root word “presume,” and ruled that any evidence of reliance is immaterial (because that is the legal result of a conclusive presumption). Instead, it ignored *Jewell Belting*, never mentioned a presumption, and ruled that the evidence of reliance was *deficient*. *Nicollet Restoration* does not support the appellants’ attempt to use a conclusive presumption as grounds to avoid the jury’s verdict.

The same is true of appellants’ reliance on *City of Geneseo v. Utilities Plus*, 533 F.3d 608 (8th Cir. 2008), a federal diversity case that applied Minnesota law. That case involved facts similar to *Jewell Belting*. There, Utilities Plus was an arm of the state called a municipal joint powers organization. Its president had negotiated, but its board of directors had not approved, a written contract to sell energy at a fixed price. When the energy purchaser sued to enforce the agreement as a contract, Utilities Plus argued that the parties had no valid contract because its board had not authorized the agreement, as required by the enabling legislation. The Eighth Circuit agreed with Utilities Plus, citing *Jewell Belting* and other cases as they apply to an attempt to enforce a contract against an arm of government. *Id.* at 615-16. The court applied similar reasoning to the plaintiff’s estoppel claims, but as this court noted in *Nicollet Restoration*, estoppel claims sound in contract. 543 N.W.2d at 846 n.2. This is a tort case that has distinct elements, a different measure of damages, and a statutory damage cap. The damages here flowed not from an unperformed contract, but in consequence of the direction, negligently provided, that

Williams should immediately quit his job so he could immediately begin recruiting for the University. Like *Jewell Belting* itself, *City of Geneseo* is not authority that supports applying a conclusive presumption to the tort of negligent misrepresentation.

It is true that the *City of Geneseo* court also applied a presumption to the plaintiff's fraud claim, but that is an extension of *Jewell Belting* not supported by this court's decisions. The fraud claim in that case is better understood as barred by the undisputed fact that the president of Utilities Plus did not represent that he had the authority to contract without the board's approval or that the board had approved the fixed-price contract. 533 F.3d at 616. Indeed, he told the plaintiff that the board had *not* approved the contract. *Id.* at 613. Here, Smith withheld information at the critical point when he told Williams to quit his job, while at the same time specifically telling Williams that he had approval for a salary package consisting of \$175,000 from the athletics department budget and \$25,000 from summer basketball camps. (Tr.456-57;App.59-60.) *City of Geneseo* would be analogous if the president (1) had advised the plaintiff to cancel an existing fixed-price contract; (2) represented that board approval existed for a contract at a better price; and (3) the plaintiff's claim had been one for negligent misrepresentation. As it is, *City of Geneseo* is, at best, another court's application of Minnesota law to facts that could only support contract-based liability.

In sum, no doctrine, case law, or public policy supports providing the University of Minnesota with a special rule exempting its athletics director and head basketball coach from the obligation to conduct themselves in the same manner as every other citizen. The University's athletics director decided not to go through with the hiring

because he had private concerns about the potential media reaction. (Tr.810-12;R.A.111.) Publicly, however, the University has taken the position that Williams lacked the integrity to coach for the University, yet it argues with great vigor that Williams could not find a job because he didn't search hard enough. While those actions may have been within the University's rights, no special elements of liability should shield it from the jury's well-supported findings of a negligent misrepresentation, reasonable reliance, and resulting damages. The judgment should be affirmed.

**B. Even if a presumption applied, imputing knowledge to Williams would have revealed that Smith offered a job to Williams with Maturi's approval.**

The appellants place great emphasis on the fact that Maturi alone had the authority to approve the hiring of assistant coaches. They try to align that fact with the *Jewell Belting* presumption by equating the village council's lack of authority to delegate the negotiation of a fire-pump contract to Maturi's lack of authority to delegate the hiring of assistant coaches. But the facts don't equate with *Jewell Belting* because Maturi didn't try to *delegate* his authority to approve; he *exercised* his authority to approve. And when he did so—just minutes before Smith called Williams with the job offer—Maturi had a duty to reasonably communicate any limits on his approval, and Smith had a duty to obtain complete and accurate information, because both men knew that Smith would imminently offer the job to Williams and, if he accepted, that Williams would immediately resign from his livelihood in order to immediately begin serving the University as a recruiter. *Bonhiver*, 311 Minn. at 122, 248 N.W.2d at 298 (stating that law of negligent misrepresentation requires defendant to “exercise reasonable care or

competence in *obtaining or communicating* the information.”) (emphasis added). Given these facts, imputing knowledge to Williams under *Jewell Belting* would not negate the element of reliance.

