

Nos. A10-1802 and A11-567

State of Minnesota
 In Supreme Court

James R. Williams,

Petitioner-Respondent,

v.

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

Appellants.

PETITION FOR REHEARING OF JAMES R. WILLIAMS

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INTRODUCTION

Pursuant to Minn. R. Civ. App. P. 140, James R. Williams respectfully requests an order for rehearing on the following grounds: (1) the majority grounded its analysis and decision on the University's status as an arm of government. (See, e.g., Slip. op. at 20) (framing issue as "whether public policy favors protecting a prospective government employee from the negligence of a government representative"). This analysis overlooks Minn. Stat. § 3.736, subd. 1, which controls here and mandates that an arm of government be liable in tort as if it were a *private* person. Once the court ruled that this action is "not subject to certiorari review" (slip. op. at 13), the University's status as an arm of government became immaterial, yet the court's holding and supporting reasoning depends on that status; (2) the majority has ruled that a prospective employee is not entitled to protection through recognition of a prospective employer's common-law duty, but the court's precedent (which the decision does not mention) has already recognized in indistinguishable circumstances that a prospective employee *is* entitled to common-law protection arising from such a relationship. *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981) (holding that prospective employee entitled to common-law relief when prospective employer withdrew offer of employment, a result that could not be sustained absent a common-law duty in that relationship); (3) the majority's decision misapplies controlling authority governing duties undertaken by a party's conduct. See *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282 (Minn. 1992); and (4) the University's appeal is from a judgment on a jury's verdict, yet the majority's decision makes multiple findings of fact. (See, e.g., Slip. op. at 22) (finding that "[t]he scope of Smith's authority

was equally available to both parties”). This contradicts the record, the controlling standard of review (facts must be viewed in a light most favorable to the verdict), controlling rules of procedure (Minn. R. Civ. P. 49.01 (a) (trial court is deemed to have made findings consistent with judgment on special verdict)), and controlling precedent on the question of duty. *Johnson v. Urie*, 405 N.W.2d 887, 891 and n.5 (Minn. 1987) (stating that when the existence of a duty turns on particular facts – which the court has so held here – resolution of disputes over those facts is for jury).

STANDARD FOR REHEARING

Rule 140 of the Minnesota Rules of Civil Appellate Procedure governs petitions for rehearing. The rule requires the petitioning party to set forth with particularity any controlling statute, decision or principle of law; any material fact; or any material question that the supreme court has overlooked, failed to consider, misapplied, or misconceived.

ARGUMENT

I. The majority decision overlooks a controlling statute, Minn. Stat. § 3.736.

The claim for relief at issue here is the tort of negligent misrepresentation. Therefore, the Minnesota Tort Claims Act, Minn. Stat. § 3.736, controls. Under the act, the state is liable in tort *as if it were a private person*. See Minn. Stat. § 3.736, subd. 1 (R.A.243) (providing that tort liability attaches “under circumstances where the state, *if a private person*, would be liable to the claimant”) (emphasis added); *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)).¹ The public policy underlying this statute is a balance between the rights of injured persons like Jimmy Williams and the state's concerns over unlimited tort liability. The legislature achieved this balance by recognizing state tort liability to injured persons on the same basis as any private party, on the one hand, while limiting the potential *amount* of state tort liability, on the other. *See* Minn. Stat. § 3.736, subd. 4(a) (R.A.244) (setting a \$300,000 tort cap for this case); Minn. Stat. § 3.736, subd. 8 (R.A.246) (extending tort cap to the limit of the state's liability insurance, \$1M in this case).

The court's decision omits any mention of this controlling authority, stating instead that its analysis "consider[s] whether public policy favors protecting a prospective *government* employee from the negligence of a *government* representative." (Slip. op. at 20) (emphasis added). And the majority interjected the University's status as an arm of government into the duty analysis at least another six times. (Slip. op. at 3, 23, 24, 25, 26, 28). The legislature has already considered the public policy underlying governmental tort liability and concluded that it exists on the same basis as any private person's tort liability. Yet the majority's very holding rests on "a prospective government employment relationship" and a misrepresentation by "representative for the prospective government employer." (Slip. op. at 3). Rehearing is necessary to bring the court's decision into harmony with controlling law.

¹ Unless noted, non-transcript references to the record are to the parties' appendices and addenda as filed in this court. For the court's convenience, a copy of its decision is attached.

II. The majority decision overlooks controlling law on duties based upon a relationship, while unduly restricting the reach of duties based upon a party's conduct.

This court has long recognized that the potential sources of a legal duty may include a contractual relationship, an applicable statute, the common law, and the parties' conduct. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 307 (Minn. 1996). The decision in this case overlooks the court's own precedent on the common-law duty existing in the relationship of prospective employer and prospective employee, and it unduly restricts what had been a well-settled body of law on duties arising from parties' conduct.

A. The majority's decision overlooks controlling authority under which the court has already recognized that a prospective employee is entitled to legal protection against a prospective employer's misrepresentation of a firm job offer.

Once the court ruled that this action is "not subject to certiorari review" (slip. op. at 13), the University's status as an arm of government became immaterial. But the majority's duty analysis is so entangled in the University's government status that it overlooks existing precedent recognizing a common-law duty in the relationship of prospective employee and prospective employer. *See Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981). *Grouse* is indistinguishable from this case on the duty issue. *Grouse*, a graduate of the Minnesota School of Pharmacy, applied for a pharmacist's position with Group Health. *Id.* at 115. He attended an initial interview and, two weeks later, a second interview. *Id.* *Grouse* then received a telephone call from

Group Health's Chief Pharmacist (Elliot), who offered him a pharmacist's position. *Id.* Grouse accepted but told Elliot that he would need to give his current employer two-weeks' notice of his resignation. *Id.* Grouse also turned down an offer from a third employer. *Id.* Elliot later called Grouse again to confirm that he had resigned. *Id.* Later, Elliot learned that Group Health's General Manager could not approve the hiring. *Id.* at 116. When Grouse called Group Health to report for work, Elliot informed him that the position had been filled. *Id.* Grouse had difficulty regaining full-time employment and suffered damages as a result. *Id.* The district court ruled that Grouse had not stated an actionable claim for relief (*id.*), but this court reversed and remanded for a trial on damages only. *Id.*

One need only substitute names and job positions to know that this case and *Grouse* are factually indistinguishable. And one needs only bedrock law to conclude that they are legally indistinguishable as well. A person cannot be liable at common law absent a duty. (See Slip. op. at 17) (stating that "the existence of a duty of care is a threshold requirement. . . . Without it, liability cannot attach.") (citing *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011)). Thus, the fact that the common-law claim Grouse pursued was promissory estoppel, while the common-law claim Williams pursued here is negligent misrepresentation, is immaterial because a plaintiff cannot seek *any* common-law remedy without first establishing that his interests are entitled to protection through a recognized common-law duty. (Slip. op. at 18) (stating that existence of duty "is derived from the legal relationship between parties and a determination that the plaintiff's interests are entitled to legal protection against defendant's conduct.") (citing

M.H. v. Caritas Family Servs., 488 N.W.2d 282, 287 (Minn. 1992)). In *Grouse*, this court ruled that the prospective employee's interests *were* entitled to legal protection against the prospective employer's conduct, a relationship that is indistinguishable from the one here and involving conduct that is indistinguishable from what occurred here. Under *Grouse*, a prospective employer has a duty not to misrepresent the firmness of its job offer in circumstances where it knows that in reliance on the offer the prospective employee intends to resign his current position. While overlooking *Grouse*, the majority in this case ruled that no such duty exists. Rehearing is necessary to bring the court's decision in this case into harmony with controlling law.

B. The majority's decision misapplies controlling authority governing duties undertaken by a party's conduct.

The majority's decision also misapplies the rule of law stated in *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282 (Minn. 1992). In *Caritas*, this court stated 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. The *Caritas* court held that when an adoption agency undertook to disclose that the prospective adoptive child had incest "in the background," it assumed a duty not to mislead the adoptive parents about the true nature of the child's genetic heritage – *i.e.*, that he was the *offspring* of an incestuous relationship. *Id.* at 288. Similarly, here, the facts show that Tubby Smith offered Jimmy Williams a job as an assistant basketball coach. (T. 456-57, 1300). But Smith also undertook to disclose the details of that job offer:

Q: Talk about anything else [during the April 2, 2007 phone call], that comes to mind?

A: Yes. He asked me –he said the money that we had talked about – we did that at the Final Four, talked about the money it would take for me to come to the University of Minnesota. And he told me that he got the money that I was asking for, and 175[,000] was going to come from the Athletic Department budget, and the other 25,000 was going to come from the camp.

Q: Now, are you saying that you had a previous discussion with him about how much money it would take to bring you from Oklahoma State to the University of Minnesota?

A: Yes.

Q: Are you telling us in this April 2 conversation, he confirmed that he had that amount?

A: Yes.

(T. 456-57). Tubby Smith told Jimmy Williams that he had authority to offer him a salary from the University of Minnesota of \$175,000 and to supplement that with \$25,000 from summer basketball camps. This is a direct representation of authority. What Smith did not tell Williams, however, was that he was well aware that the job offer was contingent on Athletics Director Joel Maturi's approval. (T. 361 (playing to jury portions of Smith video deposition, Court Exhibit H at p. 122)). Instead, Smith counseled Williams to *immediately* call Sean Sutton, the head coach at Oklahoma State University, and resign. (T. 461-62, 1057-58, 1182-83). This conduct falls squarely within the rule stated in *Caritas*. Smith undertook to disclose the details of his job offer to Williams, but he omitted the single detail – a contingency of which Smith was well aware – that made the offer misleading. Instead of disclosing this fact, Smith chose to gamble with Williams' future by counseling him to resign his livelihood to further *Smith's* need for

immediate recruiting, while betting that he would later get Maturi's approval for Williams' hiring.

In ruling that *Caritas* is inapplicable here, the majority stated that “[s]ignificant to our analysis of the duty owed [in *Caritas*] was that the *adoptive parents asked the agency about the child’s background*, and the agency’s response withheld factual information that rendered its response misleading.” (Slip. op. at 19) (emphasis added) (citing 488 N.W.2d at 285-88). This statement misapplies *Caritas*. First, *nothing* in the *Caritas* court’s duty analysis mentions any question the adoptive parents asked about the child’s background or takes into account anything the parents may have asked the agency. *Caritas* has been read and re-read, and there is nothing significant to the court’s duty analysis concerning questions the adoptive parents asked.

Second, the parents in fact asked no such questions. The decision shows that the *adoption agency* broached the topic of incest four times, first, exploring the parents’ feelings about adopting a child “with incest in the background” (*id.* at 284); second, telling the parents that there was a “possibility of incest in the family” (*id.* at 285); third, asking the parents “Did it matter if there was incest in the family’s background?” (*id.*); and fourth, mentioning in a document “the possibility of incest.” *Id.* The decision shows that the parents asked two questions, neither of which were the subject of their claims or were of any significance to the court’s decision: (1) whether the birth mother had taken drugs during pregnancy; and (2) whether the birth mother was 13 years old as first stated or 17 years old as later stated. *Id.* The court’s duty analysis in *Caritas* is in no way grounded in the adoptive parents’ questions. Instead, its holding is grounded in what the

adoption agency *undertook on its own*, because “having undertaken to disclose information about the child’s genetic parents and medical background to the adoptive parents, [the agency] negligently with[eld] information in such a way that the adoptive parents were misled about the truth.” *Id.* at 288. This is exactly what occurred here. Tubby Smith undertook on his own to detail the authority for his job offer to Jimmy Williams, but he withheld information in such a way that Williams was misled about the truth.

Later in its analysis in this case, the majority decision returns to *Caritas* and apparently narrows the duty applied in that case by stating that “[t]he facts in *Caritas* demonstrated that the adoptive parents had inquired over time about the adopted child’s family background and genetic history, and the adoption agency had responded with increasingly detailed facts.” (Slip. op. at 27-28) (citing 488 N.W.2d at 285-86). Applying this as a point of distinction, the majority states that “[u]nlike the situation in *Caritas*, Williams never asked whether Smith had the authority to hire; he simply assumed that authority existed.” (Slip. op. at 28). Even more important than the absence of support in *Caritas* for the above statement is the harm its application to Jimmy Williams does to Minnesota law.

First there is the absence of support in *Caritas*. The only relevant period of time in *Caritas* is the time before the parents incurred their damage by legally adopting the child. Beyond the question about drugs and age, there is nothing in *Caritas* supporting the conclusion that the parents *ever* inquired about the child’s family background, and nothing supporting the conclusion that the parents inquired about his genetic history until

the child was six years old (the parents took him home at age 45 days and legally adopted him 11 months later). Instead, the *adoption agency* immediately introduced the topic of genetic history and undertook four times to provide information about it, each time misleading the parents as to the truth and inducing them to incur their damages through a legal adoption. And, like Jimmy Williams, the parents made assumptions based upon the agency's misrepresentation. When the agency told the parents about a "possibility of incest in the family," the parents didn't follow up with a question about the child himself because they assumed that "[a]s long as it's in the family, it didn't affect him." 488 N.W.2d at 284-85. The majority decision states that "[w]e have never held that the plaintiff's mistaken assumption can impose a duty," but in fact *Caritas* itself is such a case.

Also like the situation here, the adoption agency was well aware *from the beginning* that the incest indeed directly affected the adoptive child, who was the offspring of a 13-year-old girl and her 17-year-old brother. *Id.* at 285 ("Caritas admits that it knew of this [incestuous] relationship from the time it first considered placing C.H. with [the adoptive family]"). Still further like the situation here, the parents' assumption in *Caritas* (reached without asking any questions) turned out to be wrong because the agency failed to disclose that it was well aware that incest was not just "in the family," but instead that the child was himself the offspring of siblings. In short, this case is not "[u]nlike the situation in *Caritas*;" it is *exactly* like the situation in *Caritas*.

Second, far more important than the majority's statements about what occurred in *Caritas* is the effect its current application to this case would have on Minnesota law.

Never before had this court held that one's duty of honest disclosure is limited to information supplied in response to a question. The duty at issue here is "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." 488 N.W.2d at 288.² In other words, the duty turns on the telling, not the asking. But the court has apparently announced a rule under which one may choose to mislead another party so long as the duped party asks no questions. Then the person with the most deceptive misrepresentation would have no duty, while the person with an implausible misrepresentation (*i.e.*, one that no reasonable person would rely on without asking questions) *would* have a duty. This is backwards public policy.

Moreover, in announcing this rule, the majority seems to have overlooked the jury's verdict, under which the jury determined that "Smith falsely represent[ed] that he had final authority to hire assistant basketball coaches at the University of Minnesota" and that Jimmy Williams reasonably relied on that misrepresentation. (Add. 13-14). The jury evaluated whether Tubby Smith made a misrepresentation when he told Jimmy

² The majority decision states that Williams' argument urging application of this well-settled duty "conflates the question of whether Smith owed a duty of care to Williams based upon a legal relationship, with the question of whether Smith supplied false information to Williams." (Slip. op. at 27). With due respect, the rule stated in *Caritas* applies when one would otherwise have "*no duty* to disclose a particular fact." 488 N.W.2d at 288 (emphasis added). If a legal relationship imposing a duty of disclosure must always exist, the law would have no use for a rule that applies when there is no such duty. Here, a duty-imposing legal relationship exists, as recognized in *Grouse*. Alternatively, however, if no duty exists based upon that relationship, *Caritas* – which applies a rule traceable to at least 1884 – may still impose such a duty when a person like Tubby Smith undertakes to disclose facts while failing to mention devastating limitations, of which he was well aware.

Williams that he had the authority for the University of Minnesota to pay him \$175,000 per year as an assistant basketball coach, even though he was well aware that he did not have the authority to hire an assistant basketball coach. The jury also evaluated whether Jimmy Williams acted reasonably in relying on Smith's misrepresentations, of which Smith was well aware and Williams was not. Williams can find no case supporting a rule that condones misrepresentations because they were not made in response to the victim's question, and he can conceive of no public policy advanced by having such a rule. For all of these reasons, the court should order a rehearing.

III. The majority's decision makes findings of fact that not only contradict the record, but also overlook the controlling standard of review, controlling rules of procedure, and controlling precedent governing the question of duty.

The district court entered a judgment on a jury's verdict in favor of Jimmy Williams. (Add. 11-12). This is Tubby Smith's and the University of Minnesota's appeal from a judgment in which they have sought review of the district court's order denying their motion for judgment as a matter of law. (A. 53; Appellants' opening br. at pp. 4, 12-13). The standard of review in such circumstances requires a reviewing court to consider the evidence in a light most favorable to the prevailing party, and to affirm if there is any competent evidence reasonably tending to sustain the verdict. *See, e.g., Langeslag v. KYMN, Inc.*, 664 N.W.2d 860, 864 (Minn. 2003). The majority's decision, however, overlooks the jury's verdict, overlooks the voluminous evidence supporting that verdict, and overlooks the controlling standard of review.

One way the majority overlooked those things was by making its own findings of fact. One prominent finding of fact is the statement that "[t]he scope of Smith's authority

was equally available to both parties.” (Slip. op. at 22). The basis for this finding is a second appellate finding of fact: that the University’s web site “readily demonstrates that Maturi had the authority to hire the assistant men’s basketball coach, and that Smith did not.” (Id.). Basing a decision on appellate findings of fact is a slippery slope, as the many oversights shown below demonstrate:

The court’s findings of fact assume an additional fact – that Williams had a reason to inquire into Smith’s authority even though Smith directly told Williams that he had authority for the University of Minnesota to pay Williams the exact dollar figure the two men previously discussed. The defendants argued to the jury that Williams should have inquired further, but in finding that Williams reasonably relied on Smith’s misrepresentations, the jury rejected that argument. In addition to the inherently misleading nature of a detailed job offer that withholds a critical contingency, the jury had ample other evidence to reach the conclusion that Williams had no reason to search the Internet at 8:03 p.m. on April 2, 2007. Jim Dickey testified that the standard for Division I basketball was for the head coach to make job offers for assistant coaches, and that this was especially so for a power coach like Tubby Smith who had enjoyed great head-coaching success, including a national championship. (T. 231, 235-36). Jim Brandenburg testified that the common practice for Division I basketball was for the head coach to have the authority to hire assistant coaches. (T. 286-87). Eddie Sutton testified that the accepted rule for Division I basketball was for head coaches to have the responsibility for hiring assistant coaches. (T. 319-20). Jim Dutcher testified that University of Minnesota athletics director Paul Giel told Dutcher that it was Dutcher’s

responsibility to hire assistant coaches. (T. 157, 1287). And Jimmy Williams testified that he had never known a head basketball coach who did not have the authority to hire his own staff, especially a power coach like Tubby Smith. (T. 491-92). The court should not have substituted its belief there was a reason for Jimmy Williams to even consult the University's website (let alone as to what he would have found had he a reason to look) for the jury's finding that Williams had no reason to question Smith's authority.

The above appellate fact findings are also unsupported. First, Tubby Smith testified that he was well aware of the limitations on his authority when he offered Jimmy Williams a job at 8:03 p.m. on April 2, 2007. (T. 361 (playing to jury portions of Smith video deposition, Court Exhibit H at p. 122)). In other words, Smith needed no tool to know his authority. He was well aware of it. Yet he counseled Williams to *immediately* call Sean Sutton, the OSU head coach, and resign. (T. 461-62, 1057-58, 1182-83). Time was of the essence for Tubby Smith because he needed Jimmy Williams to recruit for him later that same week. Under these circumstances, to say that the potential for searching a web site made Smith's limitations *equally* available to Williams contradicts the record and the applicable standard of review.

Second, the web site on which the majority relied has a completely different web address than the one in use at the *relevant* time – April 2007. (Compare Slip. op. at 22 with Trial Ex. 109).³ And the fact that the court last visited this site on August 6, 2012 only reinforces the point. (Slip. op. at 22). The only potentially relevant inquiry about

³ Trial Exhibit 109 is a snapshot of a university delegation document. For the court's convenience, Exhibit 109 is attached. As discussed below, however, the defendants

what was publicly available to Jimmy Williams is evidence of what existed on the University's web site after dinner on April 2, 2007. And the jury had no evidence of that because the only document purporting to show what was available on the Internet was excluded from evidence. (T. 1418-19).

Third, there is no evidence *anywhere* as to how *readily available* the actual delegation policy is now, or was then. The court should not, therefore, have made a finding of fact about what was "readily available" to Jimmy Williams during a very brief window of time in April 2007 when Tubby Smith was urging him to immediately resign.

Just finding the webpage identified by the majority is no easy proposition. Assuming Jimmy Williams' search (had he any reason to make it) would start from the home page of the University's website, and further assuming the website functioned in the same manner on April 2, 2007 as it does today, a search asking some root of the question at hand – authority to hire assistant men's basketball coaches – reveals nothing. The searcher would need the legal prescience to know that one should search "delegation" to find the cited page.