Presumptions are a legal fiction. The law employs such fictions to carry out public policy that is thought to override the law’s preference for actual facts (*i.e.*, the truth), like the actual fact that Smith misled Williams into quitting his job, and the actual fact that Williams relied on that offer because it was consistent with his three-plus decades of college coaching experience and because he considered Smith to be a man of integrity, an honest man, a sincere man, and a man of the highest reputation. (Tr.541;App.85.) As discussed above, the public policy supporting the *Jewell Belting* presumption has no application here, so the court should apply the truth as the jury’s verdict found it to be under the actual facts of record. But even employing the fiction that Williams knew “the extent of authority possessed by the officer[] with whom [he was] dealing” (*Jewell Belting*, 91 Minn. at 11, 97 N.W. at 425), the imputed knowledge would not negate reasonable reliance in this case, because, as of the time Smith offered him the job, the following facts are what would be imputed to Williams:

- Williams would have known, as the University so adamantly insists, that Maturi alone had the authority to approve the hiring of assistant coaches;
- Williams would have known that Maturi had his resume, so Maturi knew that Williams had coached at the University in the 1970s and ‘80s;

- Williams would have known that Maturi had discussed Williams with Regina Sullivan, who had raised concerns about Williams' previous employment at the University;
- Williams would have known that Maturi had discussed him with Tubby Smith just as Smith prepared to offer Williams the job. Williams would have known that Maturi had related Regina Sullivan's concerns; that Smith had responded that he knows Williams well and has no reservations as to Williams' integrity and honesty; and that Smith had spoken to others about Williams and received positive feedback;
- Williams would have known that Maturi had not attempted to delegate authority for Smith to hire anyone within the universe of potential coaches, but instead, despite some objections, that Maturi had specifically approved Williams' hiring by telling Smith that it was his call;
- Williams would have known that Maturi expected Smith to act on his approval immediately;
- Williams would have known that Maturi himself acted upon his approval by taking the necessary steps to formalize the hiring by directing employees to arrange for temporary housing, transportation, University paperwork, security clearance (ID and keys), and NCAA recruiting compliance;
- Williams would have known that Maturi and the University do not take such steps for mere job *candidates*;
- Williams would have known that Maturi expected Williams to start work for the University that week.

In short, imputing knowledge to Williams under *Jewell Belting* would establish that Maturi had the authority to hire Williams, that Maturi had exercised that authority, that Maturi had taken steps to implement his authorized act, and that it would be reasonable to rely on that state of facts in resigning his job and making immediate plans to recruit for the University of Minnesota in three days' time. Even if the *Jewell Belting* presumption applied to this action for negligent misrepresentation, it would provide no basis for negating the jury's verdict that Williams reasonably relied on Smith's job offer and suffered damages as a result. The judgment should be affirmed.

**C. A conclusive presumption would not, in any event, apply to the University's proprietary activities.**

This is an action in tort. Negligent misrepresentation is the only claim for relief upon which the judgment rests. The University of Minnesota asks this court to apply a special tort element to its liability for negligent misrepresentation on the sole ground that it is the University of Minnesota. The University and the state's top-paid employee, it argues, must be permitted to misrepresent the authority of individuals to hire basketball coaches, or fiscal chaos is certain to ensue. (UofM at 21 (arguing that "government entities should be protected from employee misrepresentations (or omissions) about their contracting authority . . . [to] promote 'fiscal stability'").) When it comes to tort liability, however, this court has made it clear that "[i]f the government is to enter into businesses ordinarily reserved to the field of private enterprise, it should be held to the same responsibilities and liabilities." *Stein v. Regents of the Univ. of Minn.*, 282 N.W.2d 552, 556 (Minn. 1979) (quotation omitted) (holding University Hospitals not immune from

suit for alleged medical negligence at its for-profit hospital facilities); *see also*, *Bufkin*, 291 N.W.2d at 226-27 (declining to apply a special tort element to arm of government for keeping of safe walkways when operating a for-profit auditorium). The appellants correctly point out that the governmental/proprietary distinction no longer has broad application. But neither is it obsolete. Here, the University has asked to be shielded from its tort liability, and in both *Stein* and *Bufkin* this court concluded that no rational basis exists for shielding arms of government from tort liability when they are engaged in proprietary functions for which private enterprises would have no similar shield. Appellants' argument should fail under the ruling in *Stein*.

In discussing the governmental/proprietary distinction in the context of an alleged estoppel, this court has noted that when the government engages in proprietary activities, it blunts the law's concern that imposing liability might hinder government and thereby frustrate public policy. *Mesaba Aviation v. County of Itasca*, 258 N.W.2d 877, 880-81 (Minn. 1977). The court went on to rule, however, that proprietary activities are not the *exclusive* avenue for blunting those concerns, stating that liability can be imposed, even for sovereign activities, "if justice so requires, weighing in that determination the public interest frustrated by the estoppel." *Id.* at 880. The importance of *Mesaba* is its recognition that when the government engages in proprietary activities there should be little or no concern that imposing liability might hinder government or frustrate public policy.

In this case, the activity in question is men's intercollegiate basketball, an activity designed to bring money and prestige to the University. The chemistry department does