And once there, as the court surely learned when it last visited the address recited in its decision, the page revealed by this address is only the beginning of the search for a given delegated authority. The page itself says nothing about what authority Tubby

never offered Exhibit 109 into evidence, or established foundation for it, and it was therefore excluded. (T. 1418-19). For purposes of this discussion, it is enough to state that the web address upon which the majority relied and the web address for Exhibit 109 are not remotely similar. What the court found to be "readily available" is of no relevance.

Smith has to hire his assistant coaches. More “clicks” are needed. And again, it is not easy.

For example, when one clicks on “Click to Search for Delegations,” a “Units” option appears. Clicking this option opens a search window with a “Unit Description” option. Entering “athletics” as a descriptor produces unit IDs for “M Athletics Administration,” “C Intercollegiate Athletics,” “UMD- Intercollegiate Athletics,” and “Athletics.” The “Athletics” unit shows a drop down for “Men’s Basketball.” Clicking on the latter places “10198” in the “Units Covered” box on the “Delegations Search” page. Pressing “Search” then produces this result: “Found 0 result(s) matching this query.” Also available, however, are “Additional delegations for this unit.” And those additional delegations number 82 pages!

One can also search by “Delegator” or “Delegatee,” and once the email address of the person being searched for is found – a confusing task in its own right – a more manageable 23 results are revealed for the current Athletics Director as delegatee. None, however, contains the words “basketball” “assistant” or “coach.” In fact, there is no better example than Exhibit 109 that a searcher must know in advance what he is looking for in order to understand what he is seeing. To even understand that Exhibit 109 might apply, Jimmy Williams would somehow have to know that the following delegation applied to him: “P&A appointments, non-reappointment of probationary employee, salary changes, status changes, renewal or non-renewal of date specific appointments, accept resignations, terminations.”

Fourth, had the defendants established foundation for Exhibit 109 by showing its relevance to the situation Jimmy Williams was in on April 2, 2007, a jury would have seen an utterly incomprehensible policy. Jimmy Williams not only would have had to readily know that his was a “P&A appointment,” he also would have had to readily know the meaning of this provision:

Re-delegable only to: *maturi*
Additional limitations: Except for Head Coaches and Assoc./Asst. Athletic
Directors

This cannot be redelegated further.

Williams would have to examine this provision and readily conclude that it might actually mean that everything he knew about power head coaches like Tubby Smith was backwards at the University of Minnesota. More likely, Williams would have given this provision its most logical reading – that authority *is* re-delegable to head coaches, because it says that *except* for head coaches the authority is not re-delegable. This was the very impression Smith left when he told Williams that he had authority for the University of Minnesota to pay him \$175,000 per year to be an assistant coach, and it is the state of affairs every witness described as the standard in Division I basketball. Moreover, even if Williams could have deciphered Exhibit 109 to glean what the University claims it states, how would he know at 8:03 p.m. on April 2, 2007 that the policy as it appeared on the Internet was up to date given that Smith’s tenure as head coach began only 11 days earlier? Indeed, how could anyone know, given that Tubby Smith did not even sign a contract with the University of Minnesota until days before he gave a deposition in this case, some nine months after he was hired? (T. 1027-28, 1109-

10). These are all academic questions in any event, because Exhibit 109 was *excluded* from evidence, yet the majority has grounded its decision in findings of fact about what was readily available to Jimmy Williams on the Internet. The majority's findings of fact overlook the standard of review and are contrary to the record, justifying rehearing.

The majority also made other findings of fact, like stating that "Smith notified Williams that Maturi had to sign off on Smith's offer before Williams submitted his resignation to OSU." (Slip. op. at 22). This was probably the most hotly contested question of fact at trial. The defendants vehemently argued to the jury that Williams' reliance on Smith's misrepresentation was unreasonable because Smith "fixed" his misrepresentation before Williams' *letter* of resignation reached Sutton. (T. 38, 55-56, 59, 61-62, 1336, 1342-45, 1348, 1352, 1360). Thus, the jury was asked to consider whether the resignation occurred on April 2, or whether it occurred when Sutton received the letter of resignation on the afternoon of April 3. The evidence viewed in a light most favorable to the verdict shows that Williams effectively resigned his position at OSU in a telephone call he made to Sean Sutton at 9:36 p.m. on April 2, before Smith said anything about a contingency in his employment offer. (T. 589; R.A. 156-57).

Facts favoring Williams' argument to the jury included Sean Sutton's testimony that he *replaced* Williams on his staff before he received the letter, and that once Williams called and gave his resignation, the resignation letter was a mere formality. (R.A. 149-50, 153-54, 156-57). In addition, the jury had evidence from which it could conclude that Smith's after-the-fact disclosure of a contingency fixed nothing, because Smith contemporaneously assured Williams that he foresaw no problem getting Maturi's

approval. Smith told Williams 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.” (T. 551; *see also* T. 536.) Williams testified that “[t]here was no alarm that this was not going to happen.” (T. 557). In addition, after Smith assured Williams that he foresaw no problem obtaining Maturi’s approval, he continued discussing Williams’ performance of job duties even after Maturi indicated opposition to the hiring. (T. 594-95). Thus, the jury had evidence from which it could conclude that Smith gave Williams no reason to believe that he should reconsider the resignation Smith urged him to give the night before.

The majority’s finding of fact replaced all of this evidence and all of the arguments that led to the jury’s verdict. This contradicts the controlling standard of review, and it is confounding besides. Williams can find no law holding that a person’s duty of honest disclosure is eradicated *ab initio* by conduct occurring after the misrepresentation. Tubby Smith misrepresented his authority on April 2, 2007. What he said to Williams on April 3 may arguably have affected the reasonableness of Williams’ reliance, but it could never eradicate the duty Smith had to begin with. The jury’s verdict directly rejected the defendants’ arguments about reliance, yet the majority has now interjected a conflicting finding of fact as grounds for holding that Smith never had a duty to begin with. The court should order rehearing so that the proper standard of review can be applied.

Additionally, the court has misperceived the role of negotiations in this case, and as a result it has announced a rule that is far too broad. The misrepresentation at issue here did not concern a term over which the parties were negotiating. It concerned the

very existence of the position being offered. The parties did not negotiate over the existence of the position. Nor did the misrepresentation occur during negotiations. (See, e.g., Slip. op. at 21) (stating that “Williams and Smith did not stand in a professional or fiduciary relationship to each other *during negotiations* over prospective employment with the University”) (emphasis added). The misrepresentation occurred when Tubby Smith called to offer Williams a job. Any negotiations occurred in previous discussions. And the fact that those previous discussions could be considered at arm’s length should provide no public policy support for the court’s holding, because what one court described as “looking out for the needs of the business” (slip. op. at 23) is not a legitimate interest on matters that are not being negotiated. True, the needs of Tubby Smith’s business were for an assistant coach to recruit in three days. But to hold that Smith’s interest in immediacy justifies a superior public policy position such that he had no duty to disclose that he was gambling with Williams’ future by betting that he could get Maturi’s approval is the worst kind of public policy imaginable. Negotiations are a red herring in this case, and the majority’s misperception to the contrary has produced a holding that shakes the very foundation of sound public policy.

Finally, while it is true that the existence of a duty is a question of law, that does not mean a court is free to resolve that question by making its own findings of fact. The appellate findings of fact that became the cornerstone for the majority’s conclusion of law not only were subject to a standard of review requiring evidence to be viewed in a light most favorable to the jury’s verdict (a standard the majority overlooked), but to the extent the defendants wanted specific findings on disputed issues (e.g., was Smith’s

limited authority “readily available” to Williams?), it was incumbent on them to seek a jury verdict to resolve such issues. *See Johnson v. Urie*, 405 N.W.2d 887, 891 and n.5 (Minn. 1987) (stating the unremarkable rule that when the existence of a duty turns on controverted facts, resolution of the facts is for the jury, while the existence of a duty based on the facts so found is for the court). When they failed to submit any such issues to a jury, by rule the defendants waived any right to a trial on them, and the trial court “shall be deemed to have made a finding in accord with the judgment on the special verdict.” Minn. R. Civ. P. 49.01 (a). The judgment on the special verdict finds the defendants liable for negligent misrepresentation. Therefore, the trial court is deemed to have found that the scope of Smith’s authority was *not* equally available to both parties but instead that Smith was in a position of superior knowledge. The trial court is deemed to have found that Williams resigned from OSU before Smith told Williams about any contingency. The trial court is deemed to have found that the parties were not engaged in arm’s length negotiations when Smith misrepresented his authority. And the trial court is deemed to have found any other fact consistent with the judgment.⁴

In sum, the majority overlooked dozens, if not hundreds, of material facts, as well as the controlling standard of review, the controlling rule of procedure, and controlling precedent on resolving fact issues affecting the question of duty. Rehearing is necessary to bring the court’s decision into harmony with controlling law.

⁴ When the court determined to apply neither the controlling standard of review nor Rule 49, the proper ruling was a remand for a trial on disputed fact issues, not a reversal grounded on appellate findings of fact.

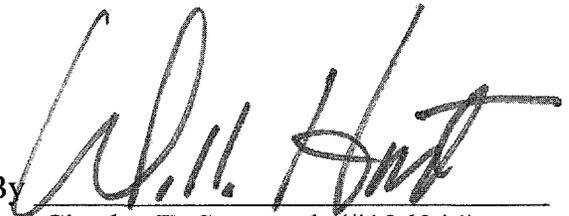
CONCLUSION

Petitioner well understands that relief under Rule 140 is extraordinary – some might say that Sisyphus stands a better chance of completing his task than does a litigant of obtaining relief under this rule. Petitioner also well understands that sound principle dictates that Rule 140 be sparingly used. But on occasion a situation will arise that reminds us why this rule exists. This is that occasion.

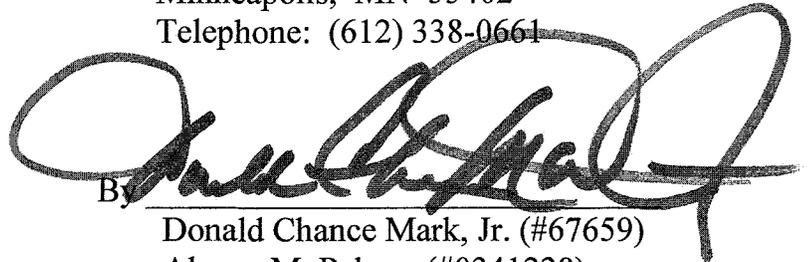
In fact, rare should be the case where rules of law or matters of policy condone conduct that is conceded to be unfair and disappointing. Those rules of law or matters of policy do not exist in this case. Perhaps equally important, this petition represents our judicial system's last opportunity to right a wrong. Justice and the rule of law demand a rehearing, and Petitioner James R. Williams therefore respectfully asks this court to take that opportunity and order rehearing.