not have a television network. The head of the history department is not the highest paid public employee in the state. The dean of the college of biological sciences will not be retiring with a privately funded golden parachute. In fact, just days ago the recipient of that golden parachute, retiring athletics director Joel Maturi, stated that his job (which includes managing the department's \$80 million budget) "has become far more of a business than it is an extension of the institution." [http://www.twincities.com/sports/ci\\_19970381](http://www.twincities.com/sports/ci_19970381). See also, *Kavanagh v. Trustees of Boston Univ.*, 795 N.E.2d 1170, 1175 (Mass. 2003) (observing that "[i]t is undeniable that a successful athletic program, particularly in popular sports like basketball, can garner substantial revenues for colleges and universities"); *Brown v. Wichita State Univ.*, 540 P.2d 66, 88 (Kan. 1975) (observing that it is "common knowledge" that college football is a "big business" and a "commercial activity"), *vacated in part on other grounds* by 219 Kan. 2, 547 P.2d 1015 (1976); *Hennessey v. NCAA*, 564 F.2d 1136, 1150 (5th Cir. 1977) ("[I]ntercollegiate athletics in its management is clearly business, and big business at that."); *Barile v. Univ. of Virginia*, 441 N.E.2d 608, 616 (Ohio App. 1981) ("[C]haracterization of intercollegiate football and other intercollegiate sports activities as big business can hardly be considered unfair."); *Appeal of Atl. Coast Conference*, 434 S.E.2d 865, 871 (N.C. App. 1993) ("Nor can we challenge the oft heard complaint that college sports are 'big business.'").

Maturi's admission is exactly the point. And the point is only enhanced by his trial testimony about the basketball program's corporate sponsorships, its apparel agreement with Nike, and the revenue it receives from the Big 10 conference, the Big 10

television network, and the NCAA basketball tournament. (Tr.682-85.) No government function will be frustrated, and no public policy will be hindered, if the University of Minnesota's head basketball coach and its athletics director are held to the same standard of conduct that would be expected of those employed by private universities like Stanford or Duke. *Bufkin*, 291 N.W.2d at 227 (stating "it is only just that the same standard of care required of such [a private person engaged in the same for-profit enterprise] be required of [like-situated government] defendants").

The appellants complain that the district court ruled on this issue with an inadequate record, but they neglect to mention that they never asked to make a record. They did not ask for leave at the summary judgment hearing; they moved for reconsideration, but not on the ground of an inadequate record; they objected to making a record at trial, and they never made, or asked to make, a record as part of their post-trial motions. Moreover, even the University's after-the-fact evidence does nothing to refute the status of its men's basketball program as a proprietary enterprise. Williams does not argue that the basketball program serves *only* a money-generating function, as the appellants contend. (UofM at 23.) Nor does he deny the fact that student athletes provide community service. (Id.) But the question here is not whether men's intercollegiate basketball is devoid of educational benefit any more than it was the question in *Stein*, where the University's hospitals, deemed proprietary, were used as *direct* learning opportunities for medical students. 282 N.W.2d at 558-59. Similarly, holding the University liable here is no more of a constitutional intrusion into its right to "determin[e] the educational value of its own programs" (UofM at 25) than it was in

*Stein*, where the educational value at issue plainly served a greater public good than men's basketball does. In fact, the University has ceded control of its athletics programs by participating in the NCAA, a distinctly non-governmental organization that dictates to the University how its employees must conduct every aspect of their athletic activities. *See Phillip v. Nat'l Collegiate Athletic Ass'n*, 960 F. Supp. 552, 553 (D.Conn. 1997) ("College basketball is big business, and the National Collegiate Athletic Association (NCAA) is the bureaucracy that oversees it."). And there is no danger that if the head basketball coach is held to the same standard as other citizens, University of Minnesota student athletes will stop performing community service, as the University apparently fears. (UofM at 23.) The question is whether an \$80 million corporate athletics powerhouse is shielded from tort liability because it happens to be connected to a state, rather than a private, institution. *Stein* answered that question "no."

The district court had evidence that the University of Minnesota's men's basketball program is recognized as the fifth most profitable program in the country, with a 2008-09 profit of \$7,843,045. *See Sid Hartman, Gophers Still Have A Lot of Unknowns*, Minneapolis-St. Paul Star Tribune, March 20, 2010 (R.A.227);<sup>15</sup> Darren Rovell, *The Most Profitable NCAA Tournament Teams* (posted March 14, 2010)

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<sup>15</sup> Available at <http://www.startribune.com/sports/gophers/88740742.html?page=2&c=y>. The top five teams are Louisville (\$16.8 million), Ohio State (\$11.4 million), Wisconsin (\$9.4 million), Syracuse (\$9 million), and the University (R.A.227) (attached as Exhibit 1 to the Affidavit of Alyson M. Palmer (see R.A.225).)

(R.A.230).<sup>16</sup> The district court considered appellants' arguments on this issue three separate times—at the summary judgment argument, when they moved for a directed verdict, and when they moved post-trial for judgment as a matter of law. Each time it correctly concluded that men's basketball is a proprietary enterprise, not an essential governmental function.

At bottom, in colorfully stating that “*Stein* trumps the century-old law of *Jewell Belting*” (A.Add.7), the appellate court did nothing more than acknowledge that modern concepts of tort liability—like this court's 1976 adoption of negligent misrepresentation as a separate claim for relief—neither hinder government nor frustrate public policy when applied to the state acting in a proprietary capacity. The appellate court did not, as the appellants try to imply, somehow attempt to overrule *Jewell Belting*, a case that governs the law of contract. The lower courts correctly ruled that the University is not entitled to avoid its liability for negligent misrepresentation on the ground that a special element of tort liability applies to its activities in connection with recruiting and hiring assistant basketball coaches for its intercollegiate men's basketball team. The judgment below should be affirmed.

**D. Appellants owed Williams a duty not to misrepresent Smith's hiring authority.**

The appellants contend that a prospective employer is free to misrepresent the firmness of job offers because no duty of care can ever exist between employer and

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<sup>16</sup> Available at [http://www.cnbc.com/id/35860314/The\\_Most\\_Profitable\\_NCAA\\_Tournament\\_Teams?slide=12](http://www.cnbc.com/id/35860314/The_Most_Profitable_NCAA_Tournament_Teams?slide=12). (R.A.230) (attached as Exhibit 2 to the Palmer Aff. (*see* R.A.225).)

prospective employee. (UofM at 27.) As a logical conclusion to this lack of duty, the appellants would also argue that the damages that flow from quitting one's job at the urging of the employer are just a risk that must befall all job applicants. The court should reject this argument.

The rule appellants urge is a blanket rule—a prospective employer can be, as Smith testified that he was, “well aware” of the need for further hiring approval, but *under no circumstances* would he or she have a duty to mention that fact when offering a job at a salary represented to be already approved. This argument contradicts settled law. See *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288-89 (Minn. 1992). In *Caritas*, this court discussed the extent of one's duty under the tort of negligent misrepresentation and concluded that “[w]e long ago recognized that even if one has no duty to disclose a particular fact, if one chooses to speak he must say enough to prevent the words from misleading the other party.” *Id.* at 288 (citations omitted). Because Smith chose to speak, he had a duty not to mislead Williams. But instead of suggesting that he and Williams first call Maturi to gain final authority, Smith guided Williams to call *Sutton* and inform him that he would be quitting immediately. Instead of telling Williams that further authority was necessary, Smith told Williams that he had approval for a specific compensation package. No law exists to support appellants' argument that a duty of care is absent when one party chooses to make incomplete representations.

The appellants argue that a duty is absent because Smith's misrepresentations—which they do not deny—occurred during “arm's length” “adversarial” negotiations over the terms of employment. These arguments contradict the facts and law and should be

rejected. As a threshold matter, the evidence shows that Smith was not Williams' adversary. Williams testified that he had no interest in leaving Oklahoma State. (Tr.447;App.55.) He had one year remaining on his contract, and he intended to perform it. (Id.) In other words, Williams had something *Smith* wanted, not the other way around. And the evidence further shows that the two engaged in no negotiations, much less arms-length adversarial negotiations. Williams told Smith what it would take to gain his interest, and Smith offered it to him, no questions asked. Smith pursued Williams and offered precisely what he asked for. (Tr.456-57,459-60,465,510,1056,1179,1300;App.59-60,62-63.) That is not an adversarial negotiation. *See also Hoyt Props., Inc. v. Prod. Res. Grp., LLC*, 736 N.W.2d 313, 318-21 (Minn. 2007) (ruling that liability for misrepresentation can lie even when representation occurs during arm's-length, adversarial mediation to settle pending lawsuit). The very bedrock of the appellants' argument is factually and legally unsupported.

Equally important, Smith's misrepresentations occurred after the so-called "adversarial negotiations" had ended. To the extent any negotiations ever occurred, they were over when Smith offered the job on Williams' terms while misrepresenting his authority to do so. Smith did not offer Williams a job as a selling point in ongoing negotiations. He didn't offer him a job with qualifications that Williams had to weigh. He offered Williams the job unconditionally because the "adversarial" aspect of the parties' discussions (which is a fiction in any event) was over and their interest had become unified on terms acceptable to both.

This court's decision in *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981), contradicts the blanket rule for which appellants advocate. The facts in *Grouse* are nearly identical, although the claim for relief there was estoppel, not negligent misrepresentation. Like 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.* at 115. Grouse accepted but told the chief pharmacist that he would need to immediately resign from his current position. *Id.* Later, the chief pharmacist telephoned Grouse to make sure that he had resigned. *Id.* Still later, the chief pharmacist repudiated the offer at another's insistence. *Id.* at 116. As with Williams here, Grouse was left with no old job and no new job. But even though the facts and circumstances are identical here, nowhere did this court suggest in *Grouse* that the chief pharmacist had no duty to Grouse because of an "arm's length" and "adversarial" relationship that, according to appellants, allows employers to misrepresent firm job offers in every employment situation. Instead, the court held that Group Health was liable, a holding that could not be sustained unless some source of duty to its prospective employee existed. The court of appeals' decision is consistent with *Grouse* and with the rule, applicable to negligent misrepresentation, that if one chooses to speak, he or she has a duty to say enough to prevent the words from misleading the other party.

Because the misrepresentation was not about the *terms* of employment, the other arguments appellants advance fall wide of the mark. Misrepresenting the very existence of an approved position is far different from the "puffing" and "selling the deal" that lies

at the heart of the appellants' argument (and the supporting cases it cites). (UofM at 33-34.) Smith was not bragging about how great Williams' job was going to be; or how much influence Williams would have over recruiting decisions; or how much Smith would depend on him during games. Instead, Smith offered Williams a job that he knew did not exist. So appellants' discussion about "[a]n employer's expressions of expectations of what might occur upon consummation of employment" (UofM at 31-32) is irrelevant here, because Smith's misrepresentations were not about the conditions of employment "upon consummation." The same is true of the appellants' argument that affirmance here would mean that "[e]mployees, including those employed at-will and those who have not been terminated, could file claims that the jobs were not precisely as advertised or discussed." (Id. at 34.) This case is not about how Smith "advertised" the assistant coach's position. It is about Smith's misrepresentation regarding his authority to hire Williams in the first place. The appellants' hyperbole about opening "a Pandora's box" of employee claims is tied to circumstances far removed from what occurred here. (Id.) The appellants' arguments about selling a prospective employee with greener-grass puffery is irrelevant because that is not what happened in this case.