Respectfully submitted,

Dated: August 20, 2012

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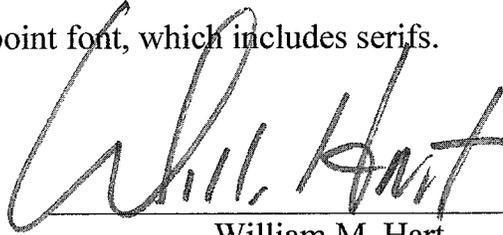
Attorneys for Petitioner/Respondent

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FORM CERTIFICATION

This document was drafted using Microsoft Word 2010 Standard. The font is Times New Roman, proportional 13-point font, which includes serifs.

Dated: August 20, 2012

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

William M. Hart

STATE OF MINNESOTA

IN SUPREME COURT

A10-1802

A11-0567

Court of Appeals

Dietzen, J.

Concurring in part, dissenting in part, Meyer, J.
and Senyk, Acting Justice

Took no part, Gildea, C.J., Page,
Anderson, Paul H., and Stras, JJ.

Tomljanovich, Esther and Senyk, Waldemar, Acting Justices¹

James R. Williams,

Respondent,

vs.

Filed: August 8, 2012
Office of Appellate Courts

Orlando Henry "Tubby"
Smith, et al.,

Appellants.

Donald Chance Mark, Jr., Alyson M. Palmer, Fafinski Mark & Johnson, P.A., Eden
Prairie, Minnesota;

Richard G. Hunegs, Hunegs LeNeave & Kvas, P.A., Minneapolis, Minnesota; and

Charles E. Spevacek, William M. Hart, Damon L. Highly, Meagher & Geer, P.L.L.P.,
Minneapolis, Minnesota, for respondent.

¹ Appointed pursuant to Minn. Const. art. VI, § 2, and Minn. Stat. § 2.724, subd. 2
(2010).

Mark B. Rotenberg, General Counsel, Brian J. Slovut, Jennifer L. Frisch, Associate General Counsel, University of Minnesota, Minneapolis, Minnesota; and

David L. Lillehaug, Fredrikson & Byron, P.A., Minneapolis, Minnesota, for appellants.

Susan L. Naughton, St. Paul, Minnesota, for amicus curiae League of Minnesota Cities.

S Y L L A B U S

1. Generally, the exclusive method for a prospective employee to obtain judicial review of the University of Minnesota's decision not to hire the person, on the ground that the decision is based on an error of law, is arbitrary and capricious, or unconstitutional, is by certiorari under Minn. Stat. ch. 606 (2010). Consequently, the failure of a prospective employee to timely seek judicial review by certiorari deprives the court of subject-matter jurisdiction over that claim. When, however, a prospective employee's claim against the University of Minnesota alleges tortious conduct such as fraud or negligent misrepresentation that is separate and distinct from the University's decision not to hire, the district court has subject-matter jurisdiction to address that claim.

2. When a prospective government employment relationship is negotiated at arm's length between sophisticated business persons and does not involve a professional, fiduciary, or other special legal relationship between the parties, the prospective employee is not entitled to protection against negligent misrepresentations by the representative for the prospective government employer.

Reversed.

OPINION

DIETZEN, Justice.

The issue presented in this case is whether the court, as a matter of public policy, should extend the protection against negligent misrepresentation to prospective employees of the University of Minnesota, which is a constitutional corporation and agency of the state.

Respondent James R. Williams brought a claim against appellants the University of Minnesota (University) and Orlando Henry “Tubby” Smith for negligent misrepresentation, alleging that Smith, the University’s men’s basketball coach, offered him the position of assistant coach, that he negligently misrepresented that he had authority to hire Williams, and that Williams suffered damage. The University argued, among other things, that the district court lacked subject-matter jurisdiction over the claim. The jury found in favor of Williams and awarded damages. The district court granted the University’s and Smith’s motion to reduce the jury’s award, but otherwise denied their motion for judgment as a matter of law. The court of appeals affirmed the district court. We conclude that the district court had subject-matter jurisdiction to address Williams’ negligent misrepresentation claim. Additionally, we conclude that when a prospective government employment relationship is negotiated at arm’s length between sophisticated business persons who do not have a professional, fiduciary, or other special legal relationship, the prospective employee is not entitled to protection against negligent misrepresentations by the representative for the prospective government employer. We therefore reverse.

In March 2007 Smith became the head coach of the University's men's basketball team. Shortly after he was hired, Smith considered a number of individuals as potential candidates for assistant coaching positions, including Williams. Williams had extensive coaching experience at a number of collegiate institutions, including as an assistant coach at the University from 1971 until 1986. During Williams' tenure with the University, the National Collegiate Athletic Association (NCAA) twice investigated the men's basketball program, found that Williams (among others) personally committed multiple violations of NCAA rules, and twice imposed penalties on that program. In the years since he left the University, Williams has not been found to have violated any NCAA rules and has obtained coaching positions with other teams. When the University hired Smith in March 2007, Williams was in the second year of a 3-year assistant coaching contract with Oklahoma State University (OSU), earning an annual salary of \$158,000. He reported to Sean Sutton, who is the head men's basketball coach at OSU.

On March 30, 2007, Williams and Smith, who were both at the NCAA Final Four basketball tournament in Atlanta, Georgia, had a two-hour meeting to discuss the University, the role Williams could play as an assistant on Smith's staff, and possible compensation for such a position. Williams believed that Smith already knew about the NCAA violations, and Smith acknowledged that the disciplinary history of Williams may have been mentioned at that meeting.

Williams and Smith spoke on April 1, 2007, again discussing the possibility of Williams becoming an assistant coach at the University. Smith asked Williams to fax his resume to the University's basketball office, and Williams did so the next day.

On April 2, 2007, Smith spoke with University Athletic Director Joel Maturi. Smith told Maturi that he wanted to hire Williams and two other individuals as his assistant coaches. Smith and Maturi discussed concerns raised by Senior Associate Athletic Director Regina Sullivan regarding Williams, but Smith reassured Maturi about Williams. Following this conversation, Maturi directed others at the University to work on “temporary housing, transportation, University paperwork, keys, [and] ID” for Williams and the other potential new assistant coaches. In response to Maturi’s direction, the University prepared, but did not finalize, a Memorandum of Agreement between the University and Williams.

Later that same day, Smith called Williams and told him the University would pay the salary Williams had requested. Smith asked Williams if he was “ready to join him at the University of Minnesota,” and Williams replied, “[Y]es.” Williams believed that Smith had offered him a job and that he had accepted. They also discussed the upcoming collegiate recruiting period, scheduled to begin that weekend. Smith wanted Williams to travel to Arkansas or Texas to recruit for the University. Williams told Smith that he had a recruiting trip scheduled with OSU head coach Sean Sutton on April 5, and if Williams was going to join Smith’s staff, he needed to call Sutton that night. Williams testified that Smith offered to call Sutton, but Williams believed that he should do so.

Williams spoke with Sutton on the evening of April 2, 2007, told him that Smith had offered him a job at the University, that he had accepted Smith’s offer, and that he would resign from OSU. Sutton asked Williams to submit a resignation letter the next

day. Williams also called his real estate agent that night and told her to put his house on the market.

The next day, April 3, 2007, Williams went to OSU to prepare and submit his resignation letter. Before Williams submitted his resignation letter, Smith called Williams to tell him that Maturi's approval was needed for the offer to Williams.

Later that same day, Smith told Williams that Maturi strongly opposed hiring Williams because Maturi had learned for the first time that Williams had multiple major NCAA rules infractions when he was previously with the University. Given the University's history of NCAA rules violations in the men's basketball program, Maturi was concerned about maintaining a clean program and the potential media reaction if Williams returned. Smith also expressed concern about his own reputation and indicated that he did not want to get off on the wrong foot with his athletic director. Sutton received Williams' resignation letter on the afternoon of April 3, 2007. That same day, Sutton made arrangements to hire a new assistant basketball coach to replace Williams. By April 8, 2007, Williams knew that the University did not consider him to be one of its assistant basketball coaches. On May 29, 2007, the University notified Williams that the position of assistant men's basketball coach had been filled. Williams was unable to find another coaching position for the 2007-08 basketball season.

Subsequently, Williams sued the Board of Regents of the University of Minnesota and Maturi, asserting common law breach of contract, negligent misrepresentation, and estoppel claims (among others), and constitutional claims under 42 U.S.C. § 1983. The University moved to dismiss the common law claims, arguing that the district court

lacked subject-matter jurisdiction over those claims because the issuance of a writ of certiorari is the only method by which a party can challenge the University's employment decisions. The University also sought dismissal of the claims under 42 U.S.C. § 1983 for failure to state a claim upon which relief could be granted. In March 2008 the district court granted the motions and dismissed all of the claims. Williams appealed.

The court of appeals affirmed the district court's dismissal of the common law, estoppel, and section 1983 claims, but reversed as to the negligent misrepresentation claim. *Williams v. Bd. of Regents of Univ. of Minn. (Williams I)*, 763 N.W.2d 646, 651-55 (Minn. App. 2009). The court of appeals held that the negligent misrepresentation claim was not "premised on an equitable or legal claim to employment," and because different considerations were at issue with that claim, judicial review would "not intrude substantially on or challenge the university's internal decision-making process." *Id.* at 652. The court of appeals remanded to the district court for trial solely on the negligent misrepresentation claim. *Id.* at 655.

Williams then commenced a separate action against Smith, asserting claims for fraud, negligent misrepresentation, interference with contract, and promissory estoppel, and the district court consolidated the two cases. Before trial, the district court granted Smith's motion to dismiss the contract and promissory estoppel claims and dismissed Maturi as a party to the litigation. The case then proceeded to trial on the negligent misrepresentation claims against the University and Smith, and the fraud claim against Smith. During the trial, Williams dismissed his fraud claim against Smith. The jury found for Williams and awarded damages.