For similar reasons, appellants' supporting case law is inapposite. In each of the foreign cases appellants rely on, the employer made express or implied representations

about the *benefits* of accepting a job offer.<sup>17</sup> Williams does not contend that Smith misrepresented the length of his expected employment with the University (as was the case in *Fry, Schoff, Thompson, and Alderson*). Williams does not contend that Smith provided assurances about his chances for promotion at the University (as was the case in *Conway*). And Williams does not contend that Smith failed to tell him how to request an accommodation for a handicap (as was the case in *Bogue*). Instead, Smith misrepresented his authority to hire Williams in the first place. This is fundamentally different from representations in the nature of generalities about longevity, working conditions, promotion opportunities, and the like. The foreign cases upon which the

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<sup>17</sup> See *Fry v. Mount*, 554 N.W.2d 263, 267 (Iowa 1996) (holding that negligent misrepresentation has no application where defendants “did no more than express their expectation that the person hired would enjoy long-term employment”); *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 50 (Iowa 1999) (holding that negligent misrepresentation does not apply “in an employment relationship, where representations are made to ‘sell’ the company rather than to guide the employee ‘with professional advice’”); *Thompson v. City of Des Moines*, 564 N.W.2d 839, 844 (Iowa 1997) (affirming judgment for defendant on plaintiff’s wrongful discharge claim; court observed that in *Fry*, “as here, the prospective employer expressed the expectation that the person hired would enjoy long-term employment”); *Alderson v. Rockwell Int’l Corp.*, 561 N.W.2d 34, 36 (Iowa 1997) (affirming judgment for defendant on claim that defendant misrepresented plaintiffs’ period of employment; court reaffirmed “our holding in *Fry* that an action for negligent misrepresentation under Restatement (Second) of Torts section 552 will not lie for alleged wrongful termination of employment”); *Conway v. Pacific Univ.*, 879 P.2d 201, 202-203 (Or. App. 1994) (reversing jury verdict in favor of plaintiff where misrepresentation at issue was dean’s assurance that poor student evaluations would not affect plaintiff’s ability to attain tenure), *affirmed* 924 P.2d 818 (Or. 1996); *Bogue v. Better-Bilt Aluminum Co.*, 875 P.2d 1327, 1331, 1338-39 (Ariz. App. 1994) (affirming denial of plaintiff’s motion to amend to add negligence claim where claim was based upon defendant’s failure to advise plaintiff he would be hired if he obtained a doctor’s note; court found that defendant had no duty to take affirmative steps to protect plaintiff), *review denied* (Ariz. July 6, 1994).

appellants rely do not support relieving them of liability for Smith's misrepresentation about his authority to hire Williams as an assistant coach.

In addition to inapposite foreign authority, appellants also claim that the appellate decision "drastically departed" from prior court of appeals' decisions. (UofM at 31 (cases cited at pp. 30-31).) But no such departure occurred here. Each of the cited cases arose from arms-length commercial transactions and involved misrepresentations that occurred *during* adversarial negotiations, before the parties consummated their transaction. This case involves no arms-length negotiations, and the misrepresentation occurred when the parties' interests had become unified through an offer and acceptance of employment.<sup>18</sup> More importantly, it is settled in Minnesota that Smith was not duty-

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<sup>18</sup> See *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 870-73 (Minn. App. 1995) (insurance company alleging negligent misrepresentation by bond underwriter and appraisal company in refinancing deal), *review denied* (Minn. July 20, 1995); *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 424-25 (Minn. App. 2000) (title company alleging negligent misrepresentation by bank in real estate closing); *Signature Bank v. Marshall Bank*, 2006 WL 2865325 at \*4-6 (Minn. App. Oct. 10, 2006) (App.185-87 (alleging negligent misrepresentation by defendant bank in transaction involving commercial loan), *review denied* (Minn. Dec. 20, 2006); *Baker v. Sunbelt Bus. Brokers*, 2008 WL 668608 at \*10 (Minn. App. Mar. 11, 2008) (App.165-66) (alleging negligent misrepresentation by sellers in sale of business); *Rasmussen v. R&N Dvorak, Inc.*, 2008 WL 1868314 at \*5 (Minn. App. Apr. 29, 2008) (App.181-82) (noting significance of arm's length transaction between individual plaintiffs and corporate and individual defendants in sale of business); *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 2007 WL 4237504 at \*6 (Minn. App. Dec. 4, 2007) (App.199) (noting that corporate parties were "sophisticated equals" in business deal involving automotive paint coating), *affirmed*, 764 N.W.2d 359 (Minn. 2009); *Crosstown Holding Co. v. Marquette Bank, N.A.*, 2005 WL 1154271 at \*5-6 (Minn. App. May 17, 2005) (App.171-72) (holding company alleging negligent misrepresentation by bank in transaction involving purchase of three bank branches; *Hunerberg Constr. Co. v. Glass Serv. Co.*, 1998 WL 345470 at \*3-4 (Minn. App. June 30, 1998) (App.175-77) (corporate plaintiff alleging negligent misrepresentation by corporate defendant in negotiation of commercial lease), *review denied* (Minn. Aug. 18, 1998).

free to misrepresent his authority merely because he was in an employer position and Williams was in a prospective employee position. *Grouse*, 306 N.W.2d 114. Instead, once he chose to make employment-related overtures to Williams, Smith was under a duty to use reasonable care in obtaining accurate information from Maturi and in communicating the information of which he admitted being “well aware.” *Bonhiver*, 248 N.W.2d at 298 (stating that law of negligent misrepresentation requires defendant to “exercise reasonable care or competence in obtaining or communicating the information.”). Because appellants owed Williams a duty of care not to misrepresent Smith’s authority to hire assistant basketball coaches at the University, and because the evidence overwhelmingly, if not conclusively, demonstrates that both Smith and the University breached that duty, this court should affirm the jury’s verdict and the judgment entered thereon.

**III. The trial court did not commit prejudicial error by allowing Williams to call two character witnesses to rebut appellants’ contention that the prior NCAA violations impugned Williams’ integrity.**

Appellants argue that the trial court committed prejudicial error by allowing Williams to call two character witnesses at the beginning of his case-in-chief. Because the court was within its discretion in admitting this evidence, and because appellants were not prejudiced by this evidence, a new trial is not warranted.

At trial, appellants introduced “extensive evidence” of Williams’ prior NCAA violations at the University. *Williams v. Smith*, Nos. A10-1802 and A11-567, 2011 WL 4905629, at \*7 (Minn. App. Oct. 17, 2011). (A.Add.8.) The University justified this evidence on the ground that a person with Williams’ past could not reasonably expect to

be re-hired. Williams, however, was not permitted to defend the substance of the violations. (5/13/10 Motion Hrg. Tr.31-32.) Recognizing the prejudicial nature of this evidence attacking Williams' character, the trial court allowed Williams to call two character witnesses: former U.S. Congressman Jim Ramstad and former Gopher and NBA player Kevin McHale, both of whom have known Williams for more than 30 years. (Tr.88-90,126,145,177.)

Appellants argue that because Williams introduced this evidence "before a single piece of relevant evidence was even offered to the jury," the trial court's decision, if affirmed, "would effectively gut Rule 608(a)." (UofM at 35.) Appellants, however, ignore the fact that they made their intent to introduce the NCAA violations clear before trial. (R.A.213-19,222-24.) Additionally, before trial the court ruled that the various NCAA reports (R.A.1-25,26-36,41-52,53-69) were admissible. (5/13/10 Tr.28,31-32.) Appellants also made clear their intent to attack Williams' character for truthfulness, alleging that Williams "misled" Smith regarding the extent of the NCAA allegations. (R.A.223.) Thus, it was well known to the trial court and the parties that appellants intended to attack Williams' character through evidence of the NCAA violations. Appellants' argument therefore boils down to an attack on the trial court's discretion about the management of trial and the order of evidence. *See In re Westby*, 639 N.W.2d 358, 366 (Minn. 2002) ("Rulings on evidentiary matters are left to the discretion of the district court and will not be reversed absent an abuse of discretion."); *Westling v. Holm*, 239 Minn. 191, 196, 58 N.W.2d 252, 255 (1953) ("[T]he conduct of a trial generally rests in the discretion of the trial court."); *City of Minneapolis v. Canterbury*, 122 Minn. 301,

142 N.W.812 (1913) (recognizing the “trial court has a wide discretion in the conduct of the trial”). The trial court acted within its discretion in allowing Williams’ character witnesses and in managing the order of evidence presentation.

Appellants persist in arguing that they never attacked Williams’ character for truthfulness during trial. (UofM at 40.) Yet they questioned Smith about what Williams told him, or failed to tell him, during their March 30 interview. (Tr.1046-47.) They cross-examined Williams concerning the same. (Tr.1303.) In their closing argument, appellants accused Williams of “not tell[ing] Coach Smith the truth” and “not [being] straightforward ... about his past.” (Tr.1325,1335.) Additionally, introduction of the NCAA violations themselves was an inevitable attack on Williams’ character. Indeed, appellants suggested that Williams’ character was so objectionable, and the nature of the violation so impugning to his integrity, that he should have known Maturi would never approve his hiring.

Citing Williams’ closing argument, appellants argue that Williams “made sure that the highly improper and prejudicial testimony was not overlooked by the jury.” (UofM at 39.) Yet appellants did not object to Williams’ closing. (Tr.1373-1405.) Nor did they request a curative instruction. Under Minnesota law, then, they waived any argument that Williams’ closing was improper. *See Patton v. Minneapolis St. Ry. Co.*, 247 Minn. 368, 375, 77 N.W.2d 433, 438 (1956) (“A party is not permitted to remain silent, gamble on the outcome, and, having lost, then for the first time claim misconduct in opposing counsel’s argument.”).