After post-trial motions were resolved, the University and Smith appealed. Together, they challenged the denial of their motion for judgment as a matter of law; the denial of their motion for a new trial based on alleged evidentiary errors; the district court's subject-matter jurisdiction over Williams' negligent misrepresentation claim as presented at trial; and the district court's failure to grant a greater remittitur. Williams cross-appealed from the district court's remittitur decision.²

The court of appeals affirmed. *Williams v. Smith (Williams II)*, Nos. A10-1802, A11-0567, 2011 WL 4905629 (Minn. App. Oct. 17, 2011). In doing so, the court of appeals concluded that Smith owed Williams a duty of care "during the hiring negotiations." *Id.* at *5. Additionally, the court of appeals held that because the University was engaged in a proprietary enterprise—collegiate sports—the rule that persons contracting with a government representative are conclusively presumed to know the extent of the representative's contracting authority was not applicable. *Id.* at *5-6. Finally, the court concluded that the evidence supported the jury's finding that Williams reasonably relied on Smith's misrepresentations regarding his authority to hire; rejected

² The jury awarded damages in the amount of \$1,247,293. On post-trial motions, the district court reduced that award to \$1,000,000 pursuant to Minn. Stat. § 3.736, subd. 4(e) (2010), because Smith was acting within the scope of his employment at the time he made the misrepresentations. On appeal, the University argued that a greater reduction should have been granted because Williams failed to mitigate his damages, any misrepresentations were not the proximate cause of his damages, or the damages awarded were the result of Williams' improper flaming of jury passion in closing arguments. Williams argued that Minn. Stat. § 3.736 was inapplicable, and therefore the full award should be restored. The court of appeals rejected all of these arguments. *Williams v. Smith*, Nos. A10-1802, A11-0567, 2011 WL 4905629, at *8-9 (Minn. App. Oct. 17, 2011).

the University's argument that a new trial was required to address evidentiary errors; and held that the court had subject-matter jurisdiction over Williams' negligent misrepresentation claim. *Id.* at *6-8.

The University then sought review by our court. We granted the University's petition for review on the following issues: (1) whether a duty of care exists in arm's-length negotiations between a prospective employer and a prospective employee; and (2) whether a person negotiating a contract with a government representative is conclusively presumed to know the extent of the authority of that representative. The University also challenged the district court's subject-matter jurisdiction over Williams' negligent misrepresentation claim.

I.

We first address the question of the district court's subject-matter jurisdiction over Williams' negligent misrepresentation claim. The University challenged jurisdiction at several points in this litigation. The court of appeals held that Williams' negligent misrepresentation claim did not "directly implicate[]" the University's "internal decision-making process" because the focus at trial would be on Smith's representations, Williams' reliance, and Williams' damages as a result of that reliance. *Williams I*, 763 N.W.2d at 652-53; *see also Williams II*, Nos. A10-1802, A11-0567, 2011 WL 4905629 at *8. The University argues, however, that before our court Williams depicts his case in standard contract terms—offer, acceptance, and repudiation of a job opportunity—and as such, this negligent misrepresentation case is a contract-based challenge to the University's decision not to hire him. This contract claim, the University argues, can be

reviewed only by a writ of certiorari, which was not sought, and thus subject-matter jurisdiction is lacking.

When a party challenges the subject-matter jurisdiction of the court, the court must examine whether it has the authority to hear the type of dispute and to grant the type of relief sought. *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010). Without subject-matter jurisdiction, we must dismiss the claim. *See Tischer v. Hous. & Redev. Auth. of Cambridge*, 693 N.W.2d 426, 427 (Minn. 2005) (holding district court erred in failing to dismiss termination claim for lack of subject-matter jurisdiction). Defects “in subject-matter jurisdiction may be raised at any time” and cannot be waived. *Seehus*, 783 N.W.2d at 147. The existence of subject-matter jurisdiction is a question of law that we review de novo. *Tischer*, 693 N.W.2d at 428.

Previously, we have observed that the University of Minnesota is a “unique constitutional corporation, established by territorial act in 1853 and perpetuated by the state constitution in 1857.” *Winberg v. Univ. of Minn.*, 499 N.W.2d 799, 801 (Minn. 1993). The people of Minnesota conferred control and management of the University’s affairs and property on the board of regents. *Id.* The Board of Regents of the University “is a unique entity, being both a constitutional corporation and an agency of the state.” *Miller v. Chou*, 257 N.W.2d 277, 278 (Minn. 1977).

As with any state agency, judicial review of the University’s administrative and quasi-judicial decisions is both limited and deferential, and under separation of powers principles, the exclusive method of review is by certiorari pursuant to Minn. Stat.

§ 606.01 (2010).³ See *Dead Lake Ass'n v. Otter Tail Cnty.*, 695 N.W.2d 129, 134 (Minn. 2005) (explaining that this court has “developed a body of case law treating the writ of certiorari as an extraordinary remedy that allows appellate review” of quasi-judicial decisions); *In re Haymes*, 444 N.W.2d 257, 259 (Minn. 1989) (“Where no right of discretionary review has been provided by statute or appellate rules for the quasi-judicial decision of an administrative agency,” an aggrieved party can petition for a writ of certiorari). The limited nature of certiorari review ensures that such decisions are “granted deference by the judiciary to avoid usurpation of the executive body’s administrative prerogatives.” *Tischer*, 693 N.W.2d at 429; see also *Dietz v. Dodge Cnty.*, 487 N.W.2d 237, 239 (Minn. 1992) (“Because it mandates nonintrusive and expedient judicial review, certiorari is compatible with the maintenance of fundamental separation of power principles, and thus is a particularly appropriate method of limiting and coordinating judicial review of the quasi-judicial decisions of executive bodies.”) (footnote omitted).

But judicial deference to the University’s administrative, quasi-judicial decisions is not absolute. Indeed, we will not hesitate to sustain a certiorari challenge to a decision of the University that is based on an error of law, or that is arbitrary, oppressive,

³ Minn. Stat. § 606.01 (2010) provides:

No writ of certiorari shall be issued, to correct any proceeding, unless such writ shall be issued within 60 days after the party applying for such writ shall have received due notice of the proceeding sought to be reviewed thereby. The party shall apply to the Court of Appeals for the writ.

unreasonable, or without evidence to support it. *See Dietz*, 487 N.W.2d at 239 (citation omitted). We have also stated that a state agency must engage in reasoned decision-making, and the agency must affirmatively state legally sufficient reasons for its decisions that are factually supported in the record. *See Dokmo v. Indep. Sch. Dist. No. 11, Anoka-Hennepin*, 459 N.W.2d 671, 675 (Minn. 1990). If it fails to do so, it runs the risk that its decision will not be upheld by the court, and a certiorari challenge will be sustained.

We conclude that the University's decision not to hire Williams is a quasi-judicial decision subject to certiorari review. Williams, however, asserts a claim for negligent misrepresentation against Smith. In *Willis v. County of Sherburne*, we held that the district court had subject-matter jurisdiction over a defamation claim brought against a government agency because the alleged defamation "occurred over a period of time which began more than a year before he was discharged and was separate and distinct from the termination of his employment." 555 N.W.2d 277, 282 (Minn. 1982). The defamation claim was based on allegations that factually inaccurate statements by the government employer were disseminated publicly. *Id.* at 279. We stated that the district court's "necessary inquiry into what the [employer] knew about the truth or falsity of those [statements] before publishing them to a third party [did] not involve any inquiry into the [employer's] discretionary decision to terminate Willis," and thus certiorari was not required. *Id.* at 282-83; *see also Clark v. Indep. Sch. Dist. No. 834*, 553 N.W.2d 443, 446 (Minn. App. 1996) (holding that a district court had jurisdiction over an employee's tort claims that did not "challenge his suspension or seek his reinstatement as relief," and

that would require the court to “apply tort law, not [] scrutinize the school district’s administrative decisions”).

We conclude that a tort claim, such as for negligent misrepresentation, that is “separate and distinct” from the government agency’s employment decision and does not involve any inquiry into the agency’s “discretionary decision” is not subject to certiorari review. Our conclusion is simply an extension of our reasoning in *Willis*, in which we recognized that the inquiry into the basis for a defamation claim was separate and distinct from the inquiry required for a termination decision. Here, the central issues decided by the jury were (a) whether Smith misrepresented the extent of his hiring authority, (b) whether Williams reasonably relied on that representation, and (c) whether Williams was damaged as a result. Unlike a challenge to a quasi-judicial hiring decision, Williams’ negligent misrepresentation claim did not challenge the “propriety” of the University’s discretionary decision not to hire him. Williams’ claim thus was separate and distinct from the University’s decision not to hire him because the central inquiry and focus was on Smith’s representations.

The University argues, however, that review by certiorari should be required because Williams merely cloaks a contract dispute in the mantle of negligent misrepresentation. *See Willis*, 555 N.W.2d at 282 (“Regardless that the claim is cloaked in the mantle of breach of contract,” a termination claim is reviewed by certiorari). This argument ignores the line that was drawn at trial between the University’s actions, for which no jury decision was required, and Smith’s representations, for which the jury’s decisions were sought. The jury’s focus was continually directed to Smith’s

representations and Williams' reliance on those representations. In contrast, the jury was not asked to decide whether the University's decision not to hire Williams was a legally permissible exercise of the University's discretionary authority.

We recognize that evidence relating to the University's hiring practices generally and decisions with respect to Williams specifically was presented at trial. For example, Athletic Director Maturi testified about his experience with collegiate athletic hiring practices, negotiations, and hiring authority. Williams testified about his previous job searches and called former and current coaches to testify about hiring practices in the collegiate basketball coaching industry. There was also extensive testimony about Williams' NCAA disciplinary history and the University's knowledge or exploration of that history during the Smith-Williams discussions.

But the introduction of this evidence did not transform Williams' negligent misrepresentation claim against *Smith* into a breach of contract claim for failure to hire against the *University*. Much, if not all, of this evidence was relevant to the reasonableness of Williams' reliance on Smith's misrepresentations. Some of it was also relevant to Williams' damages claim. Further, the district court ensured that the jury did not evaluate the evidence as a challenge to the University's decision not to hire by instructing the jury that the University's decision not to hire Williams was not at issue and that its focus was on the negligent misrepresentation claim. Finally, the special verdict form, in a detailed eight-question format, asked the jury to decide whether Smith "falsely represent[ed] that he had final authority to hire" at the University, whether Williams reasonably relied on that representation, and whether Williams was harmed in

doing so. Nothing in the special verdict form allowed the jury to decide anything about the University's decision not to hire Williams. We assume that the jury follows a court's instructions. *State v. Ferguson*, 581 N.W.2d 824, 833 (Minn. 1998); *see also State v. Forcier*, 420 N.W.2d 884, 885 n.1 (Minn. 1988). We have no reason to assume otherwise here.

In summary, we conclude that Williams' negligent misrepresentation claim is not subject to certiorari review under Minn. Stat. ch. 606 (2010) because it is separate and distinct from the University's decision not to hire him. Moreover, the jury was appropriately instructed to consider only the issues related to Smith's alleged negligent misrepresentations, and to limit its consideration to that claim. We therefore conclude that the district court had subject-matter jurisdiction over Williams' negligent misrepresentation claim.

II.

Having concluded that the district court had subject-matter jurisdiction to address Williams' negligent misrepresentation claim, we now consider whether the University owed Williams a duty of care to protect him against negligent misrepresentations, and whether the claimed reliance is reasonable when a person negotiating with a government representative is conclusively presumed to know the authority of that representative.

This court has adopted the definition of negligent misrepresentation set forth in Restatement (Second) Torts § 552 (1976):

One who, in the course of his business, profession or employment, or in any other 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.

See Bonhiver v. Graff, 311 Minn. 111, 122, 248 N.W.2d 291, 298 (1976) (adopting Restatement (Second) of Torts §552 (Tent. Draft No. 12 (1966))). To prevail on a negligent misrepresentation claim, the plaintiff must establish: (1) a duty of care owed by the defendant to the plaintiff; (2) the defendant supplies false information to the plaintiff; (3) justifiable reliance upon the information by the plaintiff; and (4) failure by the defendant to exercise reasonable care in communicating the information. *See id.* at 122, 248 N.W.2d at 299; *Florenzano v. Olson*, 387 N.W.2d 168, 174 (Minn. 1986). At issue here are the first and third elements, the duty of care and justifiable reliance. We address each issue in turn.

A.

The University argues that an employer owes no duty to a prospective employee in the context of negotiations for an employment opportunity and therefore Williams' negligent misrepresentation claim fails as a matter of law. Williams, on the other hand, contends that Smith owed him a duty of care because liability for misrepresentations can arise even during an arm's-length negotiation, and because once Smith chose to speak, he had a duty not to mislead Williams after Williams' and Smith's interests were "unified."

We believe that the manner in which appellants treated Williams regarding his prospective employment with the University was unfair and disappointing. We do not condone their conduct. But the question we must decide is whether appellants owed Williams a duty of care and, therefore, whether appellants' conduct is actionable. The

question of whether a duty of care exists in a particular relationship is a question of law, which this court determines de novo. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011); *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). Moreover, the existence of a duty of care is a threshold requirement. *Domagala*, 805 N.W.2d at 22. Without it, liability cannot attach. *Id.*

Previously, we have recognized a duty of care exists, for a negligent misrepresentation claim, in the context of certain legal relationships. For example, we have recognized a duty exists in professional relationships such as an accountant/client and attorney/client, and in certain fiduciary relationships involving, for example, guardians, executors, and directors of corporations. *See Florenzano*, 387 N.W.2d at 174-75 (noting that the word “duty” is commonly reserved for obligations of performance which rest upon a person in an official or fiduciary capacity and includes such offices or relations as those of attorney, guardian, executor or broker, a director of a corporation and a public official); *Bonhiver*, 311 Minn. at 122, 248 N.W.2d at 298-99 (concluding liability could be imposed on accountants who were aware of audited entity’s impaired condition and knew that examiners’ relied on accountants’ work papers). Additionally, we have extended the duty to certain special legal relationships in which one party has superior knowledge or expertise. *See M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992) (concluding that adoption agency with superior factual knowledge regarding health and genetic history of a child’s birth parents owed a duty to adoptive parents who sought information on that history); *see also Florenzano*, 387 N.W.2d at 175 (recognizing that insurance agent and “would-be financial advisor” owed duty of care).

Thus, if a duty exists in a given case, it is derived from the legal relationship between the parties and a determination that the plaintiff's interests are entitled to legal protection against defendant's conduct. *See Caritas Family Servs.*, 488 N.W.2d at 287; *see also L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 378 (Minn. 1989) ("An analysis of whether or not a duty of care is owed to a particular plaintiff begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. If [a duty is owed], it is because the law recognizes that public policy favors the protection of that person's interests against the [defendant's] negligent conduct.") (citation omitted) (internal quotation omitted). Nonetheless, we have declined to adopt a negligent misrepresentation claim "in all contexts." *Smith v. Brutger Cos.*, 569 N.W.2d 408, 414 n.4 (Minn. 1997). We have instead recognized that "conduct actionable against one class of defendant[s] is not automatically actionable against another class of defendants." *Caritas Family Servs.*, 488 N.W.2d at 287. This limited scope of negligent misrepresentation rests in part on the principle that "[t]ort liability in the first instance always depends on whether the party accused of the tort owes a duty to the accusing party." *Id.* (citing *L & H Airco, Inc.*, 446 N.W.2d at 378).

In *Caritas*, the adoptive parents asserted that once the agency undertook to disclose that incest existed in the child's background, it assumed a duty of care that its disclosure be complete and unambiguous to ensure that the parents were not misled. 488 N.W.2d at 288. We observed that no duty is owed "unless the plaintiff's interests are entitled to legal protection against the defendant's conduct." *Id.* at 287. We held that a duty of care existed when the adoption agency disclosed some information about the

child's birth parents and genetic background, and negligently withheld information in such a way that the parents were misled. *Id.* at 288. Significant to our analysis of the duty owed was that the adoptive parents asked the agency about the child's background, and the agency's response withheld factual information that rendered its response misleading. *Id.* at 285-88.

Recently, we declined to decide whether a negligent misrepresentation claim can be brought by a party to an arm's-length commercial transaction. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 370 n.7 (Minn. 2009).⁴ Other state courts that have considered this issue have not extended the duty of care to an arm's-length commercial transaction. *See, e.g., Fry v. Mount*, 554 N.W.2d 263, 266 (Iowa 1996) (concluding that where relationship was " 'adversarial' in nature, not advisory," no duty of care was owed); *Onita Pac. Corp. v. Trustees of Bronson*, 843 P.2d 890, 897 (Or. 1992) (recognizing a distinction between a professional who owes duty of care when "acting to further the economic interests of" the person owed the duty of care, while no duty owed

⁴ We note that the court of appeals has declined to recognize such a claim in the context of private, sophisticated parties negotiating a commercial transaction at arm's length. *See Smith v. Woodward Homes, Inc.*, 605 N.W.2d 418, 424-25 (Minn. App. 2000) (declining to recognize a duty of care in a transaction negotiated by adversarial parties at arm's length, where both parties were "experienced at closing real-estate transactions and [the closing company] has not demonstrated any special relationship between them indicating they were anything other than sophisticated equals negotiating a business transaction."); *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 872 (Minn. App. 1995) ("Because Dain was selling a deal to Safeco, and not supplying information for the guidance of Safeco, and because they were sophisticated equals negotiating a commercial transaction, Dain did not owe Safeco a duty for purposes of a negligent misrepresentation tort threshold").

where “two adversarial parties [are] negotiating at arm’s length to further their own economic interests.”). The underlying reasoning is that sophisticated parties negotiating a commercial transaction are entitled to legal protection only for intentional, fraudulent misconduct. *See* Restatement (Second) of Torts § 552, cmt. a (recognizing a “more restricted rule of liability” for negligent misrepresentation because a significant difference exists between “the obligations of honesty and of care” and stating “it does not follow that every user of commercial information may hold every maker to a duty of care.”).

Nor have we recognized a duty of care in the context of prospective government transactions. Indeed, we have required parties who challenge erroneous government action as “wrongful” to show something more than “simple inadvertence, mistake, or imperfect conduct” by the defendant government agency. *See City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011) (citation omitted).

Applying these principles, we consider whether public policy favors protecting a prospective government employee from the negligence of a government representative. To do so, we consider the nature of the relationship between Williams and Smith. *See, e.g., Florenzano*, 387 N.W.2d at 175 (explaining that defendant was liable for representations made as an “insurance agent and would-be financial advisor,” but the same representations made by a “stranger” or “neighbor” would be “nothing more than gratuitous advice”); *L & H Airco, Inc.*, 446 N.W.2d at 378 (“If an attorney owes a duty to his client’s adversary, it is because the law recognizes that public policy favors the protection of that person’s interests against the attorney’s negligent conduct.”).

We conclude that the legal relationship between Williams and Smith is not the type of relationship entitled to legal protection, and therefore no duty of care against negligent misrepresentation is owed. Three reasons support our conclusion. First, their relationship in negotiating potential employment was not a professional, fiduciary, or special legal relationship in which one party had superior knowledge or expertise. *Florenzano*, 387 N.W.2d at 175 (imposing duty where insurance agent “and would-be financial advisor” provided information on financial advantages of withdrawing social security benefits, without “knowing [whether it was] true or false,” but noting that the “same representations, if made by a stranger off the street or the next-door neighbor, would be nothing more than gratuitous advice”); *Caritas Family Servs.*, 488 N.W.2d at 287 (recognizing “the compelling need of adoptive parents for full disclosure of . . . information that may be known to the agency”). In short, Williams and Smith did not stand in a professional or fiduciary relationship to each other during the negotiations over prospective employment with the University, nor was Smith acting in an advisor capacity to Williams. *See Bogue v. Better-Bilt Aluminum Co.*, 875 P.2d 1327, 1339 (Ariz. Ct. App. 1994) (“Although an employer has a special relationship with an employee, the same cannot be said about the employer’s relationship with a job applicant.”), *rev. denied* (Ariz. July 6, 1994); *Conway v. Pac. Univ.*, 879 P.2d 201, 203 (Or. Ct. App. 1994) (“Whatever duty an employer may owe to an employee in other contexts of the employment relationship, we know of no duty of an employer to act to further the economic interests of the employee in the negotiation of the employment contract.”), *aff’d*, 924 P.2d 818 (Or. 1996).

Moreover, Smith did not have the type of superior knowledge or expertise typically indicative of a special legal relationship. Instead, the parties stood on equal footing regarding the scope of Smith's authority in negotiating a prospective employment relationship. The scope of Smith's authority was equally available to both parties. A review of the University's publicly accessible web site, which is a matter of public record, readily demonstrates that Maturi had the authority to hire the assistant men's basketball coach, and that Smith did not. *See Delegations of Authority Program*, <http://compliance.umn.edu/delegationHome.htm> (last visited Aug. 6, 2012). Nothing in this publicly available information indicates that Smith held delegated authority to hire assistant basketball coaches. In addition, Smith notified Williams that Maturi had to sign off on Smith's offer before Williams submitted his resignation to OSU, and there was no evidence that Smith told Williams that Smith had final hiring authority. Thus, even assuming there was a legal relationship that would support a duty of care, any knowledge Smith had was not superior to Williams' knowledge – Smith's knowledge (Maturi's hiring authority) was shared with Williams. *See also Sarpal*, 797 N.W.2d at 26 (“The court made no finding that the [government] employee intended to deceive the Sarpals or induce them to build their shed in violation of the zoning ordinance.”)