Significantly, the court of appeals recognized the prejudicial nature of the NCAA violations: while noting (as the trial court did) that Williams' character evidence was technically inadmissible under Rule 608, it found that any unfair advantage from such evidence was "counterbalanced" by appellants' "extensive evidence of Williams's past NCAA infractions and the considerable harm incurred by the university therefrom." (A.Add.8.) The court of appeals therefore "struggle[d] to see how Williams's inadmissible character evidence was truly prejudicial" to appellants. *Id.*

The trial court not only acted within its discretion in allowing Ramstad and McHale to testify on Williams' behalf, but appellants have failed to establish any prejudice. Appellants are not entitled to a new trial on these grounds.

#### **IV. The jury's damages award is supported by the evidence.**

Appellants argue that the jury's damages award should have been reduced because it was not justified by the evidence and because it was "fueled" by passion or prejudice. (UofM at 41-46.) These arguments are without merit.

##### **A. Williams' undisputed evidence supports the jury's verdict.**

Appellants argue that Williams failed to meet his burden of proving that Smith's misrepresentation was the proximate cause of his future damages. (UofM at 42-44.) At trial, however, Williams introduced the following undisputed evidence:

- One of Williams' expert witnesses—Coach Jim Brandeburg—testified that the University's decision not to hire Williams after offering him the job was "devastating" because it damaged Williams' "personal character and professional reputation." (Tr.296-97.)

- Williams testified that two schools—Kentucky and Florida State—expressed concerns about what had happened at the University. (Tr.482-84,604.)
- Williams testified that, whenever a job opportunity presented itself, he would make a telephone call “to get the lay of the land type thing and see what’s going on.” (Tr.489.) He discovered, however, that his reputation had been damaged because, “[n]o one don’t quite understand what happened” at the University. (Tr.489-90.)
- Williams had enjoyed uninterrupted employment for nearly 40 years.

This evidence ties Williams’ inability to find another job directly to Smith’s misrepresentation. Had Smith not misrepresented his authority to hire Williams on April 2, then Williams would not have resigned from OSU, and his professional reputation would not have been damaged as a result. *See Keenan v. Computer Assocs. Int’l, Inc.*, 13 F.3d 1266, 1275 (8th Cir. 1994) (“[T]he causal link between the misrepresentations and the damages is established by proof that the misrepresentations caused [plaintiff] to enter into a situation that ‘ultimately’ caused damage to his reputation and loss of income.”).

Appellants assert that Williams “admitted that his inability to secure future employment resulted from his voluntary disclosure to potential employers that he intended to sue the University of Minnesota.” (UofM at 43.) Williams’ actual testimony, however, was as follows:

Q: All right. And was there any opportunity at that point to get a position at the University of Kentucky through Coach [Billy] Gillespie?

A: Well, we talked about it, and one of the issues that was concerning the A.D. there and Billy was what happened at the University of Minnesota and that comments that were made, you know, by Mr. Maturi and also the University attorney. Their comments, you know, you know, was very strong and extremely negative.

(Tr.482-83.) He offered similar testimony concerning Florida State University. (Tr. 483-84,604.) Relying on this testimony, the court of appeals held that “the uncertainty regarding [Williams’] fallout with Minnesota adversely impacted his interview processes at Florida State and Kentucky; this evidence was sufficient for the jury to find a proximate causal nexus between the misrepresentation and the damages.” (A.Add.9.)

Appellants next assert that Williams admitted that he did not apply for certain positions “even though the evidence at trial showed that he likely could have obtained the[se] positions.” (UofM at 43.) Williams’ testimony, however, undercuts this argument. (Tr.596-97,603-604 (testimony regarding the OSU and Oral Roberts positions).) As the court of appeals noted, the jury considered and rejected appellants’ failure to mitigate damages argument. (A.Add.9) (observing that, “the failure to mitigate was an evidentiary issue presented to the jury. The jury considered all of the evidence Minnesota and Smith currently rely on and found that Williams did not fail to mitigate his damages”). Here, appellants once again seek to re-try a fact issue by arguing facts only in a light most favorable to their own position.

Next, appellants argue that James Dickey “testified that the reason he did not consider Williams for an available position was because Williams would be distracted by his legal action against the University.” (UofM at 43-44.) This argument defies the

standard of review, which calls for a view of the evidence in a light most favorable to the verdict. Further, appellants' argument omits a few of those facts, like the fact that Dickey was hired only six weeks before Williams' trial began. (Tr.197,202.) Because Dickey needed his assistant coaches to begin recruiting "as soon as possible," he found it impossible to hire Williams because of a date-certain trial scheduled during the summer recruiting period. (Tr.198-199,203.) Moreover, this argument is an apparent attempt to impose upon Williams some heretofore unknown obligation to waive his legal rights as part of his mitigation efforts. It would be unreasonable to require Williams to drop his lawsuit on the eve of trial, and the jury was right to reject the appellants' contention to the contrary.

Appellants further argue that Williams "did not submit any other applications for employment." (UofM at 43-44.) Williams, however, made hundreds of telephone calls seeking other coaching jobs. (Tr.601-602.) In making these calls, he realized the extent of the damage to his reputation. (Tr.489-90.) Appellants' suggestion that Williams was required to submit *written* applications to "apply" for jobs ignores the reality of Division I men's college basketball (as evidenced by Williams 30-plus years of experience) and

the evidence in this case.<sup>19</sup> Again, as the court of appeals noted, these were arguments for the jury, not for an appellate court. (A.Add.9) (rejecting mitigation of damages argument on grounds that jury considered and rejected “all of the evidence Minnesota and Smith currently rely on”).

Incredibly, appellants suggest that Williams “sabotaged” his job prospects by pursuing litigation against them. (UofM at 44.) Not surprisingly, they do not cite any legal authority—because there is none—to support their claim. While it is true that Minnesota law requires a plaintiff to take reasonable steps to mitigate his damages, nothing requires a plaintiff to forego his legal rights as part of that effort. Appellants were free to argue that point as a factual matter to the jury, but their suggestion that a person must forego his legal rights as a matter of law is just another in their long line of arguments that every rule of law has a University of Minnesota exception. The evidence supports the jury’s view on mitigation of damages and the damages award.

The undisputed evidence at trial supports the jury’s verdict, including its award for future damages. Appellants’ conduct undoubtedly damaged Williams’ reputation. Because such damages are recoverable under Minnesota law, the trial court properly denied appellants’ request to reduce the damages award.

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<sup>19</sup> Indeed, the way Smith hired his assistant coaches in this case undermines appellants’ suggestion that assistant coaches always “apply” for jobs by submitting a formal application. Smith called Jirsa about serving as an assistant coach before he was hired by the University. (Tr.848.) By the time Jirsa traveled to Minnesota on April 3, he believed he was “in good shape to get the job.” (Tr.848-50.) Vince Taylor “stopped by practice” to inquire about a job on Smith’s staff. (Tr.897-98.) And Smith spoke with the University about hiring his son, Saul, as an assistant coach before he was hired. (Tr.1037-38.)

**B. The jury's verdict was not the result of passion or prejudice.**

Relying solely on the amount of the verdict, appellants argue that it was the result of improper passion or prejudice. (UofM at 45-46.) Specifically, they assert that Williams' closing argument "enflame[ed] the jury's emotion and passion, and influence[ed] the jury to want to punish the University." (Id. at 45.)

Appellants ignore the fact that Williams presented undisputed evidence in support of his damages. (Tr.494-97,503-504.) The jury was attentive and conscientious in its task. Indeed, it is clear from the amount of the jury's award (\$1,247,293) that it conducted its own calculations and arrived at a reasoned decision as to the amount it believed would adequately and fairly compensate Williams. Appellants' disagreement with the amount of damages is not grounds for reversal or evidence of jury passion. Additionally, the verdict must be considered in its context. As the trial court (and court of appeals) recognized (see section II.C. above), college basketball is a big money business. Consequently, the amount of the verdict, by itself, is not sufficient grounds to reverse the jury's verdict. The court of appeals rightly concluded that "the jury award was in line with the annual compensation Williams was to earn and was compounded by a reasonable timeline; the compensation was not so excessive as to compel a conclusion that the jury was impassioned." (A.Add.9.)

Appellants' argument concerning Williams' closing is also without merit. In Minnesota, parties have wide latitude concerning closing arguments. *See Connolly v. Nicollet Hotel*, 258 Minn. 405, 420, 104 N.W.2d 721, 732 (1960) ("We have recognized that of necessity much latitude must be allowed to counsel. He is rarely limited to the

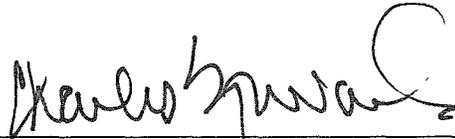
immediate issues in the case but entitled to much latitude in that respect. He may even share his client's prejudices against his adversary so far as they rest on the facts in his case."'). Here, Williams' closing was based wholly on the evidence presented at trial. Moreover, at no time during the closing did appellants object to the argument or request a curative instruction. (Tr.1310-11,1373-1405.) Consequently, appellants waived their argument that Williams' closing was improper. *See Patton*, 247 Minn. at 375, 77 N.W.2d at 438.

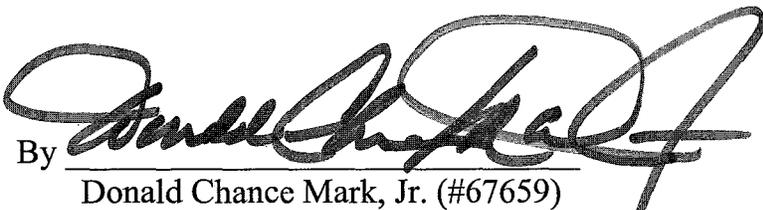
**CONCLUSION**

Respondent James Williams respectfully requests that this court affirm the judgment in all respects.

Respectfully submitted,

Dated: February 22, 2012

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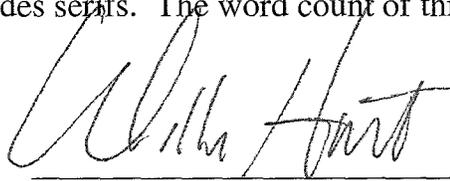
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## FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 13,977.

Dated: February 22, 2012

A handwritten signature in cursive script, appearing to read "William M. Hart", written over a horizontal line.

William M. Hart