Second, the nature of the relationship between Williams and Smith does not support recognizing a duty of care in this case. The relationship between Williams and Smith in their discussions of Williams' prospective employment as an assistant basketball coach was that of two sophisticated business people, both watching out for their individual interests while negotiating at arm's length. Both coaches had decades of

coaching experience at a variety of institutions, with a variety of hiring practices, a variety of athletic directors, and a variety of employment conditions. Williams had successfully negotiated coaching contracts with several elite institutions, both public and private, including the University, OSU, The University of Tulsa, San Diego State University, the University of Nebraska, the University of Louisiana—Lafayette, and the Minnesota Timberwolves. Williams’ contract with OSU was in writing. Smith and Williams were, by their own admissions, experienced participants in the collegiate basketball coaching environment, including the hiring practices within that environment.

Third, we perceive no reason or public policy that warrants imposing a duty of care in the context of a prospective government employment relationship involving negotiations by sophisticated parties who do not stand in a special legal relationship. The weight of authority from other jurisdictions refuses to recognize a claim for negligent misrepresentation in such circumstances. *See, e.g., McNierney v. McGraw-Hill, Inc.*, 919 F. Supp. 853, 862 (D. Md. 1995) (“It is by no means certain that [the duty of care] would be imposed” in at-will employment negotiations); *Fry*, 554 N.W.2d at 266 (“The record before us plainly reveals that [the employee] and [employer] were dealing at arm’s length. The relationship was ‘adversarial’ in nature, not advisory.”); *American Med. Int’l, Inc. v. Giurintano*, 821 S.W.2d 331, 340 (Tex. App. 1991) (“It would be fanciful at best to suggest that every time one applies for a job with a potential employer that a fiduciary relationship is created. When a person enters into job negotiations he is looking out for himself while the potential employer is looking out for the needs of the business.”).

We conclude that Williams' interests in prospective employment with the University's men's basketball program are not entitled to legal protection against Smith's negligent misrepresentations.⁵

The dissent relies on *Northernair Productions, Inc. v. County of Crow Wing*, 309 Minn. 386, 244 N.W.2d 279 (1976), and *Mulroy v. Wright*, 185 Minn. 84, 240 N.W. 116 (1931), to argue that we have previously recognized the tort of negligent misrepresentation against the government. The argument is without merit for two reasons. First, the holding in *Northernair* was that county officials were not liable when "they negligently misrepresent the *legal* requirements of their zoning ordinance to members of the public who rely on that misrepresentation." 309 Minn. at 387, 244 N.W.2d at 281 (emphasis added). The holding in *Northernair* is of little help to

⁵ The dissent inaccurately states that we hold the University has no obligation to "supply accurate and truthful information to a prospective employee." In doing so, the dissent misstates our holding. Specifically, we hold that when a prospective employment relationship is negotiated at arm's length between two sophisticated parties, the prospective employee is not entitled to legal protection against negligent misrepresentation by the representative for the prospective government employer. But a prospective employee like Williams does have a potential claim for intentional, fraudulent misrepresentations. See *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007) (identifying elements of fraud claim). Thus, even if a plaintiff cannot establish that a defendant owed a duty of care, the plaintiff may bring a claim for fraudulent misrepresentation if the element of "fraudulent intent" can be established. In this case, nothing in the record suggests that Smith's statements were made with fraudulent intent, which Williams most likely realized when he voluntarily dismissed his fraud claim prior to the jury's deliberations. Thus, while our holding today bars negligent misrepresentation claims based on prospective government employment negotiated at arm's length between two sophisticated parties, it does not bar actions for intentional, fraudulent misrepresentations. The dissent's assertion that we hold that the University has no obligation to supply "truthful information to a prospective employee" is therefore incorrect.

Williams, since it essentially stands for the unremarkable proposition that city officials are generally not liable for misrepresentations of law. In addition, *Northernair* and *Mulroy* did not recognize a cause of action for negligent misrepresentation in an arm's-length negotiation between sophisticated parties regarding prospective employment. In *Northernair*, the claim failed because misrepresentations of law are not actionable in the absence of either special knowledge or a fiduciary relationship—the two critical components missing in that case, and missing here as well. See 309 Minn. at 389, 244 N.W.2d at 281-82 (explaining that misrepresentations of law are actionable if defendant is “learned in the field [of law] and has taken advantage of the solicited confidence” of the plaintiff, or if “the person misrepresenting the law stands . . . in a fiduciary or other similar relation of trust and confidence.”) (citation omitted).

It is true, as the dissent suggests, that we observed in *Northernair* that we “will continue to allow a cause of action against government officers and employees for negligent misrepresentation of fact” *id.* at 390, 244 N.W.2d at 283, but we relied on *Mulroy* for that proposition. *Id.* at 388, 244 N.W.2d at 281. *Mulroy* dealt with a city clerk’s erroneous assessment certification; in *Mulroy*, the defendant was held liable “not merely for careless words,” but for “the careless performance of a service” owed by the government official. 185 Minn. at 88, 240 N.W. at 117 (quoting *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922)). *Mulroy* is particularly weak support for the claims here because the government official in *Mulroy* had a public duty as custodian of the city’s records to furnish accurate information about the assessments shown in those records. *Id.* at 86-87, 240 N.W. at 117. *Smith*, in contrast, holds no duty to the public. See

Restatement (Second) of Torts § 552, cmt. k (acknowledging that government officials who have, “by acceptance of [the] office, . . . undertaken a duty to the public to furnish information of a particular kind,” can be held liable to “the class of persons for whose benefit the duty is created”). Further, there was no evidence here, and the dissent points to none, that supports a conclusion that either Smith or the University assumed a duty to furnish the public with particular information regarding the hiring authority of Smith, Maturi, or anyone else at the University. Consequently, *Northernair* and *Mulroy* do not directly support the claims of Williams and both are factually distinguishable.

Second, our recent cases have carefully limited recognition of the tort of negligent misrepresentation, against both private actors and government officials. Recently, in *Valspar Refinish, Inc. v. Gaylord’s, Inc.*, we declined to decide whether a negligent misrepresentation claim can be brought by a party to an arm’s-length commercial transaction. 764 N.W.2d 359, 370 n.7 (Minn. 2009). In *City of North Oaks v. Sarpal*, we held that neither erroneous government action nor “a simple mistake by a government official” is wrongful government conduct. 797 N.W.2d 18, 25-26 (Minn. 2011). These recent decisions are consistent with earlier decisions in which we have rejected an expansive view of both negligent misrepresentation and government liability. *See Smith*, 569 N.W.2d at 414 n.4 (declining to adopt negligent misrepresentation “in all contexts”); *see also Mesaba Aviation Div. of Halvorson of Duluth, Inc. v. Cnty. of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977) (noting that the court does “not envision that estoppel will be freely applied against the government”).

Alternatively, Williams relies on *Caritas* to argue that when Smith spoke to Williams, he had a duty not to mislead Williams. But this argument is flawed. Specifically, this argument conflates the question of whether Smith owed a duty of care to Williams based upon a legal relationship, with the question of whether Smith supplied false information to Williams. *See* Restatement (Second) of Torts, § 552. The duty of care examines the legal relationship between the parties, not the nature of the representations, and in the absence of a duty, there can be no breach. *See Domagala*, 805 N.W.2d at 22-23.⁶

Additionally, the holding in *Caritas* is narrow. In *Caritas*, we held that once the adoption agency undertook to disclose some genetic information to the adoptive parents, it had a duty “to not mislead [the parents] by only partially disclosing the truth.” 488 N.W.2d at 288. We specifically declined, however, to impose that duty in the context of all adoptions. *Id.* at 287. The facts in *Caritas* demonstrated that the adoptive parents had inquired over time about the adopted child’s family background and genetic history, and

⁶ The dissent contends that we “mischaracterize[]” the adoptive parents’ inquiries in *Caritas*. These inquiries were relevant because liability for negligent misrepresentation “depends in the first analysis on whether a duty of care is owed,” *L & H Airco, Inc.*, 446 N.W.2d at 378, and no duty is owed “unless the plaintiffs’ interests are entitled to legal protection against a defendant’s conduct.” *Caritas*, 488 N.W.2d at 287. Thus, the adoption agency’s superior knowledge, coupled with its misleading disclosures of that knowledge, led to protection of the adoptive parents’ interests. *See id.* at 288 (recognizing that imposing a duty on adoption agency would benefit adoptive parents because “adoption agencies are the adoptive parents’ only source of information about the child’s medical and genetic background”). We have not recognized a duty of care in the absence of either superior knowledge or a special relationship, particularly in the context of sophisticated parties who are experienced at negotiating the transaction at issue.

the adoption agency had responded with increasingly detailed facts. *Id.* at 285-86. As we pointed out, the adoptive parents did not allege that the agency insufficiently investigated the child’s family and genetic background or had an “affirmative common law duty to disclose facts” beyond those required by statute or administrative rule. *Id.* at 287. Instead, the duty of care arose in *Caritas* because the agency “undertook to disclose the information,” and therefore “assumed a duty to use due care that its disclosure be complete and adequate.” *Id.* We nevertheless recognized that “under other circumstances the policy concerns of the adoption agencies may preclude a cause of action.” *Id.* at 287.⁷

Unlike the situation in *Caritas*, Williams never asked whether Smith had the authority to hire; he simply assumed that authority existed. We have never held that the plaintiff’s mistaken assumption can impose a duty, particularly in the context of sophisticated parties negotiating at arm’s length.

We have not previously recognized the tort of negligent misrepresentation in the context of government employment relationships and we decline to do so here. In summary, we conclude that Smith did not owe Williams a duty of care in these negotiations. We therefore hold that in the absence of a duty of care, Williams’ claim for negligent misrepresentation fails as a matter of law.

⁷ Moreover, we fail to see how Smith’s disclosure could have misled Williams into believing that Smith had final hiring authority when Smith told Williams the opposite—that Maturi had that authority. *See Domagala*, 805 N.W.2d at 22 (“[W]e have continued to recognize that generally in law, we are not our brother’s keeper.”) (citation omitted) (internal quotation marks omitted).

B.

Our conclusion that no duty of care was owed makes it unnecessary to address the issue of Williams' reliance.

We conclude that we also need not resolve the scope of the decision relied on by the University, *Jewell Belting Co. v. Village of Bertha*, to argue that Williams' reliance was unreasonable. 91 Minn. 9, 12, 97 N.W. 424, 425 (1903). Specifically, we have rejected the use of the proprietary-governmental conduct dichotomy to determine the manner of judicial review of municipal decision-making. *Cnty. of Washington v. City of Oak Park Heights*, ___ N.W.2d ___, A11-0067, slip. op. at 23 (Minn. Aug. 8, 2012). We reject the proprietary-governmental conduct dichotomy in this context as well.

Reversed.

GILDEA, C.J., PAGE, ANDERSON, Paul H., and STRAS, JJ., took no part in the consideration or decision of this case:

CONCURRENCE & DISSENT

MEYER, Justice (concurring in part, dissenting in part).

I agree with the majority that the district court had subject-matter jurisdiction to resolve the negligent misrepresentation claim of James Williams against the University of Minnesota, but I respectfully dissent from the majority's conclusion that public policy does not support imposing a duty of care on the University to supply accurate and truthful information to a prospective employee. The majority ignores our case law that expressly recognizes a cause of action against the government for negligent misrepresentations of fact when there is no other access to the information. Therefore, consistent with our precedent, I would affirm the jury verdict on the negligent misrepresentation claim.

The existence of a legal duty is a question of law based on public policy concerns. *Smith v. Brutger Cos.*, 569 N.W.2d 408, 415 (Minn. 1997) (Tomljanovich, J., dissenting); *M.H. v. Caritas Fam. Servs.*, 488 N.W.2d 282, 287 (Minn. 1992). The majority erroneously states that we have never recognized a duty of care in the context of prospective government transactions.¹ We first recognized a cause of action against the government for negligent misrepresentation of fact in *Mulroy v. Wright*, 185 Minn. 84, 88, 240 N.W. 116, 117-18 (1931), where we held that government employees have a duty of care in supplying accurate factual information on which they know that others will rely. In *Mulroy*, we concluded that

¹ The majority indicates that parties who challenge government action must show "wrongful" conduct. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011). This is the standard that applies in the context of equitable estoppel claims against the government and has no application to a negligent misrepresentation claim. *See id.*

a government official who furnished a certificate that inaccurately showed there were no special assessments on certain property—“knowing and intending that someone else rely thereon”—owed “a duty imposed by law” to the buyer of the property who relied upon the certificate. *Id.* at 88, 240 N.W. at 118. We imposed a duty on the government official as a matter of law because the law imposes a duty “when one assumes to act and knows that others will act in reliance upon such conduct.” *Id.* at 86, 240 N.W. at 117. As we explained, where the government official “was in a position to know the truth,” he had a duty to provide accurate factual information so that persons who relied on that information would “not suffer loss through improper performance of the duty or neglect in its execution.” *Id.* at 86-87, 240 N.W. at 117.

We have since reaffirmed that “[w]e will continue to allow a cause of action against government officers and employees for negligent misrepresentation of fact.” *Northernair Prods., Inc. v. Cnty. of Crow Wing*, 309 Minn. 386, 390, 244 N.W.2d 279, 282 (1976). We explained the public policy rationale as follows:

Members of the public have no other access to factual information maintained by the government except through government officers and employees. Therefore, the policy of promoting accuracy through the prospect of tort liability outweighs the possibility of inhibiting performance of duties of office or employment.

Id. at 390, 244 N.W.2d at 282. We have distinguished negligent misrepresentations of law, concluding that subjecting public officials to liability for “innocent misrepresentations” regarding the interpretation of a zoning ordinance—a matter of law—“would frustrate dialogue which is indispensable to the ongoing operation of government” and noted that the

public “had alternative means of obtaining an interpretation of the zoning ordinance.” *Id.* at 388-90, 244 N.W.2d at 281-82.

In this case, Smith, as a University employee, assumed to act on behalf of the University and knew that Williams would act in reliance upon his job offer. Williams presented evidence that the University’s head men’s basketball coach Tubby Smith offered him the job of assistant men’s basketball coach. Smith told Williams that he “got the money” they had discussed: \$175,000 from the Athletics Department and \$25,000 from basketball camps. Smith knew that the job offer was subject to the approval of the University’s Athletic Director, but falsely represented that Smith had final hiring authority, knowing and intending that Williams would rely on Smith’s representation to resign from his current position. At Smith’s urging, Williams immediately resigned from his position at Oklahoma State University (OSU) so that he could begin recruiting for Minnesota. Several weeks later, after Williams had given up his job at OSU, the University informed Williams that the assistant coaching position at Minnesota had been filled. Based on this evidence, the jury found that Smith falsely represented that he had final authority to hire assistant basketball coaches at Minnesota, a negligent misrepresentation of fact.

There is no evidence in the record that Williams had access to any publicly available information regarding the authority to hire within the men’s basketball program.² In fact,

² The University relies on our 1903 decision in *Jewell Belting Co. v. Village of Bertha*, 91 Minn. 9, 12, 97 N.W. 424, 425 (1903), for the proposition that a person contracting with a municipal corporation is “conclusively presumed to know the extent of authority possessed by the officers with whom they are dealing.” *Jewell Belting* is distinguishable. *Jewell Belting* was an action to recover under a contract, not a negligent
(Footnote continued on next page.)

the jury specifically found that Williams reasonably relied on Smith's representation that he had final hiring authority and that Williams was not negligent in relying on Smith's representation. Notwithstanding the jury's findings and our obligation to view the evidence "in the light most favorable to the verdict," *Reedon of Faribault, Inc. v. Fid. & Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488, 491 (Minn. 1988), the majority claims that "the parties stood on equal footing regarding the scope of Smith's [hiring] authority." The majority's view of the evidence is not consistent with the jury's finding that Smith failed to use reasonable care in communicating his authority to Williams, that Williams reasonably relied on Smith's representation that he had final hiring authority and that Williams was not negligent in doing so. The evidence at trial demonstrates that Smith was well aware of the limits of his own hiring authority while Williams had no means of ascertaining the accuracy of Smith's representation. The majority asserts, without record support, that information about Smith's hiring authority was available on the University's website. There is nothing in the trial record indicating that information about hiring authority within the men's basketball program was accessible to the public when Smith offered Williams the job in

(Footnote continued from previous page.)

misrepresentation case. *See id.* at 10, 97 N.W. at 424. Further, the narrow issue we decided in *Jewell Belting* related to the legal power of a village council to delegate authority to enter into a contract; the presumption of knowledge concerned the power of the village council to delegate authority—a legal question, not a fact question. *See id.* at 10-11, 97 N.W. at 424-25 (concluding that village council did not have power to delegate authority to enter into contract for fire engine, which involved the exercise of judgment and discretion); *cf. Miller v. Osterlund*, 154 Minn. 495, 496, 191 N.W. 919, 919 (1923) (explaining that "the law is presumed to be equally within the knowledge of both parties"). In this case, the University is not arguing that the Board of Regents did not have the power to delegate hiring authority to the head basketball coach.

2007—just a few weeks after Smith became the head basketball coach—or that Williams was aware of the availability of that information. Significantly, the University asserts only that the exclusive authority of the Athletic Director to hire assistant coaches “was commonly known within the University’s athletic department.”

On these facts, I would conclude that the government official (Smith) owed a duty of care to provide accurate information to the public (Williams). The government official’s duty should be imposed as a matter of law by this court. Recognizing a duty of care in this case would serve the public policy of promoting accuracy when a government official knows that others will act in reliance on the official’s representations of fact, and would be consistent with this court’s precedent. *See Northernnaire*, 309 Minn. at 390, 244 N.W.2d at 282.

The majority further observes that Smith and Williams were both “sophisticated business people” and “experienced participants in the collegiate basketball coaching environment,” thereby suggesting that Williams should have realized that Smith did not have final hiring authority. Williams testified, however, that in all his years of coaching, he did not know of a single head basketball coach who did not possess the authority to hire his own staff. Other experienced coaches similarly testified that they had never heard of a university administrator vetoing the hiring decision of a head coach. The majority also questions how Smith “could have misled Williams into believing that Smith had final hiring authority” when Smith told Williams that the Athletic Director had that authority, but this disclosure took place only after Williams had orally resigned from his position at OSU and the head coach had acted to fill that position. Therefore, in describing the nature of the

relationship between Williams and Smith, the majority has unfairly skewed the evidence to support its result, contrary to our standard of review.

In addition, the majority erroneously suggests that a duty did not arise under these circumstances, in part because “Williams never asked whether Smith had the authority to hire.” The majority attempts to distinguish the duty we recognized in *M.H. v. Caritas Family Services*, 488 N.W.2d 282, 287 (Minn. 1992), on the basis that the adoptive parents in *Caritas* “had inquired over time about the adopted child’s family background and genetic history.” The majority mischaracterizes *Caritas* by implying that the duty in that case arose from the inquiries of the adoptive parents. The adoptive parents in *Caritas* did not make any specific inquiries about the incest in the child’s background before they adopted the child. *See* 488 N.W.2d at 284-85. Nonetheless, we explained that the adoption agency “had a legal duty to not mislead plaintiffs by only partially disclosing the truth.” *Id.* at 288. In other words, “having undertaken to disclose information about the child’s genetic parents and medical background,” the adoption agency could not “negligently withhold[] information in such a way that the adoptive parents were misled as to the truth.” *Id.* We recognized “the compelling need” of the adoptive parents for accurate medical background information where the adoption agency was their “only source of information.” *Id.* at 287-88. Williams makes a similar argument here—that “because once Smith chose to speak, he had a duty not to mislead Williams”—but the majority rejects this argument as conflating “the question of whether Smith owed a duty” with “the question of whether Smith supplied false information.”

Like the duty we recognized in *Caritas*, a duty to not negligently misrepresent factual information in the possession of the University does not impose an “extraordinary or onerous burden” on the University. 488 N.W.2d at 288. Smith knew the limits of his hiring authority and simply had a duty not to falsely represent the scope of his hiring authority when he knew that Williams would rely on that authority to resign from his position at OSU. On the other hand, the failure to use due care had enormous consequences for Williams, who suffered losses exceeding \$1 million in reasonably relying on Smith’s false representation that he had final authority to hire assistant coaches. Imposing a duty of care on the University to provide truthful and accurate information to a prospective employee aligns with our established “policy of promoting accuracy through the prospect of tort liability” where the public has “no other access to factual information maintained by the government.” *Northernair*, 309 Minn. at 390, 244 N.W.2d at 282. Therefore, I would affirm the jury verdict and uphold our precedent holding that the government has a duty to use due care in supplying factual information that is not otherwise accessible to the public.

SENYK, Acting Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice Meyer